

BANKRUPTCY

by

DONNA W. MCKENZIE SKENE



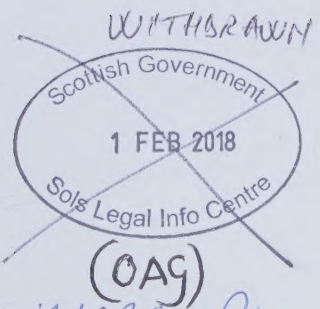
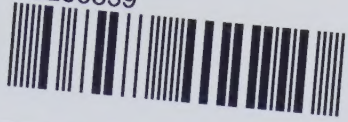
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Donna W. McKenzie Skene
Senior Lecturer, University of Aberdeen

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PREFACE

In Scotland, bankruptcy law is that part of the law that comes into play when individuals and certain types of entity become insolvent.¹ It may thus be distinguished from company or corporate insolvency law, which is that part of the law that comes into play when companies and certain other types of entity become insolvent. The distinction is partly historic, company insolvency law having developed later than, and separately from, bankruptcy law and partly as a result of differing policy considerations.² As will be seen, however, bankruptcy law and company insolvency law do have many underlying principles in common, and the provisions of bankruptcy law and company insolvency law have been harmonised in a number of areas.

When does a debtor become insolvent? The term “insolvent” is not a term of art in Scots law and, like the term “bankruptcy” itself, can be used in a number of different ways. This is discussed in more detail in Ch.1.

However defined, insolvency raises important and difficult economic and social, as well as legal, issues. It may have wide ranging legal, economic and social consequences for not only the debtor, but for the debtor’s creditors, employees (if relevant), those dealing with (or who have previously dealt with) the debtor, the family of an individual debtor, the state and society as a whole. Furthermore, bankruptcy law impacts on virtually every other area of law, including property law, contract law, delict, commercial law, employment law, environmental law and private international law. As Wood observes³:

“Bankruptcy has a profound effect on normal legal relationships. Bankrupts . . . are disqualified from working. Property is seized and sequestered. Assets are expropriated without compensation. Contracts are shattered and their terms interfered with or negated. Security interests are frozen or avoided or debased. The cost of credit is increased or credit—the lifeblood of modern economies—is withdrawn. People lose their jobs and their pensions. The collapse of banks and insurance companies destroys the savings of the citizen. The economy of the state itself may be sapped. Bankruptcy is a destroyer and a spoliator.”

It is not surprising, therefore, that bankruptcy law has been described most aptly as “meta-law”,⁴ and its importance cannot be underestimated.

Insolvency begs many important policy questions. Perhaps the most fundamental is whether and, if so, to what extent, the law should make special provision for insolvency. If such provision is to be made, the next question is what form should it take? That will depend on the function it is to perform.

¹ It cannot be described as personal insolvency law since it encompasses certain entities as well as natural persons. What is known as bankruptcy law may have different scope in different jurisdictions.

² Policy considerations are discussed further below.

³ Wood, PR, *Principles of International Insolvency*, 2nd edn (London: Sweet & Maxwell, 2007), para.1–001.

⁴ Tung, F, “Is International Bankruptcy Possible?” 23 *Michigan Journal of International Law* 31 (2001–2002).

This gives rise to other questions, such as how should the law treat insolvent debtors? Should the law treat different types of debtor differently? Where is the balance to be struck between the rights of debtors, creditors and others? Should it always be struck in the same place or in different places for different types of debtor? Should it take into account factors such as moral blame? How should the law treat creditors inter se: first come, first served, or on some other basis? Scots law has made special provision for the insolvency of debtors since early times, but the form of that provision and the underlying policy has varied over time. The history of bankruptcy law in Scotland is discussed in Ch.2, while theory and general principles are discussed further in Ch.3.

Bankruptcy law in Scotland is largely statute-based and contained in specific Scottish bankruptcy legislation. Some important parts of the law, however, are still to be found in the common law or in other legislation including, for the present at least, the recently recast EU regulation on insolvency proceedings, which contains rules applicable to purely domestic bankruptcy cases as well as increasingly common cross-border cases.

Bankruptcy law in Scotland is different from bankruptcy law in the other parts of the UK, although there are many similarities.⁵ Bankruptcy law in Scotland is largely devolved to the Scottish Parliament, which has legislated extensively in this area. Some important aspects of bankruptcy law, however, remain reserved to the UK Parliament. Devolution and the extent of the Scottish and Westminster Parliaments legislation in this area are discussed in more detail in Ch.2.

The justification for this book is the many resultant changes to bankruptcy law in Scotland in recent years. Despite these changes, however, it is arguable that the underlying principles and concepts of bankruptcy law in Scotland have not changed fundamentally. This means that earlier works such as Bell's *Commentaries*, Goudy's *A Treatise on the law of bankruptcy in Scotland* and McBryde's *Bankruptcy* are still regularly referred to and indeed are referred to where relevant throughout this book.

This book deals with the judicial process of sequestration and the main alternatives thereto, namely the debt arrangement scheme, trust deeds for creditors and judicial factories. It also deals with the cross-border aspects of bankruptcy law. The law is stated as at 31 August 2017 although it has been possible to include some developments that have taken place after that date.

⁵ See further, Ch.2.

CONTENTS

	Page
<i>Preface</i>	v
<i>Table of Cases</i>	xiii
<i>Table of Statutes</i>	xxix
<i>Table of Scottish Statutes</i>	xxxvii
<i>Table of Statutory Instruments</i>	lv
<i>Table of Scottish Statutory Instruments</i>	lvii
<i>Table of European Legislation</i>	lxvii
<i>Table of UNCITRAL Model Law on Cross-Border Insolvency</i>	lxxi
 CHAPTER 1	
THE MEANING OF BANKRUPTCY AND INSOLVENCY	
Introduction	1
Absolute insolvency	1
Practical insolvency	2
Apparent insolvency	2
 CHAPTER 2	
HISTORY AND DEVELOPMENT OF BANKRUPTCY LAW	
Introduction	11
Early law	12
Early bankruptcy legislation	12
Subsequent development of bankruptcy legislation	13
Modern bankruptcy legislation	15
Future bankruptcy legislation	22
 CHAPTER 3	
THEORY AND PRINCIPLES OF BANKRUPTCY LAW	
Introduction	25
Justifications for insolvency law	25
Theories of insolvency law	27
The general principles of bankruptcy law	28
 CHAPTER 4	
THE ACCOUNTANT IN BANKRUPTCY AND INSOLVENCY PRACTITIONERS	
Introduction	33
The Accountant in Bankruptcy	33
Insolvency practitioners	50
 CHAPTER 5	
PRE-APPLICATION MORATORIUM	
Introduction	75
Circumstances in which pre-application moratorium applies	75
Nature and extent of moratorium	77
Duration of moratorium	78
 CHAPTER 6	
NATURE AND SCOPE OF SEQUESTRATION	
Introduction	81
Nature of sequestration	81
Whose estate may be sequestrated?	81
Issues relating to the scope of sequestration	84

CHAPTER 7	APPLICATIONS FOR SEQUESTRATION	
	Introduction	85
	Applications for sequestration of the estate of a living debtor	86
	Applications for sequestration of the estate of a deceased debtor	104
	Applications for sequestration of the estate of a trust	111
	Applications for sequestration of the estate of a partnership	117
	Applications for sequestration of the estate of a body corporate or unincorporated body	125
	Application for sequestration by a foreign representative under the Cross-Border Insolvency Regulations 2006	132
	Combined applications	132
	Jurisdiction	132
	Effect of debtor application or petition for sequestration	135
CHAPTER 8	THE AWARD OF SEQUESTRATION	
	Introduction	137
	Procedure for determining a debtor application or petition for sequestration	137
	Concurrent proceedings	151
	Sequestration not to fall asleep	153
	Transfer of sequestration	153
	Date of sequestration	154
	Registration of warrant to cite or determination of debtor application	155
	Refusal to award sequestration	158
	Procedure following award of sequestration	159
CHAPTER 9	REVIEW OF AWARD OF SEQUESTRATION	
	Introduction	165
	Recall	165
	Reduction	180
	Other remedies	182
	Damages for wrongful sequestration	183
CHAPTER 10	THE INTERIM TRUSTEE, THE TRUSTEE, THE COMMISSIONERS AND THE CREDITORS	
	Introduction	185
	Background to the current law	185
	The interim trustee	186
	The trustee	198
	Commissioners	216
	Creditors	221
CHAPTER 11	VESTING OF THE DEBTOR'S ESTATE ON SEQUESTRATION AND RELATED MATTERS	
	Introduction	225
	Estate which vests in the trustee in sequestration	225
	The effect of vesting and the nature of the trustee's right to the debtor's property	232
	Property exempt from attachment/exceptional attachment	244

Property held in trust.	248
Property subject to orders made under the Proceeds of Crime Act 2002.	251
Property subject to landlord's hypothec	254
Property subject to a security	255
Property subject to diligence.	255
Property subject to retention (or reservation) of title	256
Property situated outwith Scotland.	259
Funds held by a bank	260
Consigned sums	260
Claims for damages for personal injury	261
Criminal injuries compensation	262
Pension rights	262
Student loans.	265
Third Parties (Rights Against Insurers) Act 2010.	267
Redundancy payments	267
Income contributions	268
Disputes about vesting	279
Post-sequestration dealings with estate.	281
Offences in relation to estate.	287
Re-vesting of estate.	287
 CHAPTER 12	
ADMINISTRATION OF THE ESTATE	
Introduction.	293
Recovering, managing and realising the debtor's estate generally	293
Recovery of the debtor's estate.	295
Management and realisation of the debtor's estate.	296
Application for directions by trustee.	317
Application to sheriff in relation to trustee's administration	319
Defects in procedure	320
The sederunt book.	323
 CHAPTER 13	
RECOVERY OF DOCUMENTS AND INFORMATION	
Introduction.	325
Recovery of documents.	325
Statement of assets and liabilities	329
Debtor's account of current state of affairs.	330
Examination of persons.	331
 CHAPTER 14	
CHALLENGE OF PRIOR TRANSACTIONS	
Introduction.	335
Gratuitous alienations	339
Unfair preferences.	351
Orders on divorce or dissolution of civil partnership	360
Excessive pension contributions.	362
Pension-sharing cases	365
Extortionate credit transactions.	367
 CHAPTER 15	
DILIGENCE	
Introduction.	371
Regulation of diligence outwith sequestration	372
Regulation of diligence of sequestration.	375

CHAPTER 16	CREDITORS' CLAIMS AND DISTRIBUTION OF THE ESTATE	
	Introduction	385
	Submission of claims	385
	Adjudication of claims	390
	Amount of claim	394
	Liabilities and rights of co-obligants	401
	The balancing of accounts in bankruptcy	403
	Distribution	408
CHAPTER 17	THE DEBTOR	
	Introduction	423
	Effects of sequestration generally	423
	Duty to co-operate with trustee and other duties	423
	Disqualifications	424
	Offences	428
	Discharge of debtor	432
	Bankruptcy restrictions	445
	Financial education	457
CHAPTER 18	END OF SEQUESTRATION	
	Introduction	461
	End of sequestration	461
	Procedure on trustee's completion of administration of estate	462
	Discharge of trustee	463
	The sequestrated estate	464
	Revival of sequestration	465
CHAPTER 19	MINIMAL ASSET CASES	
	Introduction	469
	Modifications to sequestration process in minimal asset cases	469
	Minimal assets cases ceasing to be such	470
CHAPTER 20	ALTERNATIVES TO SEQUESTRATION: INTRODUCTION AND OVERVIEW	
	Introduction	473
	Voluntary arrangements with creditors	474
	Composition	474
	The debt arrangement scheme	475
	Trust deeds for creditors	475
	Judicial factors	475
CHAPTER 21	INTRODUCTION	
	Introduction	477
	Background to the scheme	477
	Changes to the scheme	479
	Outline of the scheme	481
	The debt arrangement scheme administrator	482
	Money advisors	482
	Payment distributors	488
	Scope of the scheme	491
	The application	494
	Decision on application	506

	Effect of debt payment programme	513
	Variation	517
	Revocation	523
	Composition	529
	Correction of accidental errors	531
	Dispensing power	531
	The debt arrangement scheme register	532
	Review and appeal	533
CHAPTER 22	TRUST DEEDS FOR CREDITORS	
	Introduction	537
	Background and development of the law	537
	Trust deeds generally	544
	The Bankruptcy (Scotland) Act 2016 and trust deeds generally	555
	Protected trust deeds	560
CHAPTER 23	JUDICIAL FACTORS	
	Introduction	587
	Circumstances in which judicial factor may be appointed	587
	Procedure for obtaining appointment of judicial factor . . .	590
	Important features of judicial factories	590
	Judicial factory and sequestration under the bankruptcy legislation or the granting of a trust deed for creditors . . .	594
	Proposals for reform of judicial factories	596
CHAPTER 24	CROSS-BORDER INSOLVENCY: INTRODUCTION AND OVERVIEW	
	Introduction	599
	The elements of a cross-border case	599
	The issues to which cross-border cases give rise	600
	The need for special rules in cross-border cases	601
	The theoretical debate	602
	National and international initiatives of cross-border insolvency	604
	Harmonisation	606
CHAPTER 25	CROSS-BORDER INSOLVENCY: SCOTS LAW	
	Introduction	609
	Section 426 of the Insolvency Act 1986	611
	EU insolvency proceedings regulation	615
	The Cross-border Insolvency Regulations 2006	647
	Common law	668

TABLE OF CASES

19 Entertainment Ltd, Re [2016] EWHC 1545 (Ch); [2017] B.C.C. 347	25–220
Abram Steamship Co (In Liquidation) v Abram (1925) 21 Ll. L. Rep. 167; 1925 S.L.T. 243.....	14–41, 14–44, 14–46
Accountant in Bankruptcy, Appellant [2017] SAC (Civ) 5; 2017 S.L.T. (Sh Ct) 77; 2017 G.W.D. 5–71	18–24, 18–31
Accountant in Bankruptcy, Appellant unreported 12 November 2014 Edinburgh Sheriff Court.	9–16, 21 93
Accountant in Bankruptcy v Allans of Gillock Ltd, 1991 S.L.T. 765	8–34
Accountant in Bankruptcy v Butler, 2007 S.L.T. (Sh Ct) 200; 2007 G.W.D. 32–542.....	6–08
Accountant in Bankruptcy v Campbell, 2012 S.L.T. (Sh Ct) 35; 2011 G.W.D. 31–669	17–48
Accountant in Bankruptcy v Clough, 2010 G.W.D. 35–714	12–77, 12–80
Accountant in Bankruptcy v Grant, 2010 G.W.D. 40–812	18–04, 18–24
Accountant in Bankruptcy v Mackay. <i>See</i> Mackay v Accountant in Bankruptcy	
Accountant in Bankruptcy v Mahmood. <i>See</i> Mahmood's Trustee v Mahmood	
Accountant in Bankruptcy v Orr, 2005 S.L.T. 1019; 2005 G.W.D. 28–528.....	14–27
Accountant in Bankruptcy v Patullo unreported 23 October 2012 Glasgow Sheriff Court	22–129
Accountant in Bankruptcy v Sneddon [2008] CSOH 11	14–29
Accountant in Bankruptcy v TW, unreported 23 September 2013 Edinburgh Sheriff Court	17–48, 17–49, 17–86, 17–103, 17–104, 17–107, 17–118, 17–119, 17–121
Accountant in Bankruptcy v Walker [2017] CSOH 78; 2017 S.L.T. 890; [2017] B.P.I.R. 803; 2017 G.W.D. 16–255	14–30, 14–33
Accountant in Bankruptcy (Brown's Trustee) v Brown [2009] CSIH 2; 2009 S.C. 236; 2009 S.L.T. 1115; 2009 S.C.L.R. 461; [2009] B.P.I.R. 215; 2009 G.W.D. 3–49	14–17, 14–51
Accountant of Court v Halifax Plc, 1999 S.C.L.R. 1135; 1999 G.W.D. 24–1166.....	11–15
Adair v David Colville & Sons Ltd, 1926 S.C. (H.L.) 51; 1926 S.L.T. 590.....	9–55
Adam & Winchester v White's Trustee. <i>See</i> W. Adam & Winchester v John Walker (White's Trustee)	
Advocate General for Scotland v King, 2015 S.L.T. (Sh Ct) 25; 2015 G.W.D. 4–77	8–20
Advocate General v Dickie, 2010 G.W.D. 31–650.....	8–17, 8–20
Advocate General v Zaoui. <i>See</i> Customs and Excise Commissioners v Zaoui	
AEEU and GMB v Clydesdale Group Plc (In Receivership) [1995] I.R.L.R. 527	12–18
AF Craig & Co, Petitioners, 1946 S.C. 19.....	9 60, 9 61
Ahmed's Trustee v Ahmed (No.2), 1993 S.L.T. 651	14–18
Aitken v Aitken [2005] CSOH 105.....	1–20, 1–21, 8–20
Allan's Executor v Union Bank of Scotland Ltd, 1909 S.C. 206; (1908) 16 S.L.T. 553.....	11–165
Allan's Trustees v Lord Advocate, 1971 S.C. (H.L.) 45; 1971 S.L.T. 62; [1970] T.R. 417.....	11–67
Alliance & Leicester Building Society v MacGregor. <i>See</i> Alliance & Leicester Building Society v Murray's Trustee	
Alliance & Leicester Building Society v Murray's Trustee, 1995 S.L.T. (Sh Ct) 77; 1994 S.C.L.R. 19.....	11–15, 11–19, 11–31, 11–169
American Energy Group Ltd v Hycarbex Asia Pte Ltd (in liquidation) [2014] EWHC 1091 (Ch)	25–218
Anantapadmanabhaswami v Official Receiver of Secunderabad [1933] A.C. 394	25–249
Anderson v Dickens [2008] CSOH 134; 2009 S.C.L.R. 609; 2009 G.W.D. 1–15.....	14–27, 14–53
Anderson v Hamilton & Co. <i>See</i> William Anderson (Watson and Campbell's Trustee) v William Hamilton and Co.	
Anderson v Mackinnon. <i>See</i> William Anderson (Watson and Campbell's Trustee) v William Mackinnon (Crawford's Trustee)	
Anderson v North of Scotland Bank Ltd (1901) 4 F. 49; (1901) 9 S.L.T. 249	11–165
Anderson v Starkey, Fletcher and Co (1813) 17 FC 246.....	22–19
Angus Jowett & Co v National Union of Tailors and Garment Workers [1985] I.C.R. 646; [1985] I.R.L.R. 326; (1985) 82 L.S.G. 1006; (1985) 135 N.L.J. 966.....	12–18
Angus Trustee v Angus. <i>See</i> Commercial Bank of Scotland Ltd v Reid (Angus Trustee)	
Araya v Coghill, 1921 S.C. 462; 1921 1 S.L.T. 321	25–247, 25–249

Archer Car Sales (Airdrie) Ltd v Gregory's Trustee, 1993 S.L.T. 223	9-16, 10-11, 10-59, 22-17, 22-18
Archivent Sales & Development Ltd v Strathclyde Regional Council, 1985 S.L.T. 154; 27 B.L.R. 98	11-81
Armada Shipping SA, Re [2011] EWHC 216 (Ch); [2011] 2 All E.R. (Comm) 481; [2011] B.P.I.R. 626; [2011] Arb. L.R. 5	25-218, 25-224, 25-226
Armour v Thyssen Edelstahlwerke AG, [1991] 2 A.C. 339; [1990] 3 W.L.R. 810; [1990] 3 All E.R. 481; [1991] 1 Lloyd's Rep. 95; 1990 S.L.T. 891; [1990] B.C.C. 925; [1991] B.C.L.C. 28; (1990) 134 S.J. 1337	11-81, 11-84
Armstrong v G Dunlop & Son's Judicial Factor, 1987 S.C. 279; 1988 S.L.T. 255	23-25, 23-27
Arthur (Douglas Andrew) v HM Advocate, 1993 J.C. 57; 1994 S.L.T. 244; 1993 S.C.C.R. 130; 1994 S.C.C.R. 621	8-33
Arthur v Secretary of State for Social Security, 1996 S.L.T. 1399	11-44
Arthur v SMT Sales and Service Co Ltd (No.1), 1998 S.C. 525; 1998 S.L.T. 1446; 1998 G.W.D. 10-477	9-58
Arthur v SMT Sales and Service Co Ltd (No.2), 1999 S.C. 109; 1999 S.L.T. 783; 1998 G.W.D. 35-1776	7-31, 9-55, 9-56
Aslam v Glasgow City Council [2016] CSIH 78; 2016 G.W.D. 34-611	9-62, 11-176
Asphaltic Limestone Co Ltd v Glasgow Corp, 1907 S.C. 463; (1907) 14 S.L.T. 706	16-75, 16-76
Assignees of Stein, Smith, Stein, Stein and Smith v Brown. <i>See</i> Douglas and others, (Assignees of John Stein, Thomas Smith, Robert Stein, James Stein and Robert Smith v Brown and Gibson Craig, (Trustees for the Creditors of John Stein and Robert Stein and Co. Distillers at Canonmills and Kilbagie	
Association of Pattern Makers and Allied Craftsmen v Kirvin Ltd, 1978 13 I.T.R. 446	12-18
Athya v Clydesdale Bank (1881) 18 S.L.R. 287	22-19
Atlas Bulk Shipping AS v Navios International Inc [2011] EWHC 878 (Ch); [2012] Bus. L.R. 1124; [2012] B.C.C. 353; [2012] 1 B.C.L.C. 151	25-220
Baillie Marshall Ltd (in liquidation) v Avian Communications Ltd, 2002 S.L.T. 189; 2000 G.W.D. 27-1057	14-57
Bain v Hugh LS McConnell Ltd, 1991 S.L.T. 691	9-55
Balcraig House's Trustee v Roosevelt Property Services Ltd, 1994 S.L.T. 1133	14-52, 14-53, 14-57
Ballard v Bohanon (No.2) [2009] CSOH 89	9-18
Bank Handlowy w Warszawie SA v Christianapol sp z oo (C-116/11); EU:C:2012:739; [2013] Bus. L.R. 956; [2013] I.L.Pr. 21; [2013] B.P.I.R. 174	25-118, 25-132
Bank of Credit and Commerce International SA (In Liquidation) (No.11), Re [1997] Ch. 213; [1997] 2 W.L.R. 172; [1996] 4 All E.R. 796; [1996] B.C.C. 980; [1997] 1 B.C.L.C. 80	25-254
Bank of Scotland, Petitioners, 1988 S.C. 245; 1988 S.L.T. 690; 1988 S.C.L.R. 487; (1988) 4 B.C.C. 457	14-12
Bank of Scotland v Mackay, 1991 S.L.T. 163; 1991 S.C.L.R. 163	8-17, 8-20
Bank of Scotland v MacLeod Paxton Woolard & Co, 1998 S.L.T. 258; 1997 G.W.D. 19-860	11-167
Bank of Scotland v Reid unreported 13 June 2000 OH	14-29
Barlow v City Plumbing Supplies Holdings Ltd [2009] CSOH 5; 2009 S.C.L.R. 350; 2009 G.W.D. 6-93	9-54, 9-55
Barnett & Co v Russell (1901) 17 Sh Ct Rep 55	22-19
Barnie (G & A) v Stevenson, 1993 S.C.L.R. 318	8-20, 15-30, 15-35
Barr (John M'Queen) (Trustee on the Sequestrated Estates of James Lamont and Others) v Smith & Chamberlain (1879) 7 R. 247	16-21
Batchelor v HM Advocate (Sentencing) HCJ, 2000 G.W.D. 34-1315	17-40
BCCI (No.10), Re. <i>See</i> Bank of Credit and Commerce International SA (In Liquidation) (No.11), Re	
Bell v Cadell (1831) 10 S. 100	15-45
Bell v Jackson unreported 31 May 2000 IH	11-165
Bell v McMillan (No.1), 1999 S.L.T. 947; 2001 G.W.D. 2-95	7-37, 9-16, 11-176
Bell's Trustee v Bell's Trustee, 1907 S.C. 872; (1907) 14 S.L.T. 941	11-50
Berry v Taylor, 1993 S.L.T. 718; 1992 S.C.L.R. 910	15-33
Birrell's Trustee v Birrell, 1957 S.L.T. (Sh. Ct.) 6; (1957) 73 Sh. Ct. Rep. 92	11-122
Blackburn v Alexander [2015] CSOH 179; 2016 G.W.D. 2-48	14-31
Blackburn v Cowie [2008] CSIH 30; 2008 S.C. 504; 2008 S.L.T. 437; 2008 Hous. L.R. 99; 2008 G.W.D. 13-246	11-25, 11-38, 12-67, 12-85
Blackwood v Cathcart (1763) Mor 4579	25-251
Blair v Wilson, Minister of Cultlie (1677) Mor 4927	14-41, 14-47

Blyth v Chisolm (1833) 11 S. 512	22-19
Bob Gray (Access) Ltd v TM Standard Scaffolding Ltd, 1987 S.C.L.R. 720	14-57, 14-66
Borthwick v Margaret (1829) 7 S. 420	22-20
Borthwick v Scottish Widows Fund (1864) 2 M. 595	16-78, 16-79
Borthwick v Shepherd (1832) 11 S. 1	22-19
Boyle's Trustee v Boyle, 1988 S.L.T. 581; 1987 S.C.L.R. 621	14-41, 14-46
Brandon v Stephens (1862) 24 D. 263	9-12
Brickmann's Trustee v Commercial Bank. <i>See</i> Robertson-Durham (Brickmann's Trustee) v Commercial Bank of Scotland Ltd	
British General Insurance Co v Borthwick (1924) 40 Sh Ct Rep 198	8-17
Broadfoot v Leith Banking Co, unreported 9 Dec 1808 FC	14-66
Brown v Burt (1848) 11 D. 338	12-05
Brown v Middlemas of Kelso Ltd, 1994 S.C. 401; 1994 S.L.T. 1352; 1994 S.C.L.R. 463	9 60
Brown v Simpson. <i>See</i> Joint Administrators of Questway Ltd v Simpson	
Brown v Stewart [2008] CSOH 155; 2008 G.W.D. 39-581	14-34
Brown's Trustee v Brown, 1995 S.L.T. (Sh Ct) 2; 1994 S.C.L.R. 470	11-123
Buchanan v Corbett, Borthwick, and Co (1827) 5 S. 805	22-27
Buchanan v McCulloch (1865) 4 Macph 135	17-79, 18-02, 18-04
Burgo Group SpA v Illochroma SA (C-327/13) EU:C:2014:2158; [2015] 1 W.L.R. 1046; [2015] B.C.C. 33; [2015] C.E.C. 191; [2014] I.L.Pr. 42	25-132, 25-135
Burnett's Trustee v Grainger, [2004] UKHL 8; 2004 S.C. (H.L.) 19; 2004 S.L.T. 513; 2004 S.C.L.R. 433; [2004] 11 E.G. 139 (C.S.); 2004 G.W.D. 9-211	11-27, 11-28, 11-30, 11-43, 11-51, 11-168, 11-171
Burton, Noter [2010] CSOH 174	12-93, 16-27, 16-28, 16-48, 16-52, 16-53
Busby Spinning Co Ltd v BMK Ltd, 1988 S.C. 70; 1988 S.L.T. 246; 1988 S.C.L.R. 127	16-73
Business City Express Ltd, Re [1997] B.C.C. 826; [1997] 2 B.C.L.C. 510	25-15, 25-16
Button v Royal Bank of Scotland Plc, 1987 G.W.D. 27-1019	9-14, 9-15
Byers v Yacht Bull Corp [2010] EWHC 133 (Ch); [2010] B.C.C. 368; [2010] 2 B.C.L.C. 169; [2010] I.L.Pr. 24; [2010] B.P.I.R. 535	25-51
Byrne, Petitioner [2015] CSIH 23; 2015 G.W.D. 12-197	9-13, 9-15
Cairns v Chief Constable Strathclyde Police unreported 2 April 2004 Glasgow Sheriff Court	11-176
Cairns v Davidson, 1913 S.C. 1054; 1913 2 S.L.T. 118	11-169
Caldwell v Hamilton, 1919 S.C. (H.L.) 100; (1919) 2 S.L.T. 154	2-04, 2-07, 11-122
Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; [2006] 2 All E.R. (Comm) 695; [2006] B.C.C. 962; [2007] 2 B.C.L.C. 141	25-257, 25-260
Campbell and Beck v Macfarlane (1862) 24 D. 1097	22-34
Campbell v Carphin, 1925 S.L.T. (Sh Ct) 30	16-79
Campbell v Cullen, 1911 1 S.L.T. 344	10-130
Campbell v Dunbar, 1989 S.L.T. (Sh Ct) 29	7-205, 8-20
Campbell v Edderline's Creditors (1801) 12 FC 480	22-20
Campbell v Goldie (1822) 2 S. 16	13-11
Campbell v McDonald's Trustees (1829) 4 F. 1127	22-19
Campbell v Sheriff, 1991 S.L.T. (Sh. Ct.) 37; 1990 S.C.L.R. 791	8-17, 8-19, 8-33
Campbell v Smith 1 Feb 1817 FC	13-11
Carabine v Carabine, 1949 S.C. 521; 1949 S.L.T. 429	23-06
Carrie's Trustee v Carrie, 2011 W.L. 4084999; 2011 G.W.D. 34-712	12-80, 12-81
Cavers Parish Council v Smailholm Parish Council 1909 S.C. 195; (1908) 16 S.L.T. 627	1 11
Cay's Trustee v Cay, 1998 S.C. 780; 1999 S.L.T. 321; 1998 S.C.L.R. 456; 1998 G.W.D. 14-722	14-18, 14-29, 14-32
Cay's Trustee v Cay unreported January 1995 Peterhead Sheriff Court	11-08, 11-47
Central Motor Engineering Co v Gibbs (Petition: Sequestration Proceedings), 1917 S.C. 490; 1917 1 S.L.T. 228	9-60
Central Motor Engineering Co v Gibbs, 1918 S.C. 755; 1918 2 S.L.T. 177	9-54, 9-55
Chaudhry v Advocate General for Scotland, [2013] CSOH 36; 2013 S.L.T. 548; 2013 S.C.L.R. 635; 2013 G.W.D. 10-211	9 59
Chesterfield United Inc, Re [2012] EWHC 244 (Ch); [2012] B.C.C. 786; [2013] 1 B.C.L.C. 709	25-220, 25-226
Cheyne's Trustees, Petitioners, 1933 S.L.T. 184	18-04, 18-24
Chiswell v Chiswell [2016] CSOH 45; 2017 S.C.L.R. 49; 2016 G.W.D. 10-186	11-173, 11-174
Chris Hart (Business Sales) Ltd v Campbell, 1993 S.C.L.R. 383	8-17, 8-19

Christie v Keith (1838) 16 S. 1224	16-80
Christie v Stratton (1746) Mor 4569	25-251
City of Edinburgh Council v Stevens unreported 18 November 2011 Edinburgh Sheriff Court	8-13
Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd, 1981 S.C. 111; 1981 S.L.T. 308	11-67, 11-83
Clark's Trustee, Noter, 1993 S.L.T. 667	10-33
Clark's Trustees v Lord Advocate, 1972 S.C. 177; 1972 S.L.T. 190	11-67
Clarke (Patrick) v Muller (C.W.M.) (1884) 11 R. 418	11-176
Clarks of Hove Ltd v Bakers Union [1978] 1 W.L.R. 1207; [1979] 1 All E.R. 152; [1978] I.C.R. 1076; [1978] I.R.L.R. 366; (1978) 13 I.T.R. 356; (1978) 122 S.J. 643	12-18
Clayton's Case. <i>See</i> Devaynes v Noble	
Clydesdale Bank Plc v Davidson (Sequestration: Discharge of Debtor), 1993 S.C. 307; 1994 S.L.T. 225; 1993 S.C.L.R. 428	17-49
Clydesdale Bank Plc v Grantly Developments (Sequestration), 2000 S.L.T. 1369; 2000 S.C.L.R. 771; 2000 G.W.D. 15-617	7-37, 7-130, 8-17, 8-19, 8-20, 10-11, 10-59
Clydesdale Bank Plc v McCaw unreported 24 May 2002 IH	12-56, 17-78
Clydesdale Bank v Anderson (1890) 27 S.L. Rep. 493	16-27
Cockburn's Trustees, Petitioners, 1941 S.C. 187; 1941 S.L.T. 162	18-23, 18-24
Collins and Aikman Europe SA, Re [2006] EWHC 1343 (Ch); [2006] B.C.C. 861; [2007] 1 B.C.L.C. 182; [2007] I.L.Pr. 2	25-119
Colquhoun's Trustee v Campbell's Trustee (1902) 4 F. 739	11-50
Colville v James (1862) 1 M. 41	25-249
Comite d'entreprise de Nortel Networks SA v Rogeau (C-649/13) EU:C:2015:384; [2016] Q.B. 109; [2015] 3 W.L.R. 1275; [2015] B.C.C. 490; [2015] 2 B.C.L.C. 349; [2016] C.E.C. 91; [2015] I.L.Pr. 33	25-43
Commercial Bank of Scotland Ltd v James Lockhart (Speedie's Trustee) (1885) 13 R. 257	16-60
Commercial Bank of Scotland Ltd v Reid (Angus Trustee) (1901) 4 F. 181; (1901) 9 S.L.T. 166	14-66
Cook v Mowbray (1829) 7 S. 778	12-42
Cook v Sinclair & Co (William) (1896) 23 R. 925; (1896) 4 S.L.T. 70	14-47, 14-58, 14-71
Cook's Trustee, Petitioner, 1985 S.L.T. 33	8-34
Cooper v Baillie (1878) 5 R. 564	9-12
Cormack v Anderson (1829) 7 S. 868	11-27
Coull's Trustee, Petitioner, 1934 S.C. 415; 1934 S.L.T. 422	18-23
Council of the Law Society of Scotland v Andrew, 1995 S.C. 68; 1995 S.L.T. 877; 1995 S.C.L.R. 48	23-29
Council of the Law Society of Scotland v McKinnie (No.1), 1991 S.C. 355; 1993 S.L.T. 238; 1991 S.C.L.R. 850	11-65, 23-31, 23-32, 23-33
Council of the Law Society of Scotland v McKinnie (No.2), 1995 S.C. 94; 1995 S.L.T. 880; 1995 S.C.L.R. 53	23-18, 23-20, 23-24, 23-25, 23-29, 23-32
Coutt's Trustee v Coutts, 1998 S.C. 798; 1998 S.C.L.R. 729; 1998 G.W.D. 22-1137	11-98
Coutt's Trustee v Webster (1886) 13 R. 1112	14-64, 14-66, 14-69
Cowan v Royal Bank of Scotland Plc [2011] CSOH 85; 2011 G.W.D. 18-427	1-21, 8-20
Cowie's Trustee v Cowie. <i>See</i> Blackburn v Cowie	
Craig v Gray's Co (1901) 17 Sh Ct Rep 113	22-20, 22-39
Craig v Hunter & Son (1905) 13 S.L.T. 525	14-57
Craig's Trustee v Lord Malcolm (1900) 2 F. 541; (1900) 7 S.L.T. 398	12-26
Craiglaw Developments Ltd v Gordon Wilson & Co, 1997 S.C. 356; 1998 S.L.T. 1046; 1997 S.C.L.R. 1157; [1998] B.C.C. 530; 1997 G.W.D. 21-1050	11-97, 14-27, 14-57
Crawford, Petitioner, 1909 S.C. 1063; 1909 I S.L.T. 536	16-32
Creditors of the deceased Galbreath of Balgair v Galbreath of Balgair (1762) Mor 4574	25-251
Creditors of William Robertson v His Children (1688) Mor 4929	14-41, 14-47
Crerar v Dow (1906) 22 Sh Ct Rep 311	22-28
Crighton v Crighton's Trustee, 1999 S.L.T. (Sh Ct) 113; 1999 S.C.L.R. 16; 1999 G.W.D. 1-2	16-49, 16-52, 16-53
Crittall Warnlife Ltd v Flaherty, 1988 G.W.D. 22-930	17-48
Crown Estate Commissioners v Liquidator of Highland Engineering Ltd, 1975 S.L.T. 58	12-25, 12-26, 12-27, 12-28
Cruise v Chitum [1974] 2 All E.R. 940; (1974) 4 Fam. Law 152; (1974) 118 S.J. 499	7-213
Cumbernauld Development Corporation v Mustone Ltd, 1983 S.L.T. (Sh Ct) 55	11-74
Cumming's Trustee v Glenrinnies Farms Ltd, 1993 S.L.T. 904; [1993] B.C.C. 829	11-44
Customs and Excise Commissioners v Zaoui, 2001 S.C. 448; 2001 S.L.T. 201; 2000 G.W.D. 40-1498	8-17, 8-20

Dall v Drummond (1870) 8 M. 1006	22–37
Dallhold Estates (UK) Pty Ltd, Re [1992] B.C.C. 394; [1992] B.C.L.C. 621; [1992] E.G. 18 (C.S.)	25–15, 25–16
Davidson v Clydesdale Bank Plc, 2002 S.L.T. 1088; 2002 G.W.D. 13–426	11–173
Davidson v Union Bank (1881) 19 S.L.R. 15	22–19
Dennistoun v Dennistoun's Trustees (1863) 1 M 869	12–39
Deutz Engines Ltd v Terex (1984), 1984 S.L.T. 273	11–81, 11–83, 11–84
Devaynes v Noble (1816) 35 E.R. 767; (1816) 1 Mer. 529	11–88, 14–57
Dickson v National Bank of Scotland, 1917 S.C. (H.L.) 50; 1917 1 S.L.T. 318	11–165
Dickson v United Dominions Trust Ltd, 1988 S.L.T. 19	11–173
Dixon & Wilson v McIntyre (1898) 6 S.L.T. 188	11–97
Dobie v Marquis of Lothian (1864) 2 M. 788	11–07
Dobie v McFarlane (1854) 17 D. 97	14–41, 14–44, 14–46
Donnelly v Royal Bank of Scotland Plc [2017] SAC (Civ) 1	7–218, 16–20, 16–73, 16–76, 16–77, 16–78, 16–82, 16–84, 17–75, 17–78, 17–79, 17–80, 18–04, 22–03, 22–31, 22–59
Dooneen Ltd (t/a McGinnes Associates) v Mond [2016] CSIH 59; 2017 S.C.L.R. 199; [2017] B.P.I.R. 380; 2016 G.W.D. 23–441	17–79, 18–04, 22–31
Doughty (Spratt's Trustee) v Wells (1906) 14 S.L.T. 299	22–20
Douglas, (Assignees of John Stein, Thomas Smith, Robert Stein, James Stein and Robert Smith v Brown and Gibson Craig, (Trustees for the Creditors of John Stein and Robert Stein and Co Distillers at Canonmills and Kilbagie, 6 E.R. 692; (1831) 2 Dow. & Cl. 171	24–10
Dow v Pennell's Trustee, 1929 S.L.T. 674	16–40
Drew v HM Advocate, 1996 S.L.T. 1062; 1995 S.C.C.R. 647	17–40
Drybrough & Co Ltd v MacDonald (1893) 20 R. 396	18–04, 18–23, 18–24
Drybrough & Co Ltd, Petitioners, 1989 S.C.L.R. 279	8–17, 8–20
Duff, Petitioner [2013] CSIH 112; 2014 G.W.D. 3–57	11–176
Duffus v Ross (1874)	22–19
Duke Group Ltd, Re [2001] B.C.C. 144	25–15, 25–16
Dumbarton Building & Civil Engineering Co Ltd v Devoy unreported 19 January 1996 IH	14–53
Dumfries & Galloway Council v Duff, 2013 G.W.D. 12–258	7–40
Dundas v Morrison (1857) 20 D. 225	12–27
Dunlop v Johnston (1866–1869) L.R. 1 Sc. 109; (1867) 5 M. (H.L.) 22	14–41, 14–43, 14–46
Dunn v Britannic Assurance Co Ltd, 1932 S.L.T. 244	23–08
Dunn v Roxburgh [2013] CSOH 42; 2013 G.W.D. 11–226	22–40
Earl of Breadalbane v Macdonald (1824) 2 S. 621	22–19, 22–20
Earl of Glencairn v Birsbane (1677) Mor 1011	14–41, 14–43
Edenote Ltd Re [1996] B.C.C. 718; [1996] 2 B.C.L.C. 389; (1996) 93(25) L.S.G. 28; (1996) 140 S.J.L.B. 176	12–94
Edinburgh & Glasgow Bank v Ewan (1852) 14 D. 547	25–250
Edmond v Gordon (1858) 20 D. (HL) 5	11–50
Eichler (A Bankrupt) [2011] BPIR 1293	25–57
Emerald Stainless Steel Ltd v South Side Distribution Ltd, 1982 S.C. 61; 1983 S.L.T. 162	11–81, 11–83, 11–85
England v Purves [1999] B.C.C. 197; [1999] 2 B.C.L.C. 256; [1998] B.P.I.R. 347	25–15
England v Smith [2001] Ch. 419; [2000] 2 W.L.R. 1141; [2000] B.C.C. 123; [2000] 2 B.C.L.C. 21; [2000] I.L.Pr. 730; [2000] B.P.I.R. 28; (1999) 96(47) L.S.G. 29; (2000) 144 S.J.L.B. 8	25–15, 25–16
Erste Group Bank AG London Branch v JSC (VMZ Red October) [2015] EWCA Civ 379; [2015] 1 C.L.C. 706	25–192, 25–259
Eurofood IFSC Ltd, Re (C-341/04) EU:C:2006:281; [2006] Ch. 508; [2006] 3 W.L.R. 309; [2006] E.C.R. I-3813; [2006] B.C.C. 397; [2007] 2 B.C.L.C. 151; [2006] All E.R. (EC) 1078; [2006] I.L.Pr. 23; [2006] B.P.I.R. 661	25–57, 25–58, 25–61–25–63, 25–96, 25–97, 25–99
Export Credits Guarantee Department v Turner, 1979 S.C. 286; 1981 S.L.T. 286	11–67
F-Tex SIA v Lietuvos-Anglijos UAB Jadecloud-Vilma (C-213/10) EU:C:2012:215; [2013] Bus. L.R. 232; [2013] C.E.C. 3; [2012] I.L.Pr. 24	25–51
Felixstowe Dock & Railway Co v United States Lines Inc [1989] Q.B. 360; [1989] 2 W.L.R. 109; [1988] 2 All E.R. 77; [1987] 2 Lloyd's Rep. 76; [1987] 2 F.T.L.R. 75; (1989) 133 S.J. 82	25–250
First Time Ltd v Liquidator of Denmore Investments Ltd [2017] SAC (Civ) 4; 2017 G.W.D. 5–64	14–18
Fleming v Walker's Trustee (1876) 4 R. 112	11–173

Fleming's Trustees v Fleming, 2000 S.C. 206; 2000 S.L.T. 406; 2000 G.W.D. 2-61.....	11-39, 11-40, 11-41
Fleming's Trustees v McHardy (1892) 19 R. 542.....	22-25
Fletcher v Anderson, 1883 10 R. 835.....	8-28
Flett v Mustard, 1936 S.C. 269; 1936 S.L.T. 345.....	22-31
Flightlease (Ireland) Ltd, Re [2012] IESC 12.....	25-257
Focus Insurance Co Ltd, Re [1996] B.C.C. 659; [1997] 1 B.C.L.C. 219.....	25-15
Forbes-Leith v Livingston (1759) Mor 1212.....	22-20
Forbes' Trustee v Ogilvy. <i>See</i> Robertson (Forbes Trustee) v Ogilvy	
Forest-Hamilton's Trustee v Forest-Hamilton, 1970 S.L.T. 338.....	11-169
Forster v Ferguson & Forster, MacFie & Alexander, [2010] CSIH 38; 2010 S.L.T. 867; 2010 G.W.D. 18-354.....	14-40
Fortune's Trustee v Cooper Watson Ltd [2017] CSOH 74; 2017 G.W.D. 15-244.....	12-70
Fortune's Trustee v Medwin Investments Ltd [2016] CSIH 49; 2016 S.C. 824; 2016 S.L.T. 923; 2016 G.W.D. 22-405.....	8-39, 8-41, 8-42, 11-172
Fourie v Le Roux [2005] EWHC 922 (Ch); [2005] B.P.I.R. 779.....	25-15
Foxley v United Kingdom (33274/96) (2001) 31 E.H.R.R. 25; 8 B.H.R.C. 571; [2000] B.P.I.R. 1009.....	12-19, 12-20
Francis Cooper & Son's Judicial Factor, 1931 S.L.T. 26.....	23-24
Fraser, Petitioner. <i>See</i> Joint Administrators of Prestonpans (Trading) Ltd, Petitioners	
Fraser v Frisbys (1830) 8 S. 982.....	22-20
Fraser v Hankey & Co (1847) 9 D. 415.....	12-05
Fraser's Trustee, Noter, 2011 G.W.D. 27-604.....	8-39
Frost v Cintec International unreported 18 June 2004.....	9-15
Galbraith v Grimshaw, 1910 A.C. 508.....	25-249
Galbraith v Whitehead (1863) 1 M. 644.....	11-173, 17-79, 18-04
Garden Haig Scott & Wallace v Stevenson's Trustee, 1962 S.C. 51; 1962 S.L.T. 78.....	13-11
Gardner v Woodside (1862) 24 D. 1133.....	9-16
Garg v McNaught [2015] CSOH 148; 2015 G.W.D. 38-603.....	9-55
Geddes v Quistorp (1889) 17 R. 278.....	18-18
Geddes' Trustee unreported 6 April 1985.....	10-130
George Hopkinson Ltd v NG Napier & Son, 1953 S.C. 139; 1953 S.L.T. 99.....	11-164
George Robertson and Co's Trustee v Union Bank of Scotland Ltd, 1917 S.C. 549; 1917 1 S.L.T. 333.....	14-57
German Graphics Graphische Maschinen GmbH v van der Schee (C-292/08) EU:C:2009:544; [2009] E.C.R. I-8421; [2010] C.E.C. 499; [2010] I.L.Pr. 1.....	25-51
Gibraltar Residential Properties Ltd v Gibralcon 2004 SA [2010] EWHC 2595 (TCC); [2011] B.L.R. 126; [2011] I.L.Pr. 27.....	25-51
Gibson v Greig (1853) 16 D. 233.....	15-33
Gibson v Wilson (1841) 3 D. 974.....	22-20
Gibson v Wilson and Munro (1894) 21 R. 840; (1894) 2 S.L.T. 56.....	8-28, 9-12, 9-54
Gilmour v Gilmours (1873) 11 M. 853.....	22-20, 22-31
Gilmour, Shaw and Co's Trustee v Learmonth, 1972 S.C. 137.....	14-41
Glasgow City Council v Chaudhry, 2015 S.L.T. (Sh Ct) 107; 2015 G.W.D. 14-249.....	8-20
Glasgow City Council v Springboig St John's School Managers [2014] CSOH 76; 2014 G.W.D. 16-287.....	11-65
Glen v Gilbey Vintners Ltd, 1986 S.L.T. 553.....	11-81, 11-85
Globe Insurance Co v Murray (1854) 17 D. 216.....	22-20
GMB v Clydesdale Group Plc. <i>See</i> AEEU and GMB v Clydesdale Group Plc (In Receivership)	
GMB v Rankin [1992] I.R.L.R. 514.....	12-18
Goetz v Aders (1874) 2 R. 150.....	8-28
Gordon v Brock (1838) 1 D. 1.....	11-96
Gordon v Sander's Trustee (1824) 2 S. 675.....	11-64
Gordon's Trustee v Farquharson (1797) Mor 2905.....	11-27
Gourlay v Straton (1827) 5 S. 804.....	12-07
Gourlay's Trustee v Gourlay, 1995 S.L.T. (Sh Ct) 7.....	12-80, 12-84
Graeme's Trustee v Giersberg (1888) 15 R. 691.....	11-50
Graham v Mackenzie (1871) 9 M. 798.....	11-173, 11-174
Graham's Trustee v Morton, 1945 S.L.T. 48.....	12-39
Grampian Regional Council v Drill Stem (Inspection Services) Ltd, 1994 S.C.L.R. 36.....	11-74
Grant v Grant (1748) Mor 949.....	14-64, 14-66, 14-69, 14-71
Grant v Green's Trustee (1901) 3 F. 1016; (1901) 9 S.L.T. 139.....	11-17
Grantly Developments v Clydesdale Bank Plc, 2002 G.W.D. 11-339.....	9-14, 9-16
Grimshaw v Bruce [2011] CSOH 212; 2012 G.W.D. 3-38.....	16-38, 16-49, 17-75

Grindall v John Mitchell (Grangemouth) Ltd, 1984 S.L.T. 335	11–173
Gupta's Trustee v Gupta, 1996 S.C. 82; 1996 S.L.T. 1098.....	13–26
Guthrie Newspaper Group v McNamara, 1992 G.W.D. 22–1245	8–12
Guthrie Newspaper Group v Morrison, 1992 G.W.D. 22–1244	1–12
H Kinsey Ltd. <i>See</i> Walkraft Paint Co Ltd v James H Kinsey Ltd	
H v K [2014] EUECJ C 295/13	25–51
Hagemeister (A Bankrupt), Re [2010] BPIR 1093	25–57
Halifax Plc v Gorman's Trustee, 2000 S.L.T. 1409; 2000 G.W.D. 8–312.....	11–15,
11–17, 11–19, 11–31, 11–45, 11–50, 11–52, 11–169, 11–170	
Hall v Crawford, 2002 S.C. 464; 2002 S.L.T. 182; 2002 S.C.L.R. 464; 2002 G.W.D.	
3–112.....	9–04, 9–21
Hamilton v Brown [2016] EWHC 191 (Ch); [2017] 1 B.C.L.C. 269; [2016] B.P.I.R.	
531.....	11–44
Hamilton v Cuthbertson (1841) 3 D. 494	16–39
Hamilton v Queensbury's Executors (1834) 12 S. 766.....	22–19
Hamilton's Executor v Bank of Scotland, 1913 S.C. 743; 1913 1 S.L.T. 296.....	12–39
Hamish Armour (Receiver of Barry Staines) v Association of Scientific Technical and	
Managerial Staff's [1979] I.R.L.R. 24, EAT.....	12–18
Hannay and Sons' Trustee v Armstrong & Co (1875) 2 R. 399.....	16–80
Harris, Petitioner [2005] CSOH 57.....	4–101
Hartlebury Printers Ltd (in liquidation) Re [1993] 1 All E.R. 470; [1992] B.C.C. 428;	
[1993] B.C.L.C. 902; [1994] 2 C.M.L.R. 704; [1992] I.C.R. 559; [1992] I.R.L.R.	
516.....	12 18
Hartley, Green & Co v Watson & Mathers (1887) 3 Sh Ct Rep 73	22–19
Harvie's Trustee v Bank of Scotland (1885) 12 R. 1141	16–68
Hastings (Wren's Trustee) v Wren, 2009 W.L. 1403429; 2010 S.C.L.R. 811; 2009	
G.W.D. 22–363	12–80
Henderson v 3052775 Nova Scotia Ltd [2006] UKHL 21; 2006 S.C. (H.L.) 85; 2006	
S.L.T. 489; 2006 S.C.L.R. 626; 2006 G.W.D. 15–275	14–29
Henderson v Bulley (1849) 11 D. 1470	18–04
Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 W.L.R. 2600; 2014	
S.C. (U.K.S.C.) 203; 2014 S.L.T. 775; 2014 S.C.L.R. 692; (2014) 158(27)	
S.J.L.B. 37; 2014 G.W.D. 23–437	14–29, 14–32, 14–58
Henderson v Henderson's Trustee (1882) 10 R. 185	22–20
Henry v Strachan & Spence (1897) 24 R. 1045; (1897) 5 S.L.T. 94.....	22–19
Henry, Re [2016] EWCA Civ 989; [2017] 1 W.L.R. 391; [2017] 3 All E.R. 735; [2016]	
B.P.I.R. 1426; [2016] Pens. L.R. 311	11–108
Heritable Reversionary Co Ltd v Millar [1892] A.C. 598; (1892) 19 R. (H.L.)	
43.....	11–63, 11–64, 11–66
Heritable Securities Investment Association Ltd v Wingates (1891) 29 S.L.R. 904.....	22–19
Heywood v Scrimgeour, 1995 S.C.C.R. 644	13 15
Highland Council v Construction Centre Group Ltd, 2004 S.C. 480; 2004 G.W.D.	
18 389.....	16–84
Hill v Frame unreported 12 May 2016 Hamilton Sheriff Court	18–24, 22–31
Hoblyn v Hoblyn's Trustee unreported 8 June 2006 Paisley Sheriff Court.....	11–57, 11–59
Hodgson v Hodgson's Trustee, 1984 S.L.T. 97	8–12, 9–15
Hofford v Gowans, 1909 1 S.L.T. 153.....	11–163, 11–167
Holden v Royal Bank of Scotland Plc [2011] CSOH 84; 2011 G.W.D. 18–424.....	1–21
Holmes, Petitioner, 1998 S.L.T. (Sh Ct) 47	13–30, 13–31
Home's Trustee v Homes' Trustees, 1926 S.L.T. 214.....	25–249
Horton & Ritchie v Walker (1909) 25 Sh Ct Rep 83	22–32
Houston v Sale (1909) 25 Sh Ct Rep 25.....	22–26
HSBC Bank Plc v Tambrook Jersey Ltd [2013] EWCA Civ 576; [2014] Ch. 252;	
[2014] 2 W.L.R. 71; [2013] 3 All E.R. 850; [2013] B.C.C. 472; [2013] 2 B.C.L.C.	
186; [2013] B.P.I.R. 484	25–14, 25–15
Hughes v Hannover Ruckversicherungs AG [1997] B.C.C. 921; [1997] 1 B.C.L.C.	
497; [1999] B.P.I.R. 224; [1997] 6 Re. L.R. 96.....	25–15
Hunt's Trustee v Hunt, 1995 S.C.L.R. 973	12–82, 12–84
Hynd's Trustee, Petitioner [2009] CSOH 76; 2009 S.C. 593; 2009 S.L.T. 659; [2009]	
B.P.I.R. 1374; 2009 G.W.D. 20–333.....	25–13, 25–14, 25–182
India v Taylor [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292; 48 R. &	
I.T. 98; (1955) 34 A.T.C. 10; [1955] T.R. 9; (1955) 99 S.J. 94.....	16–27, 25–152
Ingle's Trustee v Ingle, 1996 S.L.T. 26; 1995 S.C.L.R. 934.....	13–18, 17–08
Inglis v Mansfield 6 E.R. 1472; (1835) 3 Cl. & F. 362.....	11–49
Inland Revenue Commissioners v MacDonald, 1988 S.L.T. (Sh. Ct.) 7; 1987 S.C.L.R.	
768.....	10–53

Institute of Chartered Accountants of Scotland v Kay, 2001 S.L.T. 1449; 2001 S.C.L.R. 1086; 2001 G.W.D. 27–1079	23–14
Integrated Building Services Engineering Consultants Ltd (t/a Operon) v Pihl UK [2010] CSOH 80; [2010] B.L.R. 622; 2010 G.W.D. 25–467	16–81, 16–84, 16–85
Interdil Srl (In Liquidation) v Fallimento Interdil Srl (C–396/09) EU:C:2011:671; [2012] Bus. L.R. 1582; [2011] E.C.R. I–9915; [2012] B.C.C. 851; [2011] B.P.I.R. 1639	25–57, 25–61, 25–62, 25–66
Invocas, Applicant. <i>See</i> Rose's Trustee, Applicant	
Iqbal v Parneiz [2017] SAC (Civ) 7; 2017 G.W.D. 6–81	11–172
Irish Bank Resolution Corp Ltd v Quinn [2012] NICH 1; [2012] B.C.C. 608; [2012] B.P.I.R. 322	25–59
Irvine v Strathclyde Regional Council, 1995 S.L.T. (Sh Ct) 28; 1994 S.C.L.R. 388	11–62
J & A Construction (Scotland) Ltd v Windex Ltd [2013] CSOH 170; 2013 G.W.D. 36–703	16–81
J v S, 2014 SCPer 13	12–80
J v S, 2014 W.L. 2807750; 2014 G.W.D. 21–408	9–51, 9–52
Jackson v McKechnie (1875) 3 R. 130	11–15
Jackson v Royal Bank of Scotland, 2002 S.L.T. 1123; 2002 G.W.D. 26–908... ..	14–18, 14–20, 14–27, 14–29, 14–54
James Gilmour (Crossford) Ltd v John Williams (Wishaw) Ltd, 1970 S.L.T. (Sh. Ct.) 6	15–33
Japan Leasing (Europe) Plc v Weir's Trustee (No.2), 1998 S.C. 543; 1998 S.L.T. 973; 1998 G.W.D. 13–631	16–32
Jardine v Nisbet (1904) 20 Sh Ct Rep 323	22–19
Job Construction Ltd v Kennedy unreported 11 June 2003 Elgin Sheriff Court ..	16–27, 16–29, 16–32, 16–71
Joel v Gill (1859) 21 D. 929	8–17
John E Rae (Electrical Services) Linlithgow Ltd v Lord Advocate, 1994 S.L.T. 788	14–29, 14–32
Johnston v Cluny Estates Trustees, 1957 S.C. 184; 1957 S.L.T. 293	15–28
Johnston's Trustee v Baird [2012] CSOH 117; 2012 G.W.D. 25–514	14–18, 14–29, 14–30, 14–33
Johnstone v Peter H Irvine Ltd, 1984 S.L.T. 209	14–13
Joint Administrators of Connaught Partnerships Ltd v Perth and Kinross Council [2013] CSOH 149; 2014 S.L.T. 608; 2014 G.W.D. 13–229	16–81
Joint Administrators of Heritable Bank Plc v Winding-Up Board of Landsbanki Islands HF [2013] UKSC 13; [2013] 1 W.L.R. 725; [2013] 2 All E.R. 355; [2013] 1 All E.R. (Comm) 1257; 2013 S.C. (U.K.S.C.) 201; 2013 S.L.T. 634; [2013] 1 B.C.L.C. 465; 2013 G.W.D. 9–202	16–87
Joint Administrators of Loanwell Ltd v Stonegate Ltd; Joint Administrators of Oceancrown Ltd v Stonegate Ltd; Joint Administrators of Questawayl Ltd v Pelosi [2016] UKSC 30; 2016 S.C. (U.K.S.C.) 91; 2016 G.W.D. 20–359	14–13, 14–29
Joint Administrators of Prestonpans (Trading) Ltd, Petitioners [2012] CSOH 184; 2013 S.L.T. 138; 2012 G.W.D. 40–787	14–13, 14–35, 14–59
Joint Administrators of Questway Ltd v Simpson [2012] CSOH 107; 2012 G.W.D. 24–494	14–18
Jones' Trustee v Jones (1888) 15 R. 328	14–66
Jopp v Hay (1845) 7 D. 260	22–34
Jopp v Johnston's Trustee (Sequestration: Removal of Client Funds) (1904) 6 F. 1028; (1904) 12 S.L.T. 279	11–163
Junespear Ltd v Dear, 2008 S.L.T. (Sh Ct) 69; 2008 G.W.D. 11–203	22–132
Kenneil v Kenneil, 1934 S.L.T. 392	14–64
Kenneil v Kenneil, 2006 S.L.T. 449; 2006 G.W.D. 11–210	14–44, 14–67
Kerr's Trustees v Lord Advocate, 1974 S.C. 115; 1974 S.L.T. 193	11–67
Kerr's Trustees v Russell (1832) 11 S. 219	22–19
King v Wieland (1858) 20 D. 960	11–173
Kinloch Damph Ltd v Nordvik Salmon Farms Ltd 30 June 1999 OH	11–84, 11–89
Kipling v Dunbar Bank Plc [2012] CSOH 40; 2012 G.W.D. 12–223	1–21, 8–20
Kirkland v Cadell (1838) 16 S. 860	12–28
Knoll Spinning Co Ltd v Brown, 1977 S.C. 291; 1977 S.L.T. (Notes) 62	16–32
Kyd v Waterson (1880) 7 R. 884	22–20, 22–32
Lafferty Construction Ltd v McCombe, 1994 S.L.T. 858	14–29, 14–30
Laing v Lord Advocate, 1973 S.L.T. (Notes) 81	16–87
Lamb & Simpson v Robertson (1898) 14 Sh Ct Rep 255	22–20
Lamb's Trustees v Reid (1883) 11 R. 76	22–20, 22–28
Larkin v Morrow (1932) 48 Sh Ct Rep 59	22–19

Laurie v Laurie (1854) 16 D. 860.....	11–51
Laurie's Trustee v Beveridge (1867) 6 M. 85.....	14–07, 14–64, 14–70
Lea v Landale (1828) 6 S. 350.....	22–19
Lehman Brothers International (Europe) in administration), Re [2012] UKSC 6; [2012] 3 All E.R. 1; [2012] Bus. L.R. 667; [2012] 1 B.C.L.C. 487; [2012] W.T.L.R. 1355; (2012) 162 N.L.J. 364.....	11–69
Lemma Europe Insurance Co Ltd, Re [2016] EWCA Civ 484.....	25–218
Leslie v White. See Liquidator of 3G Design Engineering Ltd v White	
Lewis v Metropolitan Property Realisations Ltd [2009] EWCA Civ 448; [2010] Ch. 148; [2010] 2 W.L.R. 615; [2009] 4 All E.R. 141; [2010] 1 F.L.R. 86; [2009] 3 F.C.R. 251; [2009] B.P.I.R. 820; [2009] Fam. Law 794; [2009] N.P.C. 76.....	11–189
Liandu v Go Debt Ltd, 2010 W.L. 3166499; 2010 G.W.D. 33–674 1–10, 1–14, 1–15, 9–15, 9–19	
Lindsay v Paterson (1840) 2 D. 1373.....	16–27, 25–250
Liquidator of 3G Design Engineering Ltd v White [2013] CSIH 20; 2013 G.W.D. 12–242.....	14–56, 14–57
Liquidators of Grampian MacLennan's Distribution Services Ltd v Carnbroe Estates Ltd [2017] CSOH 8; 2017 G.W.D. 3–37.....	14–29
Littlejohn v Black (1855) 18 D. 207.....	11–50
Littlejohn v Hamilton (1833) 11 S. 701.....	22–20
Liu v Hastings unreported 28 March 2014 Glasgow Sheriff Court.....	16–31, 16–33
Lochrie v McGregor, 1911 S.C. 21; 1910 2 S.L.T. 251.....	8–20
London and Brazilian Bank Ltd v Lumsden's Trustees, 1913 1 S.L.T. 262.....	23–08
Long v Wilson (1886) 2 Sh Ct Rep 4.....	22–19
Lord Advocate v MacKenzie, 1993 S.C.L.R. 153.....	8–20
Lord Advocate v Thomson, 1993 S.C.L.R. 677.....	1–13
Lord Advocate v Thomson, 1995 S.L.T. 56; 1994 S.C.L.R. 96.....	1–10, 1–14, 1–15, 7–37
Lusk v Elder (1843) 5 D. 1279.....	16 27
Lutz v Bauerle (C–557/13) EU:C:2015:227; [2015] Bus. L.R. 855; [2015] B.C.C. 413; [2015] C.E.C. 1015; [2015] I.L.Pr. 21.....	25–90
Lyell v Christie (1823) 2 S. 288.....	22–19
Lympe Investments Ltd Re [1972] 1 W.L.R. 523; [1972] 2 All E.R. 385; (1972) 116 S.J. 332.....	1–11
Macadam v Martin's Trustee (1872) 11 M. 33.....	11–163
McAlister v RW Swinburne and Co (1874) 1 R. 958.....	22–34, 22–35
McArthur's Trustee v McArthur, 1997 S.L.T. 926; 1997 S.C.L.R. 252; 1997 G.W.D. 5 175.....	11 163
McCowan v Wright (1852) 14 D. 968; (1853) 15 D. 494.....	14–44, 14–53, 14–57, 14–64, 14–66, 14–67, 14–69
McCue v Scottish Daily Record and Sunday Mail Ltd unreported 30 November 1998 IH.....	11–176
McCulloch v McCulloch, 1953 S.C. 189; 1953 S.L.T. 117.....	23–17
MacDonald's Trustee v Cunningham, 1998 S.L.T. (Sh Ct) 12; 1997 S.C.L.R. 986; 1997 Hous. L.R. 117; 1997 G.W.D. 32–1638.....	11–07
MacDonald's Trustee v MacDonald, 1992 S.L.T. (Sh Ct) 25.....	8–11, 8–19, 8–33
MacDougall's Trustee v Ironside, 1914 S.C. 186; 1913 2 S.L.T. 431.....	14–64, 14–67
MacFadyen's Trustee v MacFadyen, 1994 S.C. 416; 1994 S.L.T. 1245.....	14–29
McGavin v Sturrock's Trustee (1891) 18 R. 576.....	12–26
McGrath v Riddell [2008] UKHL 21; [2008] 1 W.L.R. 852; [2008] 3 All E.R. 869; [2008] Bus. L.R. 905; [2008] B.C.C. 349; [2012] 2 B.C.L.C. 655; [2008] B.P.I.R. 581; [2008] Lloyd's Rep. I.R. 756; (2008) 105(16) L.S.G. 26; (2008) 152(16) S.J.L.B. 30.....	25–15, 25–254, 25–258
MacGregor v MacLennan's Trustee (1898) 25 R. 482; (1898) 5 S.L.T. 287.....	22–37
McGruther v AB Services (Scotland) Ltd unreported July 2011, Sheriff Principal of Glasgow and Strathkelvin.....	14–13, 14–52, 14–53, 14–57
McGruther v McFadyen unreported 24 January 2010 Glasgow Sheriff Court.....	14–29
McGruther v Walton, 2004 S.C.L.R. 319.....	14–18, 14–29
McGuinness v McGuinness's Trustee, 1993 S.C.L.R. 755.....	16–30
Machin's Trustee v Machin, 2017 G.W.D. 15–253.....	11–39, 11–41
Mackay v Accountant in Bankruptcy, 2004 S.L.T. 777; 2004 G.W.D. 21–467.....	14–18
Mackenzie v Calder (1868) 6 M. 833.....	14–53, 14–64, 22–40
Mackessack and Son v Molleson (1886) 13 R. 445.....	12–30
Mackin, Petitioner, 2015 S.C. GLA 73.....	5–12, 7–35, 8–10, 8–11, 8–20, 8–21, 21–77
McKinnon v Graham [2013] EWHC 2870 (Ch); [2013] B.P.I.R. 1070.....	25–17
Mackinnon v Monkhouse (1881) 9 R. 393.....	16–68
McKinnon v Risk (1890) 6 Sh Ct Rep 77.....	22–19

Mackinnon's Trustee v Bank of Scotland, 1915 S.C. 411; 1915 1 S.L.T. 182	16-39
MacLachlan v McGregor & Son (1886) 2 Sh Ct Rep 250.....	22-20
McLachlan & Son v Keith & Co (1886) 2 Sh Ct Rep 142	22-37
McLaren's Trustee v National Bank of Scotland Ltd (1897) 24 R. 920; (1897) 5 S.L.T. 40.....	14-47, 14-66, 14-70, 14-71
McLaughlin, Petitioner [2009] CSOH 49; 2009 G.W.D. 16-248.....	1-21
McLaughlin, Petitioner [2010] CSIH 24; 2010 G.W.D. 14-258	8-20
McLay v McQueen (1899) 1 F. 804; (1899) 6 S.L.T. 391	14-41
McLennan v Revlis Ltd unreported 20 September 1999 Aberdeen Sheriff Court.....	14-57
MacLeod's Trustee v MacLeod, 2007 Hous. L. R. 34.....	12-77, 12-82, 12-86
McLuckie Brothers Ltd v Newhouse Contracts Ltd, 1993 S.L.T. 641	14-29, 14-30
McMahon's Trustee v McMahon, 1997 S.L.T. 1090; 1997 S.C.L.R. 439; (1997) Hous. L.R. 74; 1997 G.W.D. 9-362	12-79, 12-82
McNaught, Noter, 2009 W.L. 3398632.....	12-92, 16-28
Macmillan v Campbell (1831) 9 S. 551, affirmed (1834) 7 W & S 441	22-20
Mahmood's Trustee v Mahmood [2016] CSOH 164; 2016 G.W.D. 39-699.....	14-29
Main v Galbraith (1881) 8 R. 880.....	14-41, 14-44, 14-45, 14-46
Mann v Sinclair (1879) 6 R. 1078	12-04
Marianski v Wiseman (1871) 9 M. 673	22-19
Marme Inversiones 2007 SL v Royal Bank of Scotland [2016] EWHC 1570 (Comm); [2017] B.P.I.R. 138	25-51
Marquess of Huntly v Earl of Fife (1887) 14 R. 1091.....	22-20
Marshall, Petitioner (Winding Up Order) (1895) 22 R. 697; (1895) 3 S.L.T. 49	25-253
Martin v Martin's Trustee (Bankruptcy: Recall), 1994 S.L.T. 261	9-12, 9-14
Masson's Trustee v W & J Bruce (Builders) Ltd unreported 20 April 1998	14-27
Matheson's Trustee v Matheson, 1992 S.L.T. 685.....	14-18, 14-29, 14-30
Matthew's Trustee v Matthew (1876) 5 M. 957	14-66
Mejury v Renfrewshire Council 28 November 2000 IH	17-40
Melville Dundas Ltd v Hotel Corporation of Edinburgh Ltd [2006] CSOH 136; 2007 S.C. 12; [2006] B.L.R. 474	16-83
Melville v Paterson (1842) 4 D. 1311	11-27
Mess v Hay (Sime's Trustee) [1899] A.C. 233; (1898) 1 F. (H.L.) 22; (1898) 6 S.L.T. 207	22-20, 22-37
Metal Industries (Salvage) Ltd v ST Harle (Owners), 1962 S.L.T. 114	16-27
Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd (in liquidation), 1917 2 S.L.T. 205.....	11-83
Mill v Paul (1825) 4 S. 219.....	16-73, 16-75
Miller (Chalmers' Trustee) v McIntosh (1884) 11 R. 729	16-38, 16-40, 16-49
Miller's Trustee v Shield (1862) 24 D. 821	14-68
Miln's Judicial Factor v Spence's Trustees (No.1), 1927 S.L.T. 425.....	13-11, 22-37
Milne, Petitioner, 14 May 2012 Peterhead Sheriff Court	5-12, 7-35, 8-10, 8-20, 8-21, 9-14, 21-77
Minhas's Trustee v Bank of Scotland, 1990 S.L.T. 23; 1989 S.C.L.R. 548	11-171
Mitchell, Appellant 27 September 2010 Edinburgh Sheriff Court	4-45, 12-94, 17-46, 17-91
Mitchell, Petitioner, 1937 S.L.T. 474.....	22-18
Mitchell v Ferguson (1781) Mor 10296.....	11-27
Mitchell v Hunter (1901) 17 Sh Ct Rep 208.....	22-28
Mitchell v Rodger (1834) 12 S. 802	14-66
Mitchell v Scott (1881) 8 R. 875	15-33, 23-32
Mitchell v Thomson (1912) 28 Sh Ct Rep 210	22-28, 22-32
Moncreiff's Trustees v Halley (1899) 1 F. 696.....	18-04, 18-24
Moncreiffe v Ferguson (1896) 24 R. 47; (1896) 4 S.L.T. 118	22-26
Moore v HM Advocate, [2010] HCJAC 26; 2010 S.C.L. 843; 2010 S.C.C.R. 451; 2010 G.W.D. 11 189.....	14-40
Morgan v Browne, 1924 S.L.T. (Sh. Ct.) 12.....	11-57
Morley's Trustee v Aitken, 1982 S.C. 73; 1983 S.L.T. 78	25-249
Morris, Petitioner [2007] CSOH 165; 2008 S.C. 111; 2007 S.L.T. 1149; [2009] B.C.C. 307; 2007 G.W.D. 32-554	25-14, 25-15, 25-254
Morrison (Merrett's Trustee) v Harrison (1876) 3 R. 406	11-43, 11-44
Mortimer v Perry, Junior & Co (1887) 3 Sh Ct Rep 375	22-19
Moses v Gifford (1866) 4 M. 1056	9-12
Mowbray v Valentine, 1998 S.C. 424; 1998 S.L.T. 1440; 1998 S.C.L.R. 305; 1998 G.W.D. 9-423	7-31, 7-40, 9-15
Muir's Trustee v Braidwood, 1958 S.C. 169; 1958 S.L.T. 149	11-98
Mulvey v Secretary of State for Social Security, 1997 S.C. (H.L.) 105; 1997 S.L.T. 753; 1997 S.C.L.R. 348; [1997] B.P.I.R. 696; 1997 G.W.D. 11 488	11-21

Munro v Rothfield, 1920 S.C. (H.L.) 165; 1920 2 S.L.T. 172.....	14-53, 14-64, 14-70
Murdoch v Newman Industrial Control Ltd, 1980 S.L.T. 13.....	9-14, 9-15
Murray's Judicial Factor v Thomas Murray & Sons (Ice Merchants) Ltd, 1992 S.C. 435; 1992 S.L.T. 824; [1992] B.C.C. 596.....	23-24
Myles J Callaghan Ltd (In Receivership) v Glasgow DC 1987 S.C. 171; 1988 S.L.T. 227; 1987 S.C.L.R. 627; (1987) 3 B.C.C. 337.....	16-77
Myles v Liquidators of City of Glasgow Bank (1879) 6 R. 718.....	12-03, 12-26
National Bank of Scotland Ltd v Union Bank of Scotland Ltd (1885) 13 R. 380.....	22 20
National Westminster Bank Plc v W J Elrick & Co, 1991 S.L.T. 709; 1991 S.C.L.R. 621.....	8-17, 8-20
Neil McLeod & Sons, Petitioners, 1967 S.C. 16; 1967 S.L.T. 46.....	1-11
New Cap Reinsurance Corporation (In Liquidation) v Grant [2012] UKSC 46; [2013] 1 A.C. 236; [2012] 3 W.L.R. 1019; [2013] 1 All E.R. 521; [2013] 1 All E.R. (Comm) 513; [2013] Bus. L.R. 1; [2012] 2 Lloyd's Rep. 615; [2013] B.C.C. 1; [2012] 2 B.C.L.C. 682; [2012] B.P.I.R. 1204.....	25-15, 25-259
Nicholson v Johnstone and Wright (1872) 11 M. 179.....	22-17, 22-20, 22-39
Nickel & Goeldner Spedition GmbH v Kintra UAB (C-157/13) EU:C:2014:2145; [2015] Q.B. 96; [2014] 3 W.L.R. 1299; [2015] R.T.R. 8; [2015] C.E.C. 270; [2015] I.L.Pr. 1.....	25-51
Nicol's Trustee v Nicol, 1996 G.W.D. 10-531.....	17-48
Nicoll v Steelpress (Supplies) Ltd, 1992 S.C. 119; 1993 S.L.T. 533; 1992 S.C.L.R. 332.....	14 57
Nike European Operations Netherlands BV v Sportland Oy (in liquidation) (C-310/14) EU:C:2015:690; [2015] Bus. L.R. 1547; [2016] 1 B.C.L.C. 297; [2016] C.E.C. 845; [2016] I.L.Pr. 1.....	25-90
Nolan v Patullo (2017) SAC (Civ) 85.....	9-59, 12-66, 12-68
Nordic Travel Ltd v Scotprint Ltd, 1980 S.C. 1; 1980 S.L.T. 189.....	14-08, 14-09, 14-42, 14-53, 14-56, 14-57, 14-65, 14-66, 14-69
Nordic Trustee ASA v OGX Petroleo E Gas SA [2016] EWHC 25 (Ch); [2017] 2 All E.R. 217; [2017] 1 All E.R. (Comm) 910; [2016] Bus. L.R. 121.....	25-202, 25-218
Nottay's Trustee v Nottay, 2001 S.L.T. 769; 2000 G.W.D. 28-1091.....	14-29, 14-32
Nova Glaze Replacement Windows Ltd v Clark Thomson and Co, 2001 S.C. 815; 2001 G.W.D. 13 508.....	14 29
Nova Scotia Ltd v Henderson [2015] CSOH 126; 2015 S.L.T. 691; 2015 G.W.D. 31-508.....	14-37
O'Donnell v Bank of Ireland [2012] EWHC 3749 (Ch); [2013] I.L.Pr. 16; [2013] B.P.I.R. 509.....	25-59
Obers (Paton's Trustees) v Paton's Trustees (No.3) (1897) 24 R. 719; (1897) 4 S.L.T. 350.....	14-41, 14-46, 25-247, 25-249
Official Receiver v Eichler [2007] BPIR 1636.....	25 57
Official Receiver v Mitterfellner [2009] BPIR 1075.....	25-57
Official Receiver v Randhawa [2006] EWHC 2946 (Ch); [2007] 1 W.L.R. 1700; [2007] 1 All E.R. 755; [2006] B.P.I.R. 1435.....	17-104, 17-107
Okell v Foden (1884) 11 R. 906.....	25 250
Oliver v McCormick, 1895 2 S.L.T. 410.....	22-39
Oliver v Wallace (1869) 7 M. 407.....	16-32
Ord v Barton (1847) 9 D. 541.....	16 21
Ovenstone's Trustee v Ovenstone, 1995 S.C.L.R. 969.....	14-17, 14-51
P & W Duncan, Petitioners, 1936 S.L.T. 162.....	8-28
Paganelli Properties (Glasgow) Ltd v Biba, 1995 S.L.T. (Sh Ct) 70; 1994 S.C.L.R. 1008.....	8-17, 8-19, 8-20
Pan Ocean Co Ltd, Re [2014] EWHC 2124 (Ch); [2014] Bus. L.R. 1041.....	25-222
Pan Ocean Co Ltd, Re [2015] EWHC 1500 (Ch); [2016] B.P.I.R. 1541.....	25-218
Pan Oceanic Maritime Inc, Re [2010] EWHC 1734 (Comm).....	25-220
Parish Council of Cavers v Parish Council of Smailholm. <i>See</i> Cavers Parish Council v Smailholm Parish Council	
Parkes v Cintec International [2005] CSOH 98.....	9-14, 9-15
Parkes v MacGregor [2011] CSIH 69; 2011 G.W.D. 38-776.....	9-54, 9-55
Parkes, Applicant, 12 May 2006 Edinburgh Sheriff Court.....	12-94
Patrick McGrail unreported Glasgow Sheriff Court 10 August 1990 (Sheriff Murphy) 11-163, 11-166.....	
Pattison v Halliday, 1991 S.L.T. 645.....	8-17, 8-18, 8-19, 17-49
Pattullo v Accountant in Bankruptcy, 2010 W.L. 1608631; 2010 G.W.D. 18 360.....	13 11, 16-31, 22-37
Pattullo v Massey unreported 6 May 2016 Edinburgh Sheriff Court.....	22-03, 22-13, 22 17, 22 31, 22-151

Pattullo, Applicant, 2017 S.C. GLA 44.....	18-24
Paul and Thain v Royal Bank (1869) 7 M. 361	16-73
Paul v Mathie (1826) 4 S. 420	13-11
Pennell v Elgin, 1926 S.C. 9; 1925 S.L.T. 620.....	11-57
Peter and Monro, Competing (1749) Mor 11852	16-95
Peters, Merchants in Glasgow v Dunlop, Merchant in Glasgow (1767) Mor 1218	22-20
Philip v Reid, 1927 S.C. 224; 1927 S.L.T. 168.....	9-55
Phosphate Sewage Co (Ltd) v Molleson (Trustee on the Sequestrated Estate of Peter Lawson & Sons) (1878) 5 R. 1125	16-27
Picard v FIM Advisers LLP [2010] EWHC 1299 (Ch); [2011] 1 B.C.L.C. 129.....	25-220, 25-222
Pilling v Drake (1857) 19 D. 938.....	16-32
Polley v West Lothian Council [2015] CSIH 19; [2015] R.V.R. 228; 2015 G.W.D. 9-160.....	9-55, 9-56
Pollock, Petitioner, 2016 S.C. LIV 48	7-63
Polymer Vision R & D Ltd v Van Dooren [2011] EWHC 2951 (Comm); [2012] I.L.Pr. 14	25 51
Powdrill v Murrayhead Ltd, 1997 S.L.T. 1223.....	16-78
Pringle's Trustee v Wright (1903) 5 F. 522; (1903) 10 S.L.T. 716	14-66
Procureur-général bij het Hof van Beroep te Antwerpen v Zaza Retail BV (C-112/10) EU:C:2011:743; [2011] E.C.R. I-11525; [2012] B.P.I.R. 438.....	25-45
Punch Taverns Properties Ltd v Rowe unreported 17 December 2003 Sheriff Principal of Lothian and Borders	1-08, 7-37
Purewall, Appellant [2017] SAC (Civ) 28; 2017 G.W.D. 30-483.....	16-32
Queensland Mercantile and Agency Co Ltd and Liquidator v Australasian Investment Co Ltd (1888) 15 R. 935	25-252, 25-254
R Gaffney & Sons Ltd (in liquidation) v Davidson, 1996 S.L.T. (Sh Ct) 36	14-57
Racal Vodac Ltd v Hislop, 1992 S.L.T. (Sh Ct) 21.....	8-17, 8-19, 8-20
Rae v Calor Gas Ltd, 995 S.C. 214; 1995 S.L.T. 244; 1995 S.C.L.R. 261	1-15
Rajapakse, Re [2007] B.P.I.R. 99.....	25 181, 25-205
Rankin v Meek, 1995 S.L.T. 526	14-18, 14-29
Rankin's Trustee v Somerville and Russell, 1999 S.L.T. 625.....	11-15, 11-17, 11-18, 11-19
Ranking of Hamilton of Provenhall's Creditors (1781) Mor. 6253	13-11
Rattray v White (1842) 4 D. 880.....	25-249
Rayatt (A Bankrupt), Re [1998] 2 F.L.R. 264; [1998] B.P.I.R. 495; [1998] Fam. Law 458.....	11-132
Raymond Harrison & Co's Trustee v North West Securities Ltd, 1989 S.L.T. 718	14-53, 14-58
Reid v Ramlort Ltd [2004] EWCA Civ 800; [2005] 1 B.C.L.C. 331; [2004] B.P.I.R. 985; (2004) 148 S.J.L.B. 877	14-06
Reid v Reid (1673) Mor. 4923	14-41, 14-44, 14-46, 14-47
Renny & Webster v Myles & Murray (1847) 9 D. 619	13-11
Renton v Girvan (1833) 12 S. 266	22-20
Renton v Scott (1854) 24 R. 1030	22-19
Renton & Gray's Trustee v Dickison (1880) 7 R. 951.....	14-66
RH v AB (1907) 23 Sh Ct Rep 213.....	22-19
Richmond (Shaw's Trustee) v United Collieries Ltd (1905) 13 S.L.T. 458	14-57
Richmond v Alexander Finlayson & Co Ltd, 1928 S.C. 637; 1928 S.L.T. 468.....	14-57
Ritchie v Burns, 2001 S.L.T. 1383; [2001] B.P.I.R. 666; 2000 G.W.D. 22-860	12-80, 12-83
Ritchie v Dickie, 1999 S.C. 593; 1999 S.C.L.R. 939; 1999 G.W.D. 15-712.....	9-14, 9-15, 9-19
Robertson v Morrison (1823) 2 S. 553	22-27
Robertson v Robertson's Trustee (1885) 13 R. 424.....	16-30
Robertson (Forbes Trustee) v Ogilvy (1904) 6 F. 548; (1904) 11 S.L.T. 739.....	11-51
Robertson-Durham (Brickmann's Trustee) v Commercial Bank of Scotland Ltd (1901) 9 S.L.T. 145.....	16-63
Rochad v Scot (1724) Mor. 4566.....	25-251
Rodger (Builders) Ltd v Fawdry, 1950 S.C. 483; 1950 S.L.T. 345	11-30
Rose v McLeod (1825) 4 S. 311	25-251
Rose's Trustee, Applicant [2013] B.P.I.R. 955; 2013 G.W.D. 22-424	11-191
Ross v Gordon's Judicial Factor, 1973 S.L.T. (Notes) 91.....	23-24, 23-31
Ross v Ross (Annuities) (1895) 22 R. 461; (1894) 2 S.L.T. 577	16-77
Ross, Petitioner [2009] CSOH 33; 2009 G.W.D. 16-246.....	9-15
Rosserlane Consultants Ltd, Petitioner [2008] CSOH 120; 2008 G.W.D. 32-489	23-05
Roy's Trustee, Noter, 2000 S.L.T. (Sh Ct) 77; 2000 S.C.L.R. 1105; 2000 G.W.D. 15-621.....	8-39
Royal Bank of Scotland, Petitioners (1893) 20 R. 741; (1893) 1 S.L.T. 40	22-18

Royal Bank of Scotland v Commercial Bank of Scotland (1881) 8 R. 805	16–59
Royal Bank of Scotland Plc v Aitken, 1985 S.L.T. (Sh Ct) 13	8–17, 8–19
Royal Bank of Scotland Plc v Forbes, 1987 S.C. 99; 1988 S.L.T. 73; 1987 S.C.L.R. 294	8–17, 8–19, 8–20
Royal Bank of Scotland Plc v Hill [2012] CSOH 110; 2012 G.W.D. 23–459	1–09
Royal Bank of Scotland Plc v J & J Messenger, 1991 S.L.T. 492	7–205
Royal Bank of Scotland Plc v MacGregor, 1998 S.C.L.R. 923	11–15, 11–19, 11–31, 11–59, 11–52, 11–169
Royal Bank of Scotland Plc v Wilson [2010] UKSC 50; 2011 S.C. (U.K.S.C.) 66; 2010 S.L.T. 1227; 2010 Hous. L.R. 88; 2010 G.W.D. 39–792	12–56, 12–57
Rubin v Eurofinance SA [2012] UKSC 46; [2013] 1 A.C. 236; [2012] 3 W.L.R. 1019; [2013] 1 All E.R. 521; [2013] 1 All E.R. (Comm) 513; [2013] Bus. L.R. 1; [2012] 2 Lloyd's Rep. 615; [2013] B.C.C. 1; [2012] 2 B.C.L.C. 682; [2012] B.P.I.R. 1204	25–183, 25–222, 25–259
Russell v van Overwaele unreported 2 March 2005 Dumbarton Sheriff Court	12 68, 12–94
Salaman v Rosslyn's Trustees (1900) 3 F. 298	22–35, 22–37
Sales Lease Ltd v Minty, 1993 S.L.T. (Sh Ct) 52; 1993 S.C.L.R. 130	8–17, 8–19, 8–20
Salmon's Trustee v Salmon, 1989 S.L.T. (Sh. Ct.) 49; 1988 S.C.L.R. 647	12–80, 12–83
Samsun Logix Corp v DEF [2009] EWHC 576 (Ch); [2009] B.P.I.R. 1502	25–220
Sands v Pringle unreported 3 December 2008 Elgin Sheriff Court	22–37
Sands v Taylor, 2010 W.L. 783735	14–30
Schmid v Hertel (C–328/12) EU:C:2014:6; [2014] 1 W.L.R. 633; [2015] B.C.C. 25; [2014] C.E.C. 846; [2014] I.L.Pr. 11; [2014] B.P.I.R. 504; (2014) 164(7593) N.L.J. 19	25 51
Schmitt v Deichmann [2012] EWHC 62 (Ch); [2013] Ch. 61; [2012] 3 W.L.R. 681; [2012] 2 All E.R. 1217; [2012] B.C.C. 561; [2014] 1 B.C.L.C. 663; [2012] I.L.Pr. 18; [2012] B.P.I.R. 392; (2012) 162 N.L.J. 214	25–257, 25–260
Scott v Scales (1873) 10 S.L.R. 315	11–50
Scottish and Newcastle Breweries Plc v Harvey–Rutherford, 1994 S.L.T. (Sh Ct) 61; 1994 S.C.L.R. 131	7–40
Scottish Milk Marketing Board v A&J Wood (A Firm), 1936 S.C. 604; 1936 S.L.T. 470	8–17, 8–19, 8–20
Seagon v Deko Marty Belgun NV (C–339/07) EU:C:2009:83; [2009] 1 W.L.R. 2168; [2009] Bus. L.R. 1151; [2009] E.C.R. I–767; [2009] B.C.C. 347; [2009] I.L.Pr. 25	25 51
Secretary of State for Trade and Industry v Burn, 1998 S.L.T. 1009	14–57
Secretary of State for Trade and Industry v Frid [2004] UKHL 24; [2004] 2 A.C. 506; [2004] 2 W.L.R. 1279; [2004] 2 All E.R. 1042; [2004] B.C.C. 525; [2004] 2 B.C.L.C. 1; [2004] B.P.I.R. 841; (2004) 154 N.L.J. 770; (2004) 148 S.J.L.B. 631	16–76, 16–77
Selkraig v Davies and Salt, 3 E.R. 848; (1814) 2 Dow 230	25–249, 25–250
Sevenoaks Stationers (Retail) Ltd, Re [1991] Ch. 164; [1990] 3 W.L.R. 1165; [1991] 3 All E.R. 578; [1990] B.C.C. 765; [1991] B.C.L.C. 325; (1990) 134 S.J. 1367	17–107
Sharp v Thomson, 1997 S.C. (H.L.) 66; 1997 S.L.T. 636; 1997 S.C.L.R. 328; [1998] B.C.C. 115; [1997] 1 B.C.L.C. 603; 1997 G.W.D. 9–364	11–27, 11–28, 11–43, 11–168, 11–171
Shierson v Vlieland–Boddy [2005] EWCA Civ 974; [2005] 1 W.L.R. 3966; [2005] B.C.C. 949; [2006] 2 B.C.L.C. 9; [2006] I.L.Pr. 12; [2005] B.P.I.R. 1170	25–57
Short's Trustee v Chung (No.1), 1991 S.L.T. 472; 1991 S.C.L.R. 629	14–29, 14–32, 14–33, 14–34, 14–58
Short's Trustee v Chung (No.2), 1998 S.C. 105; 1998 S.L.T. 200; 1997 S.C.L.R. 1181; 1997 G.W.D. 37 1885	14 34
Short's Trustee v Keeper of the Registers of Scotland, 1996 S.C. (H.L.) 14; 1996 S.L.T. 166; 1996 S.C.L.R. 571	14 34
Simpson's Trustee v Simpson, 1993 S.C.L.R. 867	12–74
Sinclair v Edinburgh Parish Council, 1909 S.C. 1353; 1909 2 S.L.T. 189	15–30, 15–35
Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36; [2015] A.C. 1675; [2015] 2 W.L.R. 971; [2015] B.C.C. 66; [2014] 2 B.C.L.C. 597; (2014) 158(44) S.J.L.B. 37	25–260, 25–261
Skjevesland v Gevevan Trading Co Ltd (No.4) [2002] EWHC 2898 (Ch); [2003] B.C.C. 391; [2003] B.P.I.R. 924	25–56
Smillie Olympic House Ltd, 2004 S.L.T. 1244; 2004 S.C.L.R. 403; 2004 G.W.D. 24–525	9 55, 9–56
Smith and Moore v Cherry Lewis Ltd (In Receivership) [2005] I.R.L.R. 86	12–18
Smith v Berry's Trustee (No.2), 1996 S.L.T. (Sh Ct) 80	12–18
Smith v Lord Advocate (No.2), 1980 S.C. 227; 1981 S.L.T. 19	16–80, 16–87

Smith v Ritchie, 1996 S.L.T. (Sh Ct) 31; 1995 S.C.L.R. 1132	11–163
Smith v Smith (1892) 20 R. 27	23–18
Smith v Smith unreported 19 January 1998 Dumfries Sheriff Court	6–07
Smith, Brothers & Co v Rostron (1860) 23 D. 140	9–12
Smith's Trustees v Grant (1862) 24 D. 1142	15–19
Smithy's Place Ltd v Blackadder & McMonagle, 1991 S.L.T. 790; 1991 S.C.L.R. 512	16–65
Snee & Co v Anderson's Trustee (1734) Mor. 1206	22–20
Somerville & Co v Miller (1887) 3 Sh Ct Rep 293	22–19
Souter v Aberdeen City Council, unreported 15 December 1999 IH	22–23
Souter v Kennedy, unreported 23 July 1999, Sheriff Principal of Tayside, Central and Fife at Perth	11–51
Southern Equities Corporation Ltd, Re. See England v Smith	
Sparkasse Hilden Ratingen Velbert v Benk [2012] EWHC 2432 (Ch); [2012] B.P.I.R. 1258	25–59
Spence v Davie, 1993 S.L.T. 217	9–55
Stanford International Bank Ltd, Re [2010] EWCA Civ 137; [2011] Ch. 33; [2010] 3 W.L.R. 941; [2010] Bus. L.R. 1270; [2011] B.C.C. 211; [2010] Lloyd's Rep. F.C. 357; [2010] B.P.I.R. 679	25–181, 25–195
Staubitz–Schreiber, Proceedings brought by (C–1/04) EU:C:2006:39; [2006] E.C.R. I–701; [2006] B.C.C. 639; [2006] I.L.Pr. 30; [2006] B.P.I.R. 510	25–64
Stewart v Auld (1851) 13 D. 1337	8–23, 16–27, 25–252, 25–253
Stewart v Jarvie, 938 S.C. 309; 1938 S.L.T. 383	15–30
Stewart's Trustee v Stewart unreported 13 September 2011 Peterhead Sheriff Court	12–67
Stichting Shell Pensioenfonds v Kryss [2014] UKPC 41; [2015] A.C. 616; [2015] 2 W.L.R. 289; [2015] 2 All E.R. (Comm) 97; [2015] B.C.C. 205; [2015] 1 B.C.L.C. 597	25–250
Stiven v Reynolds & Co (1891) 18 R. 422	11–96
Stocznia Gdynia SA v Bud–Bank Leasing Sp. z oo [2010] B.C.C. 255	25–181, 25–186
Stojevic v Official Receiver [2006] EWHC 3447 (Ch); [2007] B.P.I.R. 141	25–57, 25–58
Street v Mason (1672) Mor 4911	14–41, 14–44, 14–46, 14–47
Strother v Read unreported 1 July 1803, FC	25–249, 25–250
Stuart & Stuart v Macleod (1891) 19 R. 223	8–17
Stuart's Trustee v HJ Banks & Co Ltd, 1998 S.C.L.R. 1109	11–15, 11–47
Sturrock v Robertson's Trustee, 1913 S.C. 582	12–26
Style Financial Services Ltd v Bank of Scotland (No.1), 1996 S.L.T. 421; [1996] 5 Bank. L.R. 15; [1995] B.C.C. 785	11–167
Style Financial Services Ltd v Bank of Scotland (No.2), 1998 S.L.T. 851; 1997 S.C.L.R. 633; 1997 G.W.D. 7–255	11–167
Sutherland v Advocate General for Scotland [2006] CSIH 38; 2006 S.C. 682; 2006 G.W.D. 24–538	9–17
Sutherland v Campbell 2003 S.L.T. 1138; 2003 G.W.D. 20–598	9–59
Sutherland v Campbell unreported 17 December 2003 IH	9–59
Sutherland v Lord Advocate, 1999 S.C. 104; 1999 S.L.T. 944; 1998 G.W.D. 35–1814	8–33
Sutherland v Sutherland (1843) 5 D. 544	1–21
SwissAir Schweizerische Luftverkehr–Aktiengesellschaft, Re [2009] EWHC 2099 (Ch); [2010] B.C.C. 667; [2009] B.P.I.R. 1505	25–221, 25–222, 25–258
T and N Ltd, Re [2004] EWHC 2878 (Ch); [2005] B.C.C. 982	25–250
Tay Valley Joinery Ltd v CF Financial Services Ltd, 1987 S.L.T. 207; 1987 S.C.L.R. 117; (1987) 3 B.C.C. 71	11–66, 11–67, 11–83
Taylor v Farrie (1855) 17 D. 639	14–56
Taylor, Noter, 1993 S.L.T. 375; [1992] B.C.C. 440	12–39
Ted Jacob Engineering Group Inc v Robert Matthew Johnston–Marshall and Partners [2014] CSIH 18; 2014 S.C. 579; 2014 S.C.L.R. 454; 2014 G.W.D. 29–570	11–65
Television Trade Rentals Ltd [2002] EWHC 211 (Ch); [2002] B.C.C. 807; [2002] B.P.I.R. 859	25–15, 25–16
Tewnion's Trustee, Noter, 2000 S.L.T. (Sh Ct) 37; 1999 G.W.D. 38–1858	8–39
Thomas Montgomery & Sons v Gallacher, 1982 S.L.T. 138	14–57
Thomas Ogilvie & Son v Taylor (1887) 14 R. 399	22–19, 22–28
Thomson v Clydesdale Bank Ltd [1893] A.C. 282	11–167
Thomson v Cooperative Bank Plc (No.1), 1999 S.L.T. 701; 1998 G.W.D. 26–1333	9–15, 9–57
Thomson v Newey & Eyre Ltd, 2005 1 S.C. 373; 2005 S.L.T. 439; 2005 G.W.D. 8–118	9–62
Thomson v Spence, 1961 S.L.T. 395	14–41
Thomson v Tough's Trustee (1880) 7 R. 1032	22–37
Thomson v Yorkshire Building Society, 1994 S.C.L.R. 1014	11–173, 11–174

Thomson, Petitioner unreported 19 December 2001 OH	11–96
Thurmond v Rajapakse [2008] B.P.I.R. 283	25–220, 25–221, 25–224
Tod's Trustees v Wilson (1869) 7 M. 1100	11–27
Toni, Petitioner, 2002 S.L.T. (Sh Ct) 159; 2002 G.W.D. 1–48	7–25, 22–34, 22–43
Transfield ER Cape Ltd [2010] EWHC 2851 (Ch)	25–220
Travers & Son v Bird (1886) 2 Sh Ct Rep 3	22–19
Trustee for the Creditors of Robert Gordon, v The Reverend Robert Farquharson. <i>See</i> Gordon's Trustee v Farquharson (1797) Mor 2905	11–27
Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA [2015] UKSC 27; [2015] 1 W.L.R. 2399; [2015] 3 All E.R. 694; [2015] 2 All E.R. (Comm) 393; [2015] B.C.C. 404; [2015] 1 B.C.L.C. 589; [2015] I.L.Pr. 42; [2016] B.P.I.R. 1532; [2015] Pens. L.R. 417	–67
Turner v IRC. 1994 S.L.T. 811; [1993] B.C.C. 299	16–84
Union of Shop, Distributive and Allied Workers v Leancut Bacon Ltd [1981] I.R.L.R. 295	12–18
United Drug (UK) Holdings Ltd v Bicare Singapore Pte Ltd [2013] EWHC 4335 (Ch)	25–218
Unity Trust Bank Plc v Ahmed, 1993 S.C.L.R. 53	8–20
Unity Trust Bank Plc v Frost [2005] CSOH 33	12–18, 16–79
Vale Sewing Machines Ltd v Robb, 1997 S.C.L.R. 797; 1997 G.W.D. 11–480	11–90
Van Overwaele v Hacking and Paterson (No.1), 2002 S.C. 62; 2001 S.C.L.R. 1098; 2001 G.W.D. 26–1063	9–17
Vizcaya Partners Ltd v Picard [2016] UKPC 5; [2016] 3 All E.R. 181; [2016] 1 All E.R. (Comm) 891; [2016] Bus. L.R. 413; [2016] 1 B.C.L.C. 683; [2016] 1 C.L.C. 806	25–259
VTB Bank (Austria) AG v Kombinat Aluminjuma Podgorica AD [2015] EWHC 750 (Ch); [2016] 1 B.C.L.C. 311; [2016] B.P.I.R. 1463	25–218
W. Adam & Winchester v John Walker (White's Trustee) (1884) 11 R. 863	13–11
Walkraft Paint Co Ltd v James H Kinsey Ltd, 1964 S.L.T. 104	14–53, 14–57
Walton's Trustee v Walton unreported 31 October 2003 Perth Sheriff Court	14–29
Watson v Cheque Shop Ltd [2005] CSOH 114	1–21, 8–20
Watson v Henderson, 1988 S.C.L.R. 439	17–48
Watson v Thompson, 1991 S.C. 447; 1991 S.L.T. 683; 1992 S.C.L.R. 78	11–98
Watt v Findlay (1846) 8 D. 529	11–50
Welsh v Hourston, 1914 2 S.L.T. 333	8–28, 9–12, 9–14, 9–16
WF Dow & Co v Union Bank (1875) 2 R. 459	16–40
Whatmough's Trustee v British Linen Bank, 1934 S.C. (HL) 51	14–57, 14–66, 14–67, 14–69
White v Stevenson, 1956 S.C. 84; 1956 S.L.T. 194	11–32, 11–38, 12–67
Whittaker's Trustee v Whittaker (Bankruptcy), 1993 S.C.L.R. 718	17–48, 17–49
Whittle v Gibb & Son (1898) 25 R. 412	9–54
Whyte v Forbes (1890) 17 R. 895	11–174
Whyte v Knox (1858) 20 D. 970	22–31
Whyte v Murray (1888) 16 R. 95	18–18
Whyte v Northern Heritable Security Investment Co (1891) 18 R. (HL) 37	18–04, 18–23, 18–24
William & James v MacLaine's Trustees (1872) 10 M. 362	22–20
William Anderson (Watson and Campbell's Trustee) v William Hamilton and Co. (1875) 2 R. 355	12–25, 12–26, 12–28
William Anderson (Watson and Campbell's Trustee) v William Mackinnon (Crawford's Trustee) (1876) 3 R. 608	16–80
William Dow (Potatoes) Ltd w Dow, 2001 S.L.T. (Sh Ct) 37; 2001 G.W.D. 7–256	11–176
William Ford and Sons v Stephenson (1888) 16 R. 24	22–26
Williamson v Sharp (1851) 14 D. 127	14–46
Williamson v Taylor (1845) 8 D. 156	16–27
Wilson v Bank of Scotland, 1987 S.L.T. 117	1–21
Wilson v Drummond's Representatives (1853) 16 D. 275	14–07, 14–64
Wilson v McVicar (1762) Mor 1214	22–20
Wilson v Speirs, 1926 S.L.T. (Sh Ct) 52	22–19
Wilson's Creditors v Wilson (1863) 2 M. 9	12–07
Wilsons (Glasgow and Trinidad) Ltd v Dresdner Bank, 1913 2 S.L.T. 437	16–21
Wm S Yuile Ltd v Gibson, 1952 S.L.T. (Sh. Ct.) 22; (1952) 68 Sh. Ct. Rep. 87	15–34
Wood v Mackay's Trustee, 1936 S.C. 93	16–60
Wotherspoon and Hope v Magistrates of Linlithgow (1863) 2 M. 348	6–07
Wright v Eurospares (Continental Parts) Ltd unreported 23 October 2001 Aberdeen Sheriff Court	11–171

Wright v Tennent Caledonian Breweries Ltd, 1991 S.L.T. 823; 1991 S.C.L.R. 633.....	9-08, 9-15, 9-60
Wyld v Hannah (1828) 6 S. 510.....	22-20
Wylie, Petitioner, 1928 S.L.T. 665.....	8-10
Wylie v Duncan (1803) M. 10269.....	11-51
Wylie, Stewart & Marshall v Jervis, 1913 1 S.L.T. 465.....	14-64
Young, Petitioner [2007] CSOH 194.....	7-56
Young v Accountant in Bankruptcy, 2010 S.L.T. (Sh Ct) 37; 2010 G.W.D. 6-108.....	17-78, 17-79
Young v Bohanon [2009] CSOH 56; 2009 G.W.D. 16-257.....	9-57, 11-176
Young's Executor, Petitioner (1888) 16 R. 92.....	18-04, 18-15, 18-23, 18-24
Zahnrad Fabrik Passau GmbH v Terex Ltd, 1985 S.C. 364; 1986 S.L.T. 84.....	11-84

TABLE OF STATUTES

1592	Compensation Act (c.61)	16-72	1889	Universities (Scotland) Act (c.55)	
1621	Bankruptcy Act (c.18)	2-08, 2-19, 14-02, 14-03, 14-14, 22-40		s.5(3)	6-07
1661	Diligence Act (c.344)	2-09, 15-15, 15-17	1890	Partnership Act (c.39)	1-02, 23-06
1672	Adjudications Act (c.45)	2-04, 15-15, 15-17		s.3	16-109
1681	Judicial Sale Act (c.17)	2-09		s.9	16-63
1696	Bankruptcy Act (c.5)	2-08, 2-19, 14-02, 14-03, 14-49, 14-56, 14-66, 22-20, 22-40		s.24(8)	7-133
1772	Bills of Exchange (Scotland) Act (c.72)	2-09, 2-10, 15-05		s.33(1)	23-06
1783	Payment of Creditors (Scotland) Act (c.18)	2-10, 2-11		(2)	23-06
1793	Payment of Creditors (Scotland) Act (c.74)	2-11, 2-12		s.35	23-05, 23-07
1814	Bankruptcy Act	2 12, 2-13		(e)	23-07
1839	Bankruptcy (Scotland) Act (c.41)	2-13, 2-14, 2-15, 2-18		(f)	23-07
1849	Judicial Factors Act (c.51)	4-03		s.38	23-06
	s.7	23-24		s.39	23-06
	s.9	4 03		s.47(1)	1-02
1853	Bankruptcy (Scotland) Act (c.53)	2 15	1907	Limited Partnerships Act (c.24)	6-05, 21-40, 22-66
1856	Bankruptcy (Scotland) Act (c.79)	2-15, 2-16, 4-01, 4-03, 11-63	1913	Bankruptcy (Scotland) Act (c.20)	2-02, 2-16, 2-17, 2-18, 2-19, 4-01, 8-35, 11-38, 11-47, 11-51, 11-61, 12-20, 15-07, 16-70, 22-04, 22-05, 22-128
	s.156	4-01, 4-03		s.97(1)	11-56
1880	Judicial Factors (Scotland) Act (c.4) s.4	23 16		(4)	11-47
	(1)	23 16		s.98(1)	11-126
	(1A)	23 16		(2)	11-126
1880	Married Women's Policies of Assurance (Scotland) Act (c.26)	14 38		s.185	22-04
	s.2	14 38		s.187	12-20
1880	Debtors Act (c.34)	2 16	1913	Bankruptcy and Deeds of Arrangement Act (c.34)	2-02
1881	Bankruptcy and Cessio (Scotland) Act (c.22)	2-16	1914	Bankruptcy Act (c.59)	2-02
1882	Civil Imprisonment (Scotland) Act (c.42)	21-96	1921	Trusts (Scotland) Act (c.58)	22.02, 22-18, 22-24
	s.4	21-96		s.5	23-24
1883	Bankruptcy (Scotland) Act (c.52)	17-14	1924	Conveyancing (Scotland) Act (c.27)	8-42
1884	Bankruptcy Frauds and Disabilities (Scotland) Act (c.16)	2-16		s.44(4)(c)	14-34
1889	Judicial Factors (Scotland) Act (c.39)	2-16, 4-03		s.46(1)	14-34
	s.1	4-03		s.46A	14-34
	s.11A	11-121, 12 18, 12-58, 14-03, 14-15, 14-47, 14-50, 14-71, 14-74, 15-20, 15-43, 16-104, 23-08, 23-16, 23-23, 23-24, 23-26, 23-28, 23-31, 23-35	1930	Third Parties (Rights Against Insurers) Act (c.25)	11-123, 22-132
	(1)	23-08, 23-16	1947	Crown Proceedings Act (c.44)	9-59
	(2)	23-09, 23-28		s.35(2)	16 87
				(b)	16-87
				(c)	16-87
				(d)	16-87
				s.50	16-87
			1961	Trusts (Scotland) Act (c.57)	22-02, 22-24
				s.2(3)	23-24
			1970	Conveyancing and Feudal Reform (Scotland) Act (c.35)	12-54, 12-55
				s.9	12-54
				s.11	12-54
				s.19(3)	12-56, 12-57
				ss.19 20	12 55

s.20(1)	12-56	(8)	17-15
(2)	12-56	s.35	23-04
s.21(1)	12-57	s.41	11-21, 11-109, 23-04, 23-14, 23-15, 23-23, 23-24, 23-29, 23-30, 23-32-23-35
(2)	12-57	(b)(i)	23-04
ss.21-23	12-55	(ii)	23-04
s.22	12-57	(iii)	23-04
s.23(1)	12-57	s.42	23-35
(2)	12-57	s.43	23-04
s.24	12-55	1981 Matrimonial Homes (Family Protection) (Scotland) Act (c.59)	9-50, 11-38
(1)	12-58	1982 Civic Government (Scotland) Act (c.45)	12-18
Sch.2	12-54	1984 County Courts Act (c.28) s.112	8-25, 17-134
Sch.3	12-54	1984 Rent (Scotland) Act (c.58) ...	11-07
1971 Sheriff Courts (Scotland) Act (c.58) s.32(1)	8-13	1985 Companies Act (c.6) Pt XVIII	25-09
1973 Law Reform (Diligence) (Scotland) Act	11-61	1985 Reserve Forces (Safeguard of Employment) Act (c.17)	16-104
1973 Hallmarking Act (c.43)	17-40	1985 Family Law (Scotland) Act (c.37)	11-127, 11-168
1973 Prescription and Limitation (Scotland) Act (c.52)	7-217, 16-19, 22-59	s.1(2)	11-134
s.9(1)(b)	7-218, 16-20	s.8(2)	14-76, 14-95
(c)	22-59	s.24(1)	11-168
1973 Local Government (Scotland) Act (c.65)	17-118	s.25(1)	11-168
s.31	17-12	(2)	11-168
(1)(b)	17-12	(3)	11-168
(2)	17-12	s.26	11-168
s.32	17-12	1985 Insolvency Act (c.65)	4-67
s.59(1)	17-13	s.2(2)	4-68
1974 Consumer Credit Act (c.39)	14-104, 20-04, 21-41, 21-83, 21-87	(3)	4-68
s.9(1)	14-104	s.3(2)	4-68
1974 Friendly Societies Act (c.46) ...	6-07	(3)	4-68
1974 Trade Union and Labour Relations Act (c.52)	6-07	s.5(2)	4-68
s.2	6-07	s.11	4-68
1975 Litigants in Person (Costs and Expenses) Act (c.47)	8-13	1985 Bankruptcy (Scotland) Act (c.66)	1-08, 2-18, 2-19, 2-21, 2-22, 2-26, 2-30, 3-13, 3-15, 4-01, 4-26, 4-34, 4-90, 5-02, 5-08, 6-06, 7-05, 7-13, 7-14, 7-30, 7-206, 8-04, 8-05, 8-20, 8-33, 8-38, 8-41, 8-50, 9-03, 9-12, 9-36, 10-03, 10-06, 10-32, 10-119, 10-120, 11-07, 11-14, 11-17, 11-26, 11-27, 11-29, 11-34, 11-38, 11-43, 11-47, 11-51, 11-56, 11-63, 11-118, 11-126, 11-127, 11-167, 11-172, 11-174-11-176, 11-193, 12-23, 12-25, 12-37, 12-94, 12-96, 12-97, 13-11, 13-18, 14-02, 14-03, 14-04, 14-11, 14-83, 14-88, 15-30, 15-35, 15-44, 16-100, 16-117, 17-47, 17-48, 17-78, 18-19, 18-24, 21-73, 21-77, 22-05, 22-07, 22-09, 22-44, 22-47, 22-48, 22-60, 22-61, 22-64, 22-128, 25-173
1977 Criminal Law Act (c.45) s.38	13-36, 25-18	s.1A(1)(a)	22-06
1978 National Health Service (Scotland) Act (c.29)	17-24	(b)	11-129
1978 Interpretation Act (c.30)	1-12	s.2	10-03
s.7	1-12		
1979 Sale of Goods Act (c.54)	1-02, 1-06		
s.1	11-85, 11-87		
s.17	11-85		
s.19	11-85		
s.25(1)	11-87		
s.61(4)	1-02		
s.62(4)	11-85		
1980 Education (Scotland) Act (c.44) s.73(f)	22-138		
s.73B(12)	11-117		
1980 Solicitors (Scotland) Act (c.46)	11-69		
s.18(1)	17-15		
(e)	23-30		
(2)	17-15		
s.19(1)	17-15		
(4)	17-15		
(6)	17-15		
(7)	17-15		

(1)	10-03	(7)	11-127
(4)	10-03	(9(b))	11-175
s.3	10-03	(10)	11-14
(6)	12-89, 12-92	s.33	23-35
s.4A(1)	5-08	(1)	11-56
s.4C(3)(c)	5-12	(b)	11-63
s.5	5-08	s.34	14-03
(2)(a)	7-13	s.35	14-03
(c)	7-13, 22-44, 22-59	s.36	14-03, 14-27
(4)	7-30	ss.36A-36C	14-83
(4A)	22-45	ss.36D-36F	14-83
(9)(a)	13-15	s.37(2)	15-23
s.5A	7-13	(4)	15-28
s.5B	7-13	(6)	15-44
s.5D	21-56	s.39(1)	10-119
s.6(2)	21-40	(2)	10-120
s.9	7-206	s.39A	11-186
s.10	9-03	s.40	12-66
s.10A	9-03	s.41	11-38
s.12(3)	9-12	s.42(2)	12-25
(e)	7-56	(3)	12-25
(3A)	9-12	s.43B	17-133
s.13(1)	10-03	s.48(1)(ii)	16-08
s.15(1)	7-206	s.52(1)	16-117
(5)	8-38	(2)	16-117
(6)	8-50	(2A)	16-117
s.16(1)	9-03	(2ZA)	16-117
(4)	9-08	(2ZB)	16-117
s.17D(4)(c)	9-36	(6)	16-117
s.18	10-03	s.54	11-14, 17-47
(3)(c)	10-33	(2)	17-47
s.20(4)	13-23	ss.54A-54G	17-50
s.20A	8-60	s.56	17-47
s.21	8-60	ss.56A-56K	17-84
(1)	8-60	ss.58B-58D	18-25
s.21A	8-60	s.60	16-67
(2)	8-33	(2)	16-70
s.28A	10-91	s.61	14-03
(1)	10-92	s.63	7-37, 8-39, 12-96, 12-97, 22-31
(2)	10-93	(1)b	18-24
s.28B	10-91	ss.63A-63C	12-97
s.29(6)	18-24	s.67(6)	14-40
s.31(1)(a)	11-02	(8)	17-32, 17-101
(b)	11-24	s.70	12-31
(5A)	11-186, 11-187	s.71B	17-122
s.32(1)	11-127	s.73(1)	22-44, 22-45, 22-46
(2)	11-127	Sch.1 para.4	16-54
(2A)	11-127	Sch.4	17-47
(2WA)	11-129	para.13	17-51
(2XA)	11-129	para.16(a)	17-51
(2YA)	11-129	para.17	18-19
(2ZA)	11-129	(1)	18-20
(3)	11-127	(2)	18-20
(4)	11-127	(3)	18-21, 23-24
(4A)	11-129	(4)	18-22
(4B)	11-129	para.18(1)	23-11
(4C)	11-129	(3)	23-11, 23-24
(4D)	11-129	Sch.5	22-06
(4E)	11-129	para.5	22-06, 22-60
(4F)	11-129	(c)	22-60
(4G)	11-129	(d)	22-60
(4H)	11-129	1986 Gas Act (c.44)	
(4J)	11-129	Pt 1	12-33
(4K)	11-129	Sch.2A para.1	12-33
(4L)	11-129		
(6)	11-14, 15-44		

1986	Insolvency Act (c.45)	2-20,	(3)	4-95
		4-09, 4-12, 4-67, 4-79, 4-90,	(4)	4-95
		4-91, 4-100, 6-07, 7-08, 8-25,	(a)	4-95
		11-34, 11-112, 13-36, 14-05,	(b)	4-95
		17-119, 17-134, 22-02, 25-09	(c)	4-95
	Pt 1	4-79, 25-15	(5)	4-95
	Pt 3	25-172, 25-173	(6)	4-95
	Pt 4	8-25	(7)	4-95
	Pt 5	8-25	(8)	4-95
	Pt 8	4-79	s.391B(1)	4-98
	Pt 13	4-67	(2)	4-98
	s.51	17-118, 17-129	s.391C(2)	4-98
	(3)	17-129	(3)	4-98
	(5)	17-129	(a)	4-98
	s.123(1)(a)	1-09, 1-11	(b)	4-98
	s.238	14-101	(c)	4-98
	s.242	14-14, 14-54	(d)	4-98
	s.243	14-27, 14-49	(4)	4-98
	s.244	14-101	s.391D(1)	4-100
	(1)	14-101	(2)	4-100
	(5)	14-101	(3)	4-100
	s.281(5)	17-76	(4)	4-100
	s.281A	17-120	(5)	4-100
	s.283A	11-183	(6)	4-100
	s.323	16-79	s.391E	4-100
	s.360	17-120	(7)	4-100
	(1)(b)	17-120	(8)	4-100
	(2)	17-120	s.391F(1)	4-100
	(5)	17-120	(2)	4-100
	s.371	12-20	(3)	4-100
	s.388	25-176, 25-185	(4)	4-100
	(2)	4-91	(5)	4-100
	(a)	4-85	s.391G	4-100
	(b)	4-85, 22-18	(7)	4-100
	(3)	4-85, 4-91, 22-18	(8)	4-100
	(5)	4-86	s.391H(1)	4-100
	s.389	4-85	(2)	4-100
	(1)	17-17, 22-18	(3)	4-100
	(2)	4-86	(4)	4-100
	s.389A	4-79	(5)	4-100
	s.390	17-119, 21-16	(6)	4-100
	(1)	4-89	(7)	4-100
	(2)	4-68, 4-91	(8)	4-100
	(c)	4-72	s.391I(1)	4-100
	(3)	4-68, 4-106, 22-18	(2)	4-100
	(4)(a)	4-90, 17-17	(3)	4-100
	(aa)	4-90	s.391J(1)	4-100
	(b)	4-90	(2)	4-100
	(c)	4-90	s.391K	4-100
	(d)	4-90	(4)	4-100
	(5)	4-90	s.391L(1)	4-100
	s.390A(1)	4-91	(2)	4-100
	(2)	4-92	(3)	4-100
	(3)	4-93	(5)(a)	4-100
	s.390B	4-91	(b)	4-100
	s.391(1)	4-68, 4-94	s.391M	4-100
	(2)	4-94	(1)	4-100
	(4)	4-68, 4-100	(2)	4-100
	(a)	4-94	(5)	4-100
	(b)	4-94	(6)	4-100
	(c)	4-94	(7)	4-100
	(7)	4-92, 4-93	s.391N(1)	4-100
	s.391A(1)(a)	4-95	(2)	4-100
	(b)	4-95	(3)	4-100
	(c)	4-95	(4)	4-100
	(2)	4-95	(a)	4-100

(b).....	4-100		Sch.4A para.8.....	4-90, 17-120
s.391O(1).....	4-100	1986	Company Directors Disqualification Act (c.46).....	4-90, 7-08, 17-84, 17-107, 17-119, 21-17, 25-09
(2).....	4-100		s.11.....	17-119
(3).....	4-100		(1).....	17-18
(4).....	4-100		(2)(a).....	17-18
(5).....	4-100		(2A)(a).....	17-18
s.391P(1).....	4-100		s.15.....	17-19
(2).....	4-100		Legal Aid (Scotland) Act (c.47)	
(3).....	4-100	1986	s.17(2B).....	21-52
(4).....	4-100		Debtors (Scotland) Act	
(5).....	4-100	1987	(c.18).....	11-61, 11-62, 15-11, 20-04, 21-41, 21-83, 21-87, 22-22, 22-98
(6).....	4-100		s.12(2)(b).....	22-22
s.391R(1).....	4-100		s.66.....	15-19
(2).....	4-100		s.72.....	15-19
(3).....	4-100		s.73J.....	15-11
(4).....	4-100		(2).....	15-27, 15-28
(5).....	4-100	1988	Housing (Scotland) Act (c.43)	
(6).....	4-100		Pt 2.....	11-07
s.391S(1).....	4-100		s.72(1).....	22-23
(2).....	4-100	1989	Electricity Act (c.29)	
(3).....	4-100		Pt 1.....	12-33
(4).....	4-100	1989	Companies Act (c.40)	
s.391T(1).....	4-100		Pt VII.....	25-11
(2).....	4-100		s.183(1).....	25-11
(3).....	4-100	1990	Education (Student Loans) Act (c.6)	
s.392(2).....	4-68		s.1.....	22-138
ss.392-398.....	4-102		Sch.2 para.6.....	11-117, 17-75
s.393(2).....	4-68	1991	Child Support Act (c.48).....	11-21, 11-127, 11-134, 15-19, 16-45, 17-75
s.415A(1)(b).....	4-95		s.31(5).....	17-75
s.421.....	12-58		s.40A.....	21-96
s.426.....	2-20, 13-36, 24-25, 25-02-25-04, 25-06-25-08, 25-17, 25-25, 25-174, 25-177, 25-187, 25-192, 25-201, 25-210	1992	Social Security Administration Act (c.5)	
(1).....	25-13		s.187.....	11-21
(2).....	25-13	1992	s.191.....	7-15
(3).....	25-13		Local Government Finance Act (c.14)	
(4).....	13-36, 25-14, 25-17		s.72(1).....	12-37
(5).....	25-16		s.99(1).....	17-38
(6).....	25-17	1992	Trade Union and Labour Relations Consolidation Act (c.52)	
(7).....	13-36, 25-18		Pt IV, Ch.II.....	12-18
(10).....	25-10		s.188(7).....	12-18
(a).....	25-09		s.189.....	12-18
(b).....	25-09		s.193(7).....	12-18
(c).....	25-09		s.194.....	12-18
(d).....	25-09	1993	Bankruptcy (Scotland) Act (c.6).....	1-22, 2-21, 4-01, 4-03, 4-36, 7-13, 7-21, 7-30, 8-20, 8-33, 8-60, 9-12, 10-03, 12-89, 13-15, 16-117, 17-78, 22-06, 22-45, 22-60
(11).....	25-09		s.2.....	10-03
(13).....	25-10		s.3(1).....	7 13
(14).....	25-10		(2).....	7-13
s.427.....	17-119		(3).....	7-30
(1).....	17-10		s.4.....	8 33
(2).....	17-10		s.6.....	9-08
(3).....	17-10		s.11.....	12-89, 17-78
(4).....	17-10		s.33(1).....	22-46
(5).....	17-10			
(6).....	17-10			
(6A).....	17-11			
s.440(2)(b).....	17-120			
Sch.B1 para.43.....	25-220			
Sch.2 paras 1-16.....	23-24			

	Sch.1 para.1	12-89		s.C2.	2-02, 4-26, 4-34
	para.5	9-08		Sch.8 para.23	4-12
	para.23	17-78	1999	Welfare Reform and Pensions Act	
1993	Pension Schemes Act			(c.30).	11-12, 11-105,
	(c.48).	11-127, 11-134			11-108-11-07, 11-127,
	Pt VII, Ch.II	12-18, 16-104			14-83, 22-46
	s.92(2)	11-110		s.11	11-108, 11-109, 14-87
	s.125	12-18		s.12	11-109, 14-87
	s.127	12-18, 16-104		s.13	11-109, 14-87
	Sch.4	16-104		(2)(a)	11-109
1994	Criminal Justice and Public Order			s.14	11-110
	Act (c.33)	13-36, 25-18		s.28(1)	14-90, 14-93
	s.136	13-36		s.29(1)	14-96
	s.168	13-36		(a)	14-88
	Sch.11 para.1	13-36	2000	Financial Services and Markets Act	
1994	Local Government etc. (Scotland)			(c.8).	4-108, 7-10, 12-18
	Act (c.39)	6-07		s.19	4-108
1995	Requirements of Writing			s.22	4-108
	(Scotland) Act (c.7)			s.212(1)	16-104
	s.3(1)	11-109		s.215(2A)	16-104
1995	Jobseekers Act (c.18)			s.372	8-25
	s.1(4)	7-15	2000	Limited Liability Partnerships	
1995	Pensions Act (c.26).	11-127,		Act (c.12)	6-06
		14-83, 14-88	2000	Insolvency Act (c.39)	4-79,
	s.29(1)(b)	17-22			25-166
	(5)(a)	17-22		s.4(1)	4-79
	(6)	17-22		(4)	4-79
	s.30(1)	17-22		s.14	25-166
	(3)	17-23	2002	State Pension Credit Act	
	s.91(3)	11-108		(c.16).	7-15
	s.159A	11-110	2002	Tax Credits Act (c.21).	7-15
1995	Criminal Procedure (Scotland)			s.45	11-21
	Act (c.46)		2002	Proceeds of Crime Act	
	s.24(6)	17-75		(c.29).	11-12, 11-70-11-75
	s.136(1)	17-42		Pt 2	7-30, 14-39, 14-61, 17-75
	(2)	17-42		Pt 3	7-30, 14-39, 14-61, 17-75
	(3)	17-42		Pt 4	7-30, 14-39, 14-61, 17-75
	s.249	17-75		s.41	10-36
	Sch.2 para.2	17-75		s.120	10-36
1995	Criminal Injuries Compensation			s.190	10-36
	Act (c.53)	11-12		s.420(1)	11-70
	s.7(2)	11-104		(2)	11-70
1996	Employment Rights Act (c.18)			(a)	11-71
	Pt XI Ch. VI	12-18, 16-104		(b)	11-71
	Pt XII	12-18, 16-104		(c)	11-71
	Pt XIII	12-18, 16-104		(d)	11-71
	s.167	12-18, 16-104		(3)	11-71
	s.169	12-18		(5)	10-36
	s.189	12-18, 16-104		s.421(1)	11-73
	s.190	12-18		(2)(a)	11-74
1996	Housing Grants, Construction and			(b)	11-74
	Regeneration Act (c.53)	16-81		(c)	11-74
1998	Late Payment of Commercial Debts			(3)(a)	11-73
	(Interest) Act (c.20).	16-36		(b)	11-73
1998	Teaching and Higher Education Act			(c)	11-73
	(c.30)			(d)	11-73
	s.22	22-138		(e)	11-73
	s.44	11-117		(f)	11-73
	Sch.2 para.6	11-118		(4)	11-75
	Sch.4	11-117		s.422	14-39, 14-61
1998	Scotland Act (c.46)		2002	Enterprise Act (c.40).	2-24, 2-25,
	s.15(1)(b)	17-11			4-90, 11-183,
	s.17(1)	17-11			16-101, 17-120
	(2)	17-11		s.251	16-102
	(4)	17-11		s.257(3)	4-90
	Sch.5 Pt II s.C1	4-26, 4-34		Sch.21 para.4	4-90

2003	Communications Act (c.21) . . .	12–33	(2)	11–120
2004	Civil Partnership Act (c.33) . . .	9–50,	s.11	11–122
		11–38, 14–38	Sch.1	11–122
2005	Mental Capacity Act (c.9)	4–90	2012	Welfare Reform Act (c.5)
2005	Gambling Act (c.19)	12–18		Pt 1
2006	Companies Act (c.46)	6–06,	2013	Enterprise and Regulatory Reform
		6–07, 15–08, 21–40, 21–49		Act (c.24)
2007	Tribunals, Courts and Enforcement			ss.92–95
	Act (c.15)	4–90	2013	Financial Services
	s.108(3)	4–90		(Banking Reform) Act
	Sch.20 Pt 1 para.1	4–90		(c.33)
	para.6	4–90	2014	Co-operative and Community
2009	Banking Act (c.1)	25–11		Benefit Societies Act
2010	Third Parties (Rights Against			(c.14)
	Insurers) Act (c.10)	11–12,	2015	Consumer Rights Act (c.15)
		11–120, 11–123,		s.3
		25–184		(3)(c)
	s.1	11–120, 11–121		s.4
	s.4(2)	11–120	2015	Deregulation Act (c.20)
	(5)	11–120		4–78, 4–79, 4–91, 4–102, 4–103
	s.7	11–121	2015	Small Business, Enterprise and
	s.6(3)	11–120		Employment Act (c.26)
	s.6A	11–120		4–77, 4–90, 4–97,
	s.7	11–120		4–100, 17–119

TABLE OF SCOTTISH STATUTES

2000	Adults with Incapacity (Scotland) Act (asp 4)	4-90	(c)	11-57			
	s.1(6)	10-16	(2)	11-11, 11-58			
2001	Abolition of Poindings and Warrant Sales Act (asp 1)	21-04	(3)	11 57			
2001	Housing (Scotland) Act (asp 10)	11-07	s.58	15-45			
2001	Mortgage Rights (Scotland) Act (asp 11)	12-59, 12-88	(1)	15-45			
2002	Debt Arrangement and Attachment (Scotland) Act (asp 17)	2-23, 4-12, 7-38, 7-113, 7-149, 7-188, 11-56, 11-61, 12-58, 21-08, 21-13, 21-59, 21-63	s.62(4)	21-07			
	Pt 1	1-08, 21-01, 21-95	Sch.2	21-86, 21-98			
	Pt 3	11-11, 11-55, 11-60	(a) para.3	11-60			
	s.1	21-40	para.4	11-60			
	s.2	5-05	Sch.2(c)	11-60			
	(3)	21-49	2003	Land Reform (Scotland) Act (asp 2)			
	(a)	21-51		Pt 2			
	(b)	21-55		12 50			
	(c)	21-31, 21-61	2003	Mental Health (Care and Treatment) (Scotland) Act (asp 13)			
	(d)	21-48		s.329(1)			
	(4)	21-63		4-90			
	(5)	21-32	2004	Antisocial Behaviour etc. (Scotland) Act (asp 8)			
s.3(1)	21-14, 21-15			Pt 8			
(2)	21-49			12-18			
(3)	21-14			s.83			
s.4(1)	21-92, 21-117			12-18			
(2)(a)	21 96		2005	Water Services etc. (Scotland) Act (asp 3)			
(b)	21-96			12-33			
(c)	21-96		2005	Charities and Trustee Investment (Scotland) Act (asp 10)			
(2A)(a)	21-96			s.69(1)			
(b)	21-96			17-20			
(c)	21-96			(2)(b)			
(3)	7-34, 7-109, 7-145, 7-184, 8-21, 21-96			17-20			
(4)	21-97			(4)			
(5)	7-34, 7-109, 7-145, 7-184, 8-21, 21-96			17-20			
s.5(1)	21 103			(5)			
(2)	21-110			17-21			
(3)	21-107			s.70(1)			
(4)	21-106			17-20			
s.6(1)	21-58		2005	Licensing (Scotland) Act (asp 16)			
(2)	21-58			12-18			
s.7(2)	21-14		2006	Housing (Scotland) Act (asp 1)			
(k)	21-59			12-49			
s.7A	21 09			Pt 3			
s.8	4-12, 21-13			12-49			
s.9(1)	21-15		2007	Bankruptcy and Diligence etc. (Scotland) Act (asp 3)			
s.10	1-08, 21-128			1-08, 2-25, 2-26, 4-06, 4-24, 4-36, 4-44, 4-90, 7-02, 7-13, 7-30, 7-132, 7-165, 7-207, 8-19, 8-20, 8-33, 8-40, 8-60, 9-03, 10-04, 10-05, 10-08, 10-32, 10-35, 10-54, 10-91, 10-100, 10-112, 10-119, 10-120, 11-02, 11-10, 11-14, 11-24, 11-26, 11-27, 11-29, 11-36, 11-57, 11-78, 11-116, 11-117, 11-129, 11-172, 11-174, 11-175, 11-182, 11-186, 12-11, 12-18, 12-49, 12-113, 13-23, 15-03, 15-18, 15-23, 15-35, 15-37, 15-47, 15-48, 16-30, 16-117, 17-32, 17-48, 17-49, 17-51, 17-83, 17-84, 17-101, 17-118, 17-119, 17-122, 18-02, 18-15, 18-25, 21-14, 21-49, 22-06, 22-46, 22-59, 25-14			Pt 2
(5)	7-06, 7-30, 21-51, 22-79			25 09			
s.11	21-86			s.1			
(1)	11-55, 11-57, 11-60			11-14, 17-48			
(a)	11-57			s.7			
(b)	11 57			10-08, 10-54			
(c)	11-57						
(d)	11-57						

s.12	10-91	17-51, 17-78, 17-85, 17-115,	
s.18(2)	11-129	17-131, 17-134, 18-25, 21-40,	
s.21	17-48	22-10, 22-47, 22-64, 22-71	
s.25(b)	7-30	s.13	11-18
s.33	8-13	(b)	11-18
s.34(2)	11-117, 17-75	s.16(1)	11-187
s.56(2)	16-55	(2)	11-14
s.127A	15-39	s.29	10-91
s.154(1)	15-23	2014	Courts Reform (Scotland) Act
(2)	15-23	(asp 18)	8-13
s.172	15-04	Pt 3 Ch.4	8-13
s.175	11-57	s.38	14-35, 14-59
s.207	15-47	2016	Bankruptcy (Scotland) Act
s.208(1)	11-78, 15-48	(asp 21)	1-04, 2-33, 3-15,
(2)(a)	11-78	4-09, 4-10, 4-12, 4-26, 4-34,	
(b)	11-78	4-39, 4-85, 4-90, 4-91, 5-08,	
(2)-(4)	15-48	6-06, 6-09, 7-08, 7-50, 7-87,	
(3)-(9)	11-78	7-124, 7-160, 7-207, 7-215,	
s.211(3)	21-09	7-216, 8-15, 8-38, 8-50, 9-02,	
s.212(2)	21-49	9-36, 10-16, 10-43, 10-49,	
(3)	21-14	10-78, 10-84, 10-87, 10-110,	
(5)(a)	21-14	10-134, 10-135, 10-144, 11-01,	
s.226	15-23, 15-38	11-05, 11-32, 11-70, 11-75,	
(2)	12-49	11-78, 11-109, 11-118, 11-121,	
Sch.4	16-55	11-132, 11-133, 12-37, 12-40,	
Sch.5 paras 5-13	22-06	12-46, 12-51, 12-53, 12-60,	
para.13(3)(b)	15-23	12-72, 12-101, 12-103, 12-104,	
Sch.6	15-23	14-05, 14-66, 15-23, 15-45,	
Pt 1	12-49, 15-38	16-19, 17-05, 17-06, 17-28,	
2010	Home Owner and Debtor Protection	17-29, 17-41, 17-55, 17-101,	
(Scotland) Act (asp 6)	2-28,	17-120, 21-77, 22-02, 22-10,	
2-29, 2-30, 7-13, 7-15, 8-50,		22-16, 22-21, 22 24, 22 25,	
11-37, 12-59, 12-66, 12-75,		22-28, 22-29, 22-34, 22-42,	
12-78, 12-88, 22-07, 22-08,		22-43, 22-49, 22-51, 22-52,	
22-48, 22-57		22-59, 22-61, 22-90, 22-100,	
Pt 2	22-07	23-31, 24-12, 25-02, 25-09,	
s.11	12-75	25-120, 25-173	
(a)	12-66	Ch.7	9-23, 9-36
s.12	8-50	Ch.16	9-23, 9-36, 11-53
2010	Interpretation and Legislative	Pt 15	5-02, 5-04
Reform (Scotland) Act		s.1(1)	6-04
(asp 10)	2-33	s.2(1)(a)	4-24, 5-05, 5-08, 7-12
2010	Housing (Scotland) Act (asp 17)	(b)	7-29, 7-45, 7-50,
s.60(1)(a)	17-25	7-55, 7-56	
(2)	17-25	(2)(a)	7-15
s.64(1)	17-25	(b)	7-15
(2)	17-25	(c)	7-15
2012	Land Registration etc. (Scotland)	(d)	7-15
Act (asp 5)		(e)	7-15
s.9(2)	22-43	(f)	7-15
s.54	14-34	(g)	7-15
2014	Bankruptcy (Scotland) Act	(h)	7-15
2014	Bankruptcy and Debt Advice	(3)	7-15
(Scotland) Act (asp 11)	2-32,	(4)	7-15
3-18, 4-11, 4-24, 4-26, 4-28,		(5)	7-16
4-31, 4-41, 4-43, 4-44, 4-46,		(6)	7-16
5-02, 5-08, 5-12, 6-06, 7-02,		(7)(a)	7-55, 8-15
7-05, 7-14, 7-17, 7-21, 7-56,		(b)	7-55
7-63, 8-04, 8-05, 8-13, 8-20,		(8)(a)	7-17
8-33, 8-51, 8-56, 9-04, 9-08,		(b)	7-17
9-12, 9-19, 10-05, 10-91, 10-93,		(c)	7-17
10-116, 10-121, 11-14, 11-18,		(d)	7-17
11-131, 11-174, 11-175, 11-187,		(e)	7-17
12-89, 12-97, 13-15, 16-07,		(9)	1-22, 7-17
16-30, 16-37, 16-54, 16-55,		s.3	7-32
16-69, 16-117, 16-130, 17-50,		s.4	7-05

(1)	7-06	(2)(a)	7-66
(2)(a)	7-07	(b)	7-66
(b)	7-07	(3)	7-26, 7-71, 7-103, 7-139, 7-178
s.5(a)	4-24, 5-08, 7-63	s.12(1)(a)	7-36, 7-46, 7-51, 7-58, 7-75, 7-83, 7-88, 7-93, 7-111, 7-120, 7-125, 7-147, 7-156, 7-161, 7-166, 7-186, 7-195, 7-200
(b)	7-73	(b)	7-36, 7-46, 7-51, 7-58, 7-75, 7-83, 7-88, 7-93, 7-111, 7-120, 7-125, 7-147, 7-156, 7-161, 7-166, 7-186, 7-195, 7-200
(c)	7-82	(2)	7-41, 7-49, 7-61, 7-79, 7-86, 7-96, 7-116, 7-123, 7-152, 7-159, 7-169, 7-191, 7-198
(d)	7-87	s.13(1)	7-40, 7-49, 7-54, 7-61, 7-79, 7-86, 7-91, 7-96, 7-115, 7-123, 7-128, 7-151, 7-159, 7-164, 7-169, 7-190, 7-198, 7-203, 8-15, 8-16
(e)	7-92	(2)(a)	7-33, 7-108, 7-183
(2)(a)	7-13	(b)	7-45, 7-50, 7-57, 7-119, 7-124, 7-155, 7-160, 7-165, 7-194, 7-199
(2A)	7-13	(3)(a)	7-144
(2B)	7-13	(b)	7-155, 7-160
(9)(a)	7-21	(4)(a)	7-74
s.6	5-07, 5-08, 6-04, 6-05, 7-209, 7-211, 13-16, 13-17, 13-22	(b)	7-64, 7-82, 7-87, 7-92
(1)	16-18	(5)	7-217
(a)	6-05	(6)	7-44, 7-81, 7-118, 7-154, 7-193
(b)	6-05	s.14(1)	7-98, 7-134, 7-173
(c)	6-05	(2)	7-134
(d)	6-05	(3)	7-64, 23-13
(e)	6-05	(4)	7-64, 23-13
(2)(a)	6-06	(5)	7-217
(b)	6-06, 7-119	(6)	7-105, 7-141, 7-180
(c)	6-06	(7)	7-105, 7-141, 7-180
(3)	4-24	s.14A	12-12, 22-109, 25-130
(a)	7-98	s.14B	25-131
(b)	7-107, 7-124	s.15	7-215
(4)	4-24	(1)	7-208
(a)	7-132	(2)	7-210
(b)	7-132	(3)	7-209
(c)	7-143, 7-155, 7-160, 7-165	(4)	7-211
(5)	7-132	(5)	7-208
(6)	7-130	(6)	7-216
(7)	4-24	(7)	7-216
(a)	7-172	(8)	7-208, 7-211
(b)	7-182, 7-194, 7-199	(9)	7-215
(8)	6-09	s.16	1-08
(9)	7-100, 7-106, 7-135, 7-142, 7-175, 7-181, 13-16	(1)(a)	1-08
s.7(1)	7-30	(b)	1-08
(2)	7-30	(c)	1-08
(3)	7-30	(d)	1-08
(4)	7-31	(e)	1-08, 22-53
s.8(2)	7-19	(f)	1-08, 1-16
(3)(a)	7-21, 7-67, 7-100, 7-135, 7-175, 13-15, 13-16	(g)	1-08, 1-16
(b)	7-22, 7-68	(h)	1-08, 1-16, 21-128
(4)	7-21, 13-15	(i)	1-06, 1-08, 1-13, 1-15
(6)	7-21, 13-15	(2)	1-16, 21-128
s.9	1-07	(3)	1-08
(1)	7-15	(4)	1-17
(2)	7-15		
(3)	7-15		
(4)(a)	7-15		
(b)	7-15, 7-17		
s.10(1)	7-42		
(2)	7-28		
(3)	7-43, 7-80, 7-117, 7-153, 7-192		
(4)	8-19		
(5)	7-106, 7-142, 7-181		
(6)	7-106, 7-142, 7-181		
s.11(1)(a)	7-20, 7-99, 7-135, 7-174		
(b)	7-20, 7-99, 7-135, 7-174		

(5)	1-17	(b)	8-33
(6)	1-17, 15-08	s.23	8-14, 8-17, 8-20
(7)	1-17	(1)	8-20
(8)	1-08, 1-13, 1-16	(a)	8-20
s.17(1)	8-24, 23-31	(b)	8-20
(2)	23-31	(2)	8-20
(a)	8-25	(3)	8-20, 8 21
(b)	8-25	s.23A(1)	15-39
(c)	8-25	(2)	15-39
(d)	8-25	(a)	15-39
(e)	8-25	(b)	15-39
(f)	8-25	(3)(a)	15-40
(g)	8-25	(b)	15-40
(h)	8-25	(4)	15-41
(i)	8-25	(5)	15-41
(3)	8-24, 23-31	(6)	15-41
(4)	8-26	(7)	15-41
(5)	8-26	(8)	15-41
(6)	8-26	(9)	15-41
(7)	8-26	s.24	15-19, 15-24, 15-30,
(8)	9-12		15-35, 23-26
(a)	8-25	(1)	15-30, 15-35
(b)	8-25	(2)	15-29
s.18	9-03	(a)	15-35
(1)	8-27, 23-31	(b)	15-30
(2)	8-27, 23-31	(c)	15-30
(3)	8-27	(d)	15-30
(4)	8-27	(3)	15-22
(5)	8-27	(4)	15-22
(6)	8-27	(5)	15-22
(7)	8-27	(6)	15-25, 15-28
(8)	8-27, 23-31	(7)	15-27
(9)	8-27	(8)	15-29
(10)	8-27	(9)	15-19
(11)	8-27	s.25	15-19
(12)	8-27	(1)	15-20, 23-26
s.19(1)	7-37, 7-43, 7-76,	(2)	15-20, 23-26
	7-80, 7-101, 7-105, 7-106,	(3)	15-36, 15-42
	7-112, 7-117, 7-137, 7-141,	(4)	15-43
	7-142, 7-148, 7-153, 7-176,	(5)	15-43
	7-180, 7-181, 7-187, 7-192	(6)	15-43
(2)	7-37	s.26(1)	8-37
(3)	7-37	(a)	8-37, 8-50
(4)	7-37	(b)	8-37, 8-50
(5)	7-37	(c)	8-37, 8-50
(7)	7-37	(2)	8-36, 8-49
s.20	7-27, 7-72, 7-104,	(3)	8-39
	7-140, 7-179, 8-04	(4)	8-39
(2)	8-04	(5)	8-39
(3)	8-04	(6)	8-39
(4)	8-04	(7)	8-39
s.21	8-05	(8)	8-40
(2)	8-05	(9)	8-40
(3)	8-05	s.27	9-01
s.22(1)	8-06	(1)	8-30
(2)	8-06	(2)	8-30
(3)	8-09, 8-37	(3)	8-30
(4)	8-09, 8-11	(4)	8-47
(5)	8-14	(5)	8-44
(a)	8-15	(7)(a)	8-45
(b)	8-15	(b)	8-45
(c)	8-15	(8)	8-45
(d)	7-56, 8-15	(9)	9-01
(e)	7-37, 8-15	(10)	9-01, 9-54
(6)	8-14	(11)	8-38
(7)(a)	8-32	(a)	8-38

(b).....	8-38	s.37(1)(a).....	9-47
(12).....	8-29	(b).....	9-32
s.29(1).....	9-06	(2).....	9-32, 9-47
(2).....	9-07	(3).....	9-32, 9-47
(3).....	9-07	(4)(a).....	9-32, 9-47
(4).....	9-09	(b).....	9-32, 9-47
(5).....	9-10	(5)(a).....	9-32, 9-41
(6).....	9-08	(b).....	9-32, 9-47
(7).....	9-08	(6).....	9-41
(8).....	9-10	s.38(1).....	9-23, 9-36
(9).....	9-10	(3)(a).....	7-218, 9-23, 9-36, 16-20
(10).....	9-11	(b).....	9-23, 9-36
(11).....	9-11	(c).....	9-36, 17-125
ss.29-38.....	9-05	s.39.....	10-27
s.30(1).....	9-12	(1).....	10-28
(2)(a).....	9-12	(2)(a).....	10-32, 13-04
(b).....	9-12	(b).....	10-32, 13-04
(c).....	9-12	(c).....	10-32
(3).....	9-12	(d).....	10-32
(4).....	9-19	(e).....	10-32
(5)(a).....	9-19	(f).....	10-32
(b).....	9-20	(g).....	10-32
(c).....	9-21	(h).....	10-32
(6).....	9-20	(3).....	10-37
(7).....	9-10	(4)(a).....	10-33, 13-05
(8).....	9-21	(b).....	10-33, 13-07, 13-23
(9)(a).....	9-24	(5).....	10-29
(b).....	9-24, 9-53	(6).....	10-29
s.31(1).....	9-26	(7).....	10-29
(2).....	9-26	(8)(a).....	10-29
(3).....	9-27	(b).....	10-29
(4).....	9-27	(9).....	10-30
(5).....	9-29	(10).....	10-30
(6).....	9-30	s.40(1).....	13-06
s.32(1).....	9-31	(a).....	10-31, 10-32, 17-29
(2).....	9-31, 9-32	(b).....	10-33
(4)(b).....	9-32	s.41(1).....	8-54, 13-15, 13-16
(c).....	9-32	(2).....	8-55, 13-17
(d).....	9-32	(3).....	8-56, 13-15, 13-16, 13-17
(3).....	9-31	(4).....	8-56
(5).....	9-32	(5).....	8-56, 13-15, 13-16, 13-17
(6).....	9-32	s.42(1).....	8-57
(7).....	9-33	(a).....	8-57
(8).....	9-33	(b).....	8-57
(9).....	9-33	(2).....	8-58
s.33(1).....	9-32	(3).....	8-58
(2)(a).....	9-32	(4).....	8-58
(b).....	9-32	(5).....	8-58
(4)(a).....	9-32	(6).....	8-58
(5).....	9-32	s.43.....	8-59
s.33(4).....	9-32	s.44.....	8-59, 19-07
s.34(1).....	9-34	(1).....	8-61
(2).....	9-34	(3).....	8-33, 8-60, 8-61
(3).....	9-38	(4)(a).....	8-61
(4).....	9-37	(b).....	8-61
s.35.....	9-39	(5).....	8-61
(1).....	9-39	(6).....	8-60, 8-61
(2).....	9-39	(7).....	8-61
(3).....	9-40	(8).....	8-62
(4).....	9-40	(a).....	8-62
(5).....	9-41	(b).....	8-62
(6).....	9-42	(9).....	8-66
(7).....	9-45	s.45.....	8-67
s.36(1).....	9-46		
(2).....	9-46		
(3).....	9-46		

s.46	16-03, 19-07	(1)	4-84, 10-20, 10-54
(1)	16-05	(a)	7-39, 7-48, 7-53,
(2)	16-09		7-60, 7-78, 7-85, 7-90,
(3)	16-09		7-95, 7-114, 7-122, 7-127,
(4)(a)	16-10		7-150, 7-158 7-163, 7-168,
(b)	16-10		7-189, 7-197, 7-202
(5)	16-13	(b)	7-39, 7-48, 7-53,
(6)	16-11		7-60, 7-78, 7-85, 7-90,
(7)(a)	16-17		7-95, 7-114, 7-122, 7-127,
(b)	16-17		7-150, 7-158 7-163, 7-168,
(c)	16-17		7-189, 7-197, 7-202
(8)	16-19	(c)	7-39, 7-48, 7-53,
(9)	16-35		7-60, 7-78, 7-85, 7-90,
s.47(1)	16-15, 15-16		7-95, 7-114, 7-122, 7-127,
(2)	16-15		7-150, 7-158, 7-163,
(3)	16-16		7-168, 7-189, 7-197, 7-202
s.48	19-07	(2)	4-84, 10-20, 10-54
(1)(a)	8-63, 16-12, 16-23	(3)	10-20, 10-54
(b)	8-63	(4)	10-55
(c)	8-63	(5)	4-84, 10-55
(d)	8-63	(6)	4-84, 10-55
(2)	8-63	(7)	10-55
(3)	16-23	(8)	4-84, 10-57
(4)(a)	8-64	(a)	7-24, 7-70, 7-102,
(b)	8-64		7-138, 7-177
(c)	8-64	(b)	7-24, 7-70, 7-102,
(d)	8-64		7-138, 7-177
(e)	8-64	(c)	7-24, 7-70, 7-102,
(f)	8-64		7-138, 7-177
(5)	8-64	(9)	4-84, 7-24, 10-57
s.49	19-07	(10)	7-24, 10-57
(1)	8-65, 10-61	(11)	7-24, 10-57, 19-05
(3)	4-84, 10-10, 10-17,	(12)	10-58, 19-05
	10-62, 10-85, 10-86,	(13)	8-50, 10-56, 13-17
	10-87, 10-93	(14)	8-52, 10-56
(4)	10-62, 10-92	s.52(1)	12-89
(5)	4-84, 10-62	(2)	12-89
(6)	10-63, 16-23	(3)	12-91
(7)	10-63, 16-23	(4)	12-91
(8)(a)	10-64	(5)	12-91
(b)	10-64	(6)	12-91
(9)(a)	10-64	(7)	12-91
(b)	10-64	s.53(1)	10-25
s.50	10-99	(2)	4-15, 10-26
(1)	10-53	s.54(1)	10-07
(a)	10-99	(2)	4-84
(b)	10-99, 16-88	(a)	10-08
(c)	10-99	(b)	10-09
(d)	10-99	(3)	10-13
(e)	10-99, 12-108	(4)	10-13
(f)	10-99, 10-122	s.55(1)	10-15
(g)	4-15	(2)	10-15
(2)	10-101, 10-119,	(3)	10-16
	12-08	(a)	10-16
(3)(a)	4-20, 10-102, 17-45	(4)	10-16
(b)	4-45, 10-103, 17-90	(5)	10-17
(4)	4-20, 4-45, 10-102,	(6)	10-18
	10-103, 17-45, 17-90	(7)	10-19
(5)	10-99, 10-102,	(8)	10-10, 10-17
	10-103, 17-45	(9)	10-17
(6)	12-89	(10)	4-84, 10-20
(7)	10-123, 12-94	s.56(2)	10-39
(8)	10-123, 12-94	(3)	10-40
(9)	10-100, 10-101,	(4)(a)	10-40
	10-119, 12-08	(b)	10-40
s.51	10-53	(5)(a)	10-40

(b)	10-40	ss.63-65	19-07
(c)	10-40	s.64(1)	10-79
(d)	10-40	(2)(a)	10-79
(6)	10-41	(b)	10-79
(7)	10-43	(3)(a)	10-80
s.57(1)	10-40	(b)	10-80
(3)	10-41	(c)	10-80
(4)	10-41	(4)	10-80
(5)	10-42	(5)	10-81
(6)	10-42	(6)	10-81
(7)	10-42	(7)	10-81
(8)	10-42	(8)	10-82
(9)(a)	10-42	(9)	10-82
(b)	10-42	(10)	10-82
(10)	10-42	(11)	10-82
(11)	10-42	s.65(1)	10-76
s.58(2)	10-44	(2)	10-76
(3)	10-45	(a)	10-76
(4)(a)	10-46	(b)	10-76
(b)	10-46	(c)	10-76
(5)	10-46	(3)	10-76
(6)	10-49	(4)	10-77
(7)	10-49	(5)	10-77
s.59(1)	10-47	(6)	10-77
(2)	10-47	(7)	10-77
(3)	10-47	(8)	10-77
(4)	10-48	(9)	10-77
(5)	10-48	(10)	10-77
(6)	10-48	(11)	10-78
s.60	19-07	s.66(1)	10-92
(1)	10-65	(2)	10-92
(2)	10-65	(3)	10-93
(3)	10-66	(4)	10-93
(a)	10-66	(5)	4-84, 10-93
(b)	10-66	(6)	10-93
(4)	10-66	(7)	10-94
(5)	10-67	(8)	10-94
(6)	10-71	(9)	10-94
s.61(1)	10-68	(10)	10-94
(2)	10-68	ss.66-68	10-91
(3)	10-68	s.67(1)	10-94
(a)	10-68	(2)	10-95
(b)	10-68	(3)(a)	10-95
(4)	10-68	(b)	10-97
(5)	10-69	(4)	10-97
(6)	10-69	s.68(1)	10-96
(7)	10-69	(2)	10-96
(8)	10-69	(3)	10-96
(9)	10-71	(4)	10-96
s.62(1)	10-70	(a)	10-94
(2)	10-70	(b)	10-97
(3)(a)	10-70	(c)	10-96
(b)	10-70	(6)	10-94, 10-96, 10-97
(4)	10-70	s.69(1)	10-84
(5)	10-70	(2)	10-84
s.63(1)	10-73	(3)(a)	10-85
(2)(a)	10-73	(b)	10-85
(b)	10-73	(4)	10-85
(3)(a)	10-74	(5)	4-84, 10-85, 10-86
(b)	10-74	(6)	10-85, 10-86, 10-87
(4)	10-74	(7)	4-84, 10-85, 10-86, 10-87
(5)(a)	10-75	(8)	10-85, 10-86, 10-87
(b)	10-75	(9)(a)	10-88
(c)	10-75	(b)	10-89
(6)	10-75	(10)	10-89, 10-121
(7)	10-75	(11)	10-89

(12)	10-89	(9)	11-46, 11-47, 11-189, 11-190
(13)	10-89	(10)	11-188, 11-189
s.70	10-87	(11)	11-166
(1)	10-87	(12)	11-166
(a)	10-87	(13)	11-22
(b)	10-87	s.79	11-73
(2)	10-87	(1)	11-06
(3)	10-87	(2)	11-96
(4)	10-87	(3)	11-07
(5)	10-87	(4)	11-07
(6)	10-87	(5)	11-07, 11-14, 11-21
(7)	10-87	s.80(1)	11-71
s.71(1)(a)	10-87	(2)	11-71
(2)	10-87	(3)	11-71
(3)	10-87	ss.80-84	11-70
(4)	10-87	s.81(1)	11-71
(5)	10-87	(2)	11-71
(b)	10-87	s.82(1)	11-71
(6)	10-87	(2)	11-71
(7)(a)	10-87	s.81(1)	11-71
(b)	10-87	(2)	11-71
(8)	10-87	s.83(1)	11-21
s.72(1)(a)	10-87	(2)	11-21
(1)(b)	10-87	s.84(1)	11-72
(2)	10-87	(2)	11-72
(3)	10-87	(3)	11-72
(4)	10-87	s.86(1)	11-21
(5)	10-87	(2)	11-21
s.73(1)	10-87	(3)	11-14, 11-21
(2)	10-87	(4)	11-01, 11-14
(3)	10-87	(5)	11-01, 15-25, 15-36, 15-40
(4)	10-87	(6)	11-18
(5)	10-87	(7)	11-18
(6)	10-87	(8)	11-18, 11-99
(a)	10-87	(9)	11-18, 11-98
(b)	10-87	(10)(a)	11-98
(7)	10-87	(b)	11-98
s.74	4-84, 10-87	(11)	11-19
s.75	4-84, 10-87-10-89	s.87(1)	11-153, 12-45
s.76	10-113, 10-118	(a)	11-20
s.77(1)	10-113, 10-114, 16-125	(2)	11-20, 11-153, 12-45
(2)	10-113	(3)	11-20, 11-153, 12-45
(3)	10-114	(4)	11-171
(4)	10-114	(5)	11-175
(5)	10-114	(a)	11-175
(6)	10-115	(b)	11-175
(7)	16-125	(c)	11-175
(a)	10-116	(6)	11-175
(b)	10-116	(a)	11-175
(c)	10-116	(b)	11-175
(8)	10-116, 16-125	(7)	11-175
(9)(a)	10-116	(8)	11-175
(b)	10-116	(9)	11-175
(c)	10-116	(10)(a)	11-175
(10)(a)	10-116	(b)	11-175
(b)	10-116	(c)	11-175
(11)	10-116	s.88	23-35
(12)	10-117	(1)	19-13, 22-68
s.78(1)	11-01, 11-02, 11-05	(a)	11-11, 11-55
(2)	11-01, 11-05	(b)	11-11, 11-55
(3)	11-30	(c)	11-11, 11-63
(4)	11-30	(2)	11-13, 11-77
(5)	11-54, 12-49	(3)	11-13, 11-53, 11-79
(8)	11-42	s.89	21-56

(1)	11-132	(3)	14-27
(2)	11-132	(4)(a)	14-20
(3)	11-134	(b)	14-20
(4)	11-134	(5)	14-32
(5)	11-134	(6)(a)	14-29
(6)	11-134	(b)	14-29
ss.89-97	11-131	(c)	14-29
s.90(1)(a)	11-138	(7)	14-32
(b)	11-139	(8)	14-29
(2)	11-139	(9)	14-29
(3)	11-140	(10)	14-38
(4)	11-140	(11)	14-47
(5)	11-140	s.99	14-27, 14-49, 14-61, 17-101, 22-40, 23-26
(6)	11-141	(1)	14-52, 14-54
(7)	11-141	(a)	14-50
(8)	11-142	(b)	14-50
(9)	11-142	(c)	14-50
ss.90-97	11-21	(2)(a)	14-57
s.91(1)	11-144	(b)	14-57
(2)	11-145	(c)	14-57
(3)	11-145	(d)	14-57
(4)	11-144	(3)	14-57
s.92(1)	11-162	(4)	14-55
(2)	11-162	(5)(a)	14-51
(3)	11-164	(b)	14-51
(4)	11-165	(6)	14-58
(5)	11-165	(7)	14-58
s.93(1)	11-146	(8)	14-71
(2)	11-146	s.100	14-73, 23-26
(3)	11-146	(1)(a)	14-76
s.94(1)	11-147	(b)	14-77
(2)	11-147	(c)	14-74, 14-78
(3)	11-148	(2)	14-75, 14-80
(4)	11-149	(3)	14-80
(5)	11-150	s.101	17-101
(6)	11-150	(1)	14-85-14-87
s.95(1)(a)	11-153	(2)	14-89
(b)	11-153	(a)	14-87
(c)	11-154	(b)	14-87
(2)	11-155	(3)	14-90
(3)	11-155	(4)	14-88
(4)	11-156	(5)	14-88
(5)	11-156	(6)	14-88
s.96(1)	11-158	(7)	14-88
(2)	11-158	(8)	14-87
(3)(b)	11-159	(9)	14-87
(c)	11-159	ss.101-103	14-83
(4)	11-159	s.102(1)(a)	14-90
(5)	11-158	(b)	14-90
(6)	11-160	(c)	14-90
(7)	11-160	(d)	14-90
(8)	11-160	(2)	14-90
(9)	11-160	(3)	14-90
s.97(1)	11-162	(4)	14-90
(2)	11-162	(5)	14-90
(3)	11-164	(6)	14-90
(4)	11-165	(7)	14-91
(5)	11-165	s.103(1)	14-86
s.98.	11-193, 14-14, 14-38, 14-39, 16-109, 17-101, 22-40, 23-26	(2)	14-91
(1)(a)	14-18	(3)	14-90
(b)	14-15	(4)	14-90
(c)	14-20	(5)	14-90
(2)(a)	14-17	(6)	14-90
(b)	14-16	s.104(1)	14-95
		(2)	14-95

(3)	14-95	s.110	12-25
(4)	14-97	(1)	12-24
(5)	14-97	(3)	12-25
(6)	14-97	(4)	12-25
(6)-(9)	14-97	(5)	12-25
(7)	14-97	(6)	12-25
(8)	14-97	(7)	12-25
(9)	14-97	(8)(a)	12-25
(10)	14-97	(b)	12-25
(11)	14-93, 14-96, 14-97	(9)	12-25
ss.104-106	14-14, 14-49, 14-73, 14-83, 14-93	(10)	12-25
s.105(1)	14-98	(11)	12-29
(2)(a)	14-98	s.111	10-37, 12-43
(b)	14-98	s.112	11-188, 11-192
(c)	14-98	(1)	11-192
(d)	14-98	(2)	11-192
(3)	14-98	(3)(a)	11-192, 11-193
(4)	14-98	(b)	11-193
(5)	14-98	(4)	11-193
(6)	14-98	(5)	11-194
(7)	14-98	(6)	11-195
(8)	14-99	(7)	11-196
s.106(1)	14-94	(8)	11-192
(2)	14-99	s.113	11-32, 11-192, 12-65, 12-68, 12-80, 12-87, 12-88, 22-133
(3)	14-99	(1)	12-71
(4)	14-98	(b)	11-193, 12-74
(5)	14-98	(2)	12-76, 12-78
(6)	14-98	(3)	12-76
s.108(a)(i)	12-13	(4)	12-75
(ii)	12-13	(5)	12-75
(1)(a)	13-09	(6)	12-78
(b)	12-14	(7)	12-68, 12-69, 12-71
(c)	12-14	s.114	9-05, 9-50, 11-38
(2)	12-13	(2)	9-51
(3)	12-15, 13-10	(3)	9-52
(4)	13-10	s.115	9-05, 9-50, 11-38
(5)	11-82, 12-15, 13-11, 16-90, 22-37	(2)	9-51
(6)	11-82, 13-11, 22-37	(3)	9-52
s.109	12-11, 12-52, 12-62	s.116	11-153, 12-44, 13-20
(1)	4-16, 10-119, 12-09	s.117	17-133
(2)	4-16, 12-10	(1)	17-134
(b)	10-119	(2)(a)	17-134
(3)	10-119, 12-11	(b)	17-134
(4)	4-16, 10-119, 12-09, 12-10	(c)	17-134
(5)	12-18	(d)	17-134
(a)	12-18	(3)(a)	17-135
(b)	12-18	(b)	17-135
(c)	12-18	(4)(a)	17-136
(d)	12-18	(b)	17-136
(e)	12-18	(6)	17-134
(f)	12-18	(8)(a)	17-134
(6)	12-48	(b)	17-134
(7)	11-82, 12-53	s.118(1)(a)	13-24
(a)	12-60	(b)	13-24
(b)	12-61	(2)	13-24
(c)	12-61	(3)	13-26
(8)	12-48	(4)	13-26
(9)	4-16, 10-119, 12-11	(4)-(7)	16-18
(10)	12-52, 12-62	(5)	13-26
(11)	10-130, 12-05	(6)	13-26
(12)	4-16, 10-119, 12-11, 12-18	(7)	13-26
(a)	12-62	(9)	13-22
		s.119	10-122
		(1)	13-27

(b).....	10-122	(6)	16-30
(2)	13-27	s.128(1)(a)	16-24
(3)	13-27	(b)	16-25
(4)	13-27	(2)(a)	16-24
(5)	13-27	(b)	16-25
(6)	13-27	s.129(1)	16-90, 16-93,
(7)	13-27	16-106, 16-118	
(8)	13-27	(a)	16-93
s.120(1)	13-36	(b)	16-93
(2)	13-36	(c)	16-93
(3)	13-26, 13-27	(d)	16-93
(6)	13-12	(e)	16-93
s.121(1)	13-29, 16-18	(f)	16-93
(2)(a)	13-30	(g)	16-93, 16-106
(b)	13-30	(h)	16-93, 16-107
(3)	13-31	(i)	16-93
(4)(a)	13-31	(2)	16-98
(b)	13-31	(3)	16-98
(5)	13-33, 13-34	(4)(a)	16-109
(6)	13-32, 13-34	(b)	16-109
(7)	13-34	(c)	16-109
(8)	13-35	(5)	16-107, 16-111
(9)	13-35	(6)	16-112
s.122.....	16-03, 19-10	(7)(a)	16-112
(1)(a)	16-06	(7)(b)	16-112
(b)	16-07	(8)	16-112
(2)(a)	16-06	(9)	16-90
(b)	16-07	(a)	22-37
(4)	16-07	(b)	22-37
(5)	16-07	(10)	16-41, 16-107
(6)	16-07	s.130.....	16-113
(7)	16-03, 16-08	(2)(a)	16-114
(8)	16-03, 16-08	(b)	16-115
(9)	16-09	(3)	10-120
(10)	10-120, 16-09	(a)	16-114
(11)(a)	16-10	(b)	16-115
(b)	16-10	(4)	16-114
(12)	16-14, 16-60	(5)	16-114
(13)	16-14, 16-60	(a)	16-114
s.123(1)(a)	16-18	(b)	16-114
(b)	16-18	(6)(a)	16-115
(2)	16-18	(b)	16-115
(3)	16-18	(c)	16-115
(4)	16-18	s.131.....	16-113, 19-10
(5)	16-18	(1)	16-118
s.124(1)	16-15, 16-16	(3)(a)	16-118
(2)	16-15	(b)	10-120, 16-118
(3)	16-16	(4)	10-120, 16-118, 16-119
s.125(1)	16-11	(5)	16-120
(2)(a)	16-17	(6)	16-120
(b)	16-17	(7)	16-120
(3)	16-19	(8)	16-121
(4)	11-82, 16-35	(9)	16-121
s.126(1)	16-24	(10)	16-122
(2)	16-25	(11)	16-122
(3)	16-25	s.132(1)	16-123
(4)	16-25	(2)	16-123
(5)	16-12, 16-26	(3)	16-124
(6)	16-29	(4)	16-124
(7)	16-28	(5)	10-121, 16-124
(9)	11-53	(6)	16-123
s.127(1)	16-30	s.133(1)	10-121
(2)	16-30	(a)	16-125
(3)	16-30	(b)	16-125
(4)	16-30	(2)	16-126
(5)	16-30	(3)	16-126

(4)	16-126	(5)	17-71
s.134(1)	16-127	(6)(a)	17-71
(a)	4-48, 16-127	(b)	17-71
(b)	16-127	(c)	17-71
(2)	16-127	(d)	17-71
(3)	16-127	s.143(2)	17-72
(4)	16-127	(3)	17-72
(5)	16-127	(4)	17-72
s.135(1)	16-128	(5)	17-72
(2)	16-128	(6)	17-72
(3)	16-129	(7)	17-72
s.136(1)	16-130	(8)	17-72
(2)	16-131	s.144(1)	17-73
(3)	16-130	(2)	17-73
(4)	16-132	(3)	17-73
(5)	16-132	(4)	17-73
(6)	16-132	(5)	17-74
(7)	16-132	(6)	17-74
(8)	16-132	s.145(1)	17-75
(9)	16-133	(2)	17-75
(10)	16-133	(3)	22-137
(11)	16-134	(a)	17-75
s.137(1)	17-54	(b)	17-75
(2)	17-54	(c)	17-75
(3)	17-57	(d)	17-75
(4)	17-55	(e)	17-75
(a)	17-55	(f)	17-75
(b)	17-55	(g)	12-46, 17-06, 17-75
(5)(a)	17-55	(4)	17-75
(b)	17-55	(5)	17-78
(c)	17-55	(6)	17-75
(6)	17-56	(7)	17-75
(7)	17-58	s.146	17-77
ss.137-144	17-52	(2)	17-77
s.138(1)	17-59	(3)	17-77
(2)	17-59	(4)	17-77
(3)(a)	17-60	(5)	17-77
(b)	17-60	(6)	17-77
(c)	17-60	s.147(1)	17-77
(4)	17-60	(2)	17-77
(5)	17-61	s.148(1)(a)	18-06
(6)(a)	17-61	(b)	12-113, 18-06
(b)	17-61	(2)	12-113, 18-06
(c)	17-61	(3)	18-06
(7)	17-62	(4)	18-09
s.139(1)	17-63	(5)(a)	18-09
(2)	17-63	(b)	18-09
(3)	17-63	(6)	18-12
(4)	17-63	(7)	18-17
(5)	17-64	(8)	18-06
(6)	17-64	s.149(1)	18-10
s.140(1)	17-65, 19-11	(2)	18-10
(2)	17-65	(3)	18-10
s.141(1)	17-67	(4)	18-10
(2)(a)	17-68	(5)	18-10
(b)	17-68	(6)	18-10
(c)	17-68	(7)	18-10
(3)	17-68	(9)	10-90, 18-13
(4)	17-68	s.150(1)	18-08
(5)	17-68	(2)	18-08
(6)	17-69	(3)	18-08
(7)	17-70	s.151(1)	18-08, 18-14
s.142(1)	17-71	(2)	18-07
(2)	17-71	(3)	18-07, 18-14
(3)	17-71	(4)	18-15
(4)	17-71	(6)	18-15

(7)	18-15	(a)	9-22
(8)	18-15	(b)	9-23
(9)	18-16	(2)	9-22, 17-124
(10)	18-16, 18-17	(3)	9-22, 17-124
s.152(1)	18-26	(4)	17-126
(2)	18-26	(a)	9-35, 9-43, 9-48
(3)(a)	18-27	(b)	9-36
(b)	18-28	(5)-(9)	9-35, 9-43, 9-48
(4)	18-29	(5)	17-127
(5)	18-27	(6)	17-127
(6)	18-27	(7)	17-127
(7)	18-28	(8)	17-127
(8)(a)-(c)	18-27	(9)	17-127
(a)-(c)	18-28	s.162	2-33, 22-59, 22-61
(b)	18-27	s.163	22-90
(c)	18-27	s.164(1)	22-50, 22-66
(9)	18-31	(2)(a)	22-66
ss.152-154	18-25	(b)	22-50, 22-66
s.153(1)	18-30	(3)	22-66
(2)	18-30	s.165	4-84, 22-67
(3)	18-30	s.166(2)(a)	22-69
(4)	18-30	(b)	22-69
(5)	18-30	(3)	22-69
s.154	18-30	s.167(1)	22-68
s.155(1)	17-88, 17-89	(b)	22-70
(b)	17-95	(2)	22-69
(2)	17-93	(3)(a)	22-78
(3)	17-93	(b)	22-79
(4)	17-93	(c)	22-80
s.156(1)	4-45, 17-100	s.168	22-72
(2)	17-101	(1)	22-73
(a)	17-101	(2)	22-73
(b)	17-101	(a)	22-73
(c)	17-101	(b)	22-73
(d)	17-101	(c)	22-73
(e)	17-101	(3)	22-73
(f)	17-101	(4)	22-75
(g)	17-101	(5)	22-76
(h)	17-101	s.169	22-83, 22-143
(i)	17-101	s.170(1)(a)	22-84
(j)	17-101	(b)	22-84
(k)	17-101	(c)	22-84
(l)	17-101	(d)	22-84
(m)	17-101	(e)	22-84
(n)	17-101	(2)	22-85
(3)	17-102	s.171(1)(a)	22-86
(4)	17-101	(b)	22-86
s.157(1)	17-121	(c)	22-86
(2)	17-121	(d)	22-86
s.158	17-94, 17-97	(e)	22-86
s.159(1)	17-105	(g)	22-86
(2)	17-89, 17-106	(h)	22-86
(3)	17-111	(i)	22-86
(4)	17-111	(2)	22-87
(5)	17-112	(3)	22-89
(6)	17-112	(4)	22-89
(7)	17-112	s.172(1)(a)	22-92
(8)	17-111	(b)	22-95
s.160(1)	17-109	(2)	22-93
(2)	17-109	(3)	22-94
(3)	17-110	s.173(1)	22-97
(4)	17-110	(2)	22-97
(5)	17-111	(3)	22-97
(6)	17-111	(4)	22-98
(7)	17-111	(5)	22-99
s.161(1)	17-123	s.173A	22-100

(1)	22-101	(3)	22-129
(2)	22-102	(4)	22-129
(3)(a)	22-103	(5)	22-129
(b)	22-104	(6)	22-129
(4)(a)	22-103	(7)	22-130
(b)	22-103	(8)	22-130
(c)	22-103	s.184	22-132
(5)	22-103	(1)(a)	22-137
(6)	22-103	(b)	22-133
(7)	22-104	(2)(a)	22-133
(8)	22-105	(b)	22-133
(9)	22-101	(3)	22-134
(10)	22-101	(4)	22-134
(11)	22-107	(5)	22-134
s.174(1)	22-111	(6)	22-137
(2)	22-111	(a)	22-137
(3)	22-111	(b)	22-138
(4)	22-111	(7)(a)	22-133
(5)	22-111	(b)	22-133
(6)	22-111	(8)(a)	22-136
(7)	22-111	(b)	22-136
(8)	22-111	(9)	22-134
(9)	22-111	(10)	22-135
s.175(1)	22-84, 22-86, 22-112, 22-113, 22-114, 22-129	(11)	22-135
(2)	22-113	s.185(1)	22-138
(3)	22-113, 22-114	(2)	22-138
(4)	22-114	s.186	22-125
(5)	22-114	(1)	22-139
(6)	22-112	(2)	22-139
s.176(1)	22-119	(3)	22-139
(a)	22-118	(4)	22-139
(b)	22-118	(5)	22-139
(2)	22-119	(6)	22-140
s.177(1)	22-92	(7)	22-140
(2)	22-92	(8)	22-141
(3)	22-92	(9)	22-141
s.178(1)	22-143	(10)	22-141
(2)	22-143	s.187(1)	22-152
(3)	22-143	(2)	22-153
(4)	22-143	(3)	22-154
(5)	22-143	s.188(1)	22-88, 22-146
s.179(1)	4-17, 22-120	(a)	22-146
(2)	4-17, 22-120	(b)	22-131, 22-146
(3)	4-17, 22-120	(c)	4-17, 22-121, 22-146
(4)	4-17, 22-121	(d)	22-135, 22-146
(5)	4-17, 22-121	(2)	4-17, 22-88, 22-121, 22-131, 22-135, 22-146
(6)	4-17, 22-121	(3)	22-140, 22-148
s.180(1)	22-74	(4)	22-136, 22-148
(2)	22-122	(5)	4-17, 22-147
(3)	22-122	(6)	4-17, 22-149
(4)	22-123	(7)	4-17, 22-149
s.181(1)	22-125	s.189(1)	22-150
(2)	22-125	(2)	22-150
(3)	22-126	(3)	22-150
(4)	22-126	s.190(2)	22-156
(5)	22-127	(3)	22-157
(6)	22-76	ss.190-192	22-155
s.182	22-144	s.191(1)(a)	22-156
s.183(1)	22-128	(b)	22-156
(a)	22-129	(c)	22-156
(b)	22-129	(d)	22-156
(c)	22-129	(2)	22-156
(2)(a)	22-129	s.192(1)	22-158
(b)	22-129	(2)	22-158

(3)	22-159	(c)	4-26
(4)	22-159	(f)	4-26
s.194	22-160	(3)	4-34
s.195	7-34, 7-109, 7-145, 7-184	(a)	4-34
(1)	5-05, 5-08, 5-11	(b)	4-34
(a)	5-05	(c)	4-34
(b)	5-05	(4)	4-18, 10-14, 10-15, 10-24, 10-51, 10-87, 10-108, 10-117, 10-132, 16-125
(c)	5-05	(a)	10-87
(2)	5-10, 21-74	(5)(a)	4-19, 10-52, 10-109, 10-133
(3)	5-11	(b)	4-20, 17-46
(4)	5-11	(c)	10-52, 10-109, 10-133, 17-46
ss.195-198	22-65	(6)	4-19, 4-20, 10-52, 10-109, 10-133, 17-46
s.196(1)	5-07, 5-11	(7)(a)	4-32
(2)	5-10, 21-74	(b)	4-32
(3)	5-11	(8)	4-31
s.197 ...	7-34, 7-109, 7-145, 7-184	(9)	4-26, 4-34
(3)	5-12	s.202	4-09
(a)	5-12	s.201(1)	4-11
(b)	5-12	(2)	4-11
(c)	5-12	(3)	4-11
(d)	5-12	(4)	4-11
(4)	5-12	s.203(1)	4-10
(5)	5-12	(2)	4-10
(a)	5-12	(3)	4-10
(b)	5-12	s.204(1)	4-11
(c)	5-12	(2)	4-11
(d)	5-12	s.206	16-67, 16-69
s.198 ...	7-34, 7-109, 7-145, 7-184	(1)	16-69
(1)	5-13	(2)	16-70
(a)	5-13	(3)	16-70
(b)	5-13	(4)	16-69, 16-71
(2)	5-13, 8-21	(5)	16-71
(a)	5-14	(6)	16-69
(b)	5-14	s.207	10-136
(c)	5-14	s.209	14-101
(d)	5-14	(1)(a)	14-104
(3)	5-15	(b)	14-102
(4)	5-15	(2)	14-103, 14-108
(a)	5-15	(a)	14-105
(b)	5-15	(b)	14-106
(c)	5-15	(3)	14-105
(5)	5-15	(4)	14-107
(6)	5-15	(5)(a)	14-108
(a)	5-15	(b)	14-108
(b)	5-15	(c)	14-108
(c)	5-15	(d)	14-108
(7)	5-15	(e)	14-108
(8)	5-15	(6)	14-109
(a)	5-15	(7)	14-13
(b)	5-15	(8)	14-104
(c)	5-15	s.210(1)	12-112
s.199(1)	4-04, 4-06	(2)	12-112
(2)	4-05	(3)	12-41, 12-109, 13-34, 14-36, 14-60, 14-81, 16-17, 16-29, 16-34, 19-08
s.200	4-11	(4)	12-109
(1)	4-13	(5)	12-111
(a)	10-50, 10-107, 10-131, 22-110	(6)	12-110
(b)	4-24	(7)	10-122, 12-110
(c)	4-26, 4-28	(8)	4-32
(d)	4-34	s.211	10-24
(e)	4-09		
(2)(a)	4-26		
(b)	4-26		
(c)	4-26		
(d)	4-26, 17-116		

(1)(b)	10-24, 18-31	(4)	11-181, 13-13, 17-31
(3)	12-102	(5)	17-31, 17-33
(4)	12-103	(6)	13-13, 17-31
(5)(a)	12-103	(7)	13-13, 17-31
(b)	12 103	(8)	13-13, 17-31
s.212	12-98	(9)	17-31, 17-101
(1)	12-100, 12-104	(a)	14-40
(a)	12-101	(b)	14-62
(b)	12-101	(10)	14-40, 14-62, 17-31, 17-101
(2)	12-101, 12-105	(11)	17-31, 17-34
(3)	12-105	(12)	17 31, 17-34
(4)	12-105	(13)	17-31, 17-35, 17-38, 17-121
(5)	12-105	s.219(1)	17-38
(6)	12 105	(2)(a)	17-37
(7)	12-106	(b)	17-36
(8)	12-106	(c)	17-39
ss.212-214	12-98	(3)	11-181, 13-13, 13-19, 14-40, 14-62, 17-34
s.213(1)	12-107	(4)	11-181, 13-13, 13-19, 14-40, 14-62, 17-34
(2)	12-107	s.220(1)	17-42
(3)	12-107	(2)	17-42
(4)	12 107	(3)	17-42
(5)	12-107	(4)	17-42
ss.213 214	12-98	s.221	16-124
s.214(1)	9-32, 9-47, 10-42, 10-48, 10-69, 10-82, 10-87, 11-165, 12-25, 12-91, 12-107, 16-30, 16-51, 17-64, 17-74, 17-127	s.222	10-32, 12-31, 12-33, 12-36
(2)(a)	8-45	(1)	12-35, 12-36
(b)	9 32, 9 47	(2)	12-35
(c)	12-91	(3)	12-35
(d)	10-42	(4)	17-38, 22-101
(e)	10-48	(a)	12-33
(f)	10-69	(aa)	12-33
(g)	10-82	(b)	12-33
(h)	10-77	(ba)	12-33
(i)	10-96	(c)	12-33
(j)	10-87	(ca)	12-33
(k)	10-87	(cb)	12-33
(l)	11-165	(d)	12-33
(m)	11-165	(e)	12-33
(n)	12-25	(f)	12-33
(o)	16-30	(5A)	12-33
(p)	17-64	(5)	12-34
(q)	17-74	(6)	12-35
(t)	17 127	s.223	17-122
(u)	12-107	(2)	17-122
(v)	16-51	(3)	17-122
s.215	12-20, 13-18, 13-21, 17-55, 17-75, 18-30	(4)	17-122
(1)	12-46, 13-09, 13-10, 17-06	(5)	17-122
(2)(a)	12-47, 17-07	(6)	17-122
(b)	12-47, 13-09, 13-10, 17-08	(7)	17-122
(3)	12-47, 17-07	(8)	17-122
(4)	13-09, 17-08	(9)	17-122
(6)	17-06	s.228(1)	1-08, 6-04, 7-212, 8-53, 10-37, 10-77, 10-114, 10-135, 10-136, 11-80, 11-81, 11-98, 12-18, 12-43, 13-11, 13-14, 13-16, 13-17, 15-08, 16-57, 16-128, 16-133, 18-06, 18-07, 22-43, 22-59
s.216	16-28	(3)	22-43
(1)	10-120, 12-39	(4)	22-43
(2)	12-40	(5)	1-04, 23-09
(3)	12-41		
s.218	17-31		
(1)	13-19, 17-31		
(2)	13-19, 17-31		
(3)	11-181, 13-13, 17-31		

(8)	7-217, 16-19, 22-59	(3)	7-31, 16-42
(9)	7-217	para.2(1)	7-31, 16-43
(c)	16-19	(2)	7-31, 16-44
(10)	7-217, 16-19, 22-59	para.3(1)	16-47
(11)	7-30, 8-08	(3)	16-50
(12)	7-15, 8-03	(4)	16-50
s.229	7-07, 10-114, 12-05, 14-21, 16-124, 21-19	(5)	16 50
(4)	14-22	(6)	16-51
(5)	14-23	(7)	16-51
(6)	14-23	(8)	16-51
(7)	14-22	(9)	16-51
(8)	14-22	(10)	16-51
(9)	14-23	(11)	16-51
(10)	14-23	para.4	7-31
(11)(a)	14-24	(1)	16-56
(b)	14-24	(2)	16-56
(12)	14-24	(3)	16-14, 16-58
(13)	14-24	(4)	16-58
(14)	14-24	(5)	16-59
(15)	14-25	para.5	7-31
s.230	14-26	(1)	16-62
s.231	11-96	(2)	16-62
s.233	15-07	Sch.3 para.1	16-104
s.234(1)	15 39	para.2	16-104
(3)	2-33	(1)	16-104
(7)	1-08, 12-58	(2)	16-104
s.235	11-118	(3)	16-104
(1)	2-33	para.3	16-104
(2)	2-33	para.4	16-104
(3)	2-33	para.5	16-104
(4)	2-33, 12-37	para.6	16-104
(5)	2 33	para.7	16-105
(6)	2-33	para.8	16 105
(7)	2-33	para.9	16-104, 16-105
s.236	2-33	para.12	16 104
Sch.1	19-04	para.13	16 105
para.1(2)	19-06	para.25	16-17
(3)	19-08	Pt 1 paras 1-6	16-98
(4)	19-09	paras 7-8	16-98
(5)	19-12	Pt 2	16-98
(6)	19-07, 19-08, 19-10	para.10	16-104
para.2(1)	19-13	para.13	16-104
(2)	19-13	Sch.4	22-59, 22-130
(3)	19-13	para.1	22-59
(4)	19-13	para.2	22-59
(5)	19-13	para.3(1)	22-59
(6)	17-66, 19-13	(2)	22-59
(7)	19-14	(3)	22 59
para.3(1)	19-15	para.4	22-59
(2)	19-15	para.5	22-59
(3)	19-16	Sch.5	12-109
(4)	19-16	para.18	14-36
para.4(1)	19-17	para.19	14-81
(2)	19-17	para.20	14-60
(3)	19-17	para.23	13-34
(4)	19-17	para.24	13-34
(5)	19-17	para.26	16-29
para.5(1)	19-18	para.27	16-34
(2)	19-18	para.35	12-41
(3)	19-18	para.38(a)	10-127
(4)	19-18	para.38(b)	10-127
Sch.2	11-82, 16-35	para.38(c)	10-128
para.1(1)	7-31, 16-36	Sch.6	10-122, 10-137
(2)	16-41	para.1	10 138
		para.2	10-138
		para.3	10-139

para.4	10-140
para.5	10-141
para.6	10-141
para.7	10-140, 10-141
para.8	10-142
para.9	10-142
para.10	10-142
para.11	10-143
para.12	10-144
para.13	10-145
para.14	10-114, 10-146
para.15	10-114, 10-146
para.16	10-146
para.17	10-147
para.18	10-148
para.19	10-149
para.20	10-149
para.21	10-149
para.22	10-150
para.23	10-150

para.24	10-150
para.25	10-151
para.26	10-124
para.27	10-124,
para.28	10-126
para.29	10-127
para.30	10-127
para.31	10-127
para.32	10-128
Sch.7	15-07
para.1	15-07, 15-08
para.1(1)-(5)	15-08
para.1(3)	15-10
para.1(4)	15-11
para.1(5)	15-12
para.1(6)	15-08
para.1(8)	15-07
para.2	15-08
Sch.8 para.24(1)	15-39
para.24(2)	15-39

TABLE OF STATUTORY INSTRUMENTS

1982	Statutory Sick Pay (General) Regulations (SI 1982/894) reg.9B.	16-104	1998	Education (Student Support) (Northern Ireland) Order (SI 1998/1760) art.3	22-138
1986	Insolvency Practitioners Tribunal (Conduct of Investigations) Rules (SI 1986/952)	4-102	1998	Teaching and Higher Education Act 1998 (Commencement No.2 and Transitional Provisions) Order (SI 1998/2004) art.3	11 117
1986	Insolvency Practitioners (Recognised Professional Bodies) Order (SI 1986/1764)	4-96	1998	Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order (SI 1998/2766)	25-09
1986	Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order (SI 1986/2123)	25-09	2000	Company Directors Disqualification (Northern Ireland) Order (SI 2002/3150)	4-90
1989	Insolvency (Northern Ireland) Order (SI 1989/2405)	4-90	2001	Financial Services and Markets Act 2000 (Regulated Activities) Order (SI 2001/544)	4-108
	art.352	4-72, 4-92, 4-106		arts 39D-39G	4-108
1989	Insolvency Act 1986 (Guernsey) Order (SI 1989/2409)	25-09	2001	Electricity (Class Exemptions from the Requirement for a License) Order (SI 2001/3270) Sch.4 Class B	12-33
1992	Act of Sederunt (Judicial Factors) Rules (SI 1992/272)	23-16	2002	Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations (SI 2002/836)	11-109, 14-87, 14-90, 14-98
	r.4	23-16		reg.1(4)(c)	11-109
1993	Act of Sederunt (Sheriff Court Ordinary Cause Rules) (SI 1993/1956)	1-15		reg.2	11-109
1994	Act of Sederunt (Rules of the Court of Session 1994) (SI 1994/1443)	4-28, 23-16		reg.11	11-109
	r.14.2	23-16		reg.12	11-109
	r.14.3(b)	23-15		reg.13	11 109
	r.62.91(2)	25-201, 25-244		reg.14	11-109
	(3)	25-201		(1)	11-109
	r.62.92(1)	25-201		reg.15(1)	11-109
	(3)(a)	25-201		(2)	11-109
	(b)	25-201		(3)	11-109
	(c)	25-201		(4)	11-109
	(d)	25-201		(5)	11-109
	(4)	25-201		reg.16	14 90
	(5)	25-210		reg.17	14-90, 14-98
	r.62.93(1)	25-213		reg.18	14-98
	(2)	25-213		reg.19(1)(c)	14-86, 14-94
	r.62.94	25-223	2002	Company Directors (Northern Ireland) Order (SI 2002/3150)	25-09
	r.62.95	25 243	2003	Insolvency Practitioners and Insolvency Service Account (Fees) Order (SI 2003/3363)	4-95
	r.62.96	25-215	2005	Insolvency Practitioners Regulations (SI 2005/524)	4-106, 22-18
	(1)	25-209		Pt 2	4-102
	(2)	25-209			
	r.72.5	12-113			
1996	Co-operation of Insolvency Courts (Designation of Relevant Countries) Order (SI 1996/253)	25-09			
1997	Council Tax (Exempt Dwellings) (Scotland) Order (SI 1997/728)	12-37			
	art.2	12-37			
	art.3	12-37			
	Sch. para.21	12-37			

	Pt 4	4–103		(4)	25–208
	reg.12	4–106		(5)	25–208
	Sch.2	4–106		para.9	25–245
2005	Insurers (Reorganisation and Winding Up) (Lloyds) Regulations (SI 2005/1998)			para.10	25–245
	reg.40	22–59	2007	para.11	25–229
2006	Transfer of Undertakings (Protection of Employment) Regulations (SI 2006/246)	12–18		Sch.5	25–177
	reg.3(1)	12–18		Cross-Border Insolvency Regulations (Northern Ireland) (SI 2007/115)	25–166
	reg.8(7)	12–18	2009	Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order (SI 2009/1941)	6–06
2006	Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order (SI 2006/606)	11–114	2009	Services (Insolvency Practitioners) Regulations (SI 2009/3081)	4–72
2006	Cross-Border Insolvency Regulations (SI 2006/1030)	2–27, 7–204, 24–25, 25–02–25–04, 25–06, 25–14, 25–165, 25–171, 25–172, 25–176, 25–177, 25–192, 25–205, 25–243, 25–245, 25–255	2014	Banks and Building Societies (Depositor Preference and Priorities) Order (SI 2014/3486)	16–103
	reg.1(1)	25–166	2015	Deposit Guarantee Scheme Regulations (SI 2015/486)	16–104
	reg.2(1)	2–27, 25–166	2015	Insolvency (Protection of Essential Supplies) Order (SI 2015/989)	12–32
	(2)	25–169	2015	Insolvency Practitioners (Recognised Professional Bodies) (Revocation of Recognition) Order (SI 2015/2067)	4–81
	(4)	25–243	2016	Insolvency Practitioners (Recognised Professional Bodies) (Revocation of Recognition) Order (SI 2016/403)	4–81
	reg.3(1)	25–172, 25–244	2016	Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order (SI 2016/1034)	2–33, 4–85
	(2)	25–172, 25–244		art.3(1)	13–36
	(3)	25–244		(2)	13–36
	(4)	25–244		(3)	13–26, 13–27
	reg.7(1)	25–177		(5)	13–33
	(2)	25–177		(6)	13–12, 13–32
	(3)	25–177		art.4(1)	17–75
	reg.8	25–176		(2)	17–75
	Sch.1	2–27, 25–166		(3)(a)	17–75
	Sch.3	25–177		(b)	17–75
	para.1(3)	25–203		(c)	17–75
	(3A)	25–203		(d)	17–75
	para.2(1)	25–242		(e)	17–75
	(3)	25–243		(f)	17–75
	para.4(1)(a)	25–209, 25–215, 25–223, 25–243		(g)	17–06, 17–75
	(b)	25–215, 25–227, 25–243		(4)	17–75
	para.5(1)	25–209, 25–215		(5)	17–78
	para.6(1)	25–203, 25–209, 25–215, 25–223, 25–243		(6)	17–75
	para.7(1)	25–206, 25–209, 25–215, 25–227, 25–243		(7)	17–75
	(2)	25–206, 25–209, 25–215, 25–227, 25–243		art.6(1)(a)	7–217
	(3)	25–206, 25–209, 25–215, 25–227, 25–243		(b)	7–217
	(5)	25–207, 25–209, 25–215, 25–227, 25–243		(c)	16–19
	para.8(1)	25–208, 25–215, 25–227		(d)	22–59
	(2)	25–208		(2)	7–217, 16–19, 22–59
	(3)	25–209, 25–215, 25–243		(3)	7–217, 16–19, 22–59
				(4)	7–217, 16–19
			2017	Insolvency Amendment (EU 2015/848) Regulations (SI 2017/702)	22–156

TABLE OF SCOTTISH STATUTORY INSTRUMENTS

1986	Insolvency (Scotland) Rules (SSI 1986/1915)	17-26	reg.20(2)(b)	21-49, 21-71	
	r.2.36H(4)(e)	17-27	reg.21(1)	21-41	
	r.2.36J(a)	17-26	(2)(b)	21-44	
	r.3.6	17-26, 17-27	reg.22(4)	21-81	
	r.4.48(4)	17-27	(2A)	21-73	
	r.5	17-26, 17-27	reg.23	21-81	
	r.50(1)(a)	17-26	reg.24	21-54, 21-136	
1998	Teaching and Higher Education Act 1998 (Commencement No.2 and Transitional Provisions) Order (SSI 1998/2004)	17-75	reg.26	21-81	
	art.3	17-75	reg.27(1)	21-81	
2001	Limited Liability Partnerships (Scotland) Regulations (SSI 2001/128)	6-06	(2)	21-81	
2001	Health Boards (Membership and Procedure) (Scotland) Regulations (SSI 2001/302)	17-24	(3)	21-81	
	reg.6(1)(g)	17-24	reg.31A	5-12, 21-73	
	(2)	17-24	reg.34	21-64	
	(3)	17-24	reg.39(3)	21-111	
2002	Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) (SSI 2002/560)	21-81, 21-111	reg.50(4)	21-158	
2004	Debt Arrangement and Attachment (Scotland) Act 2002 (Commencement) Order (SSI 2004/401)	21-02	(5)	21-158	
2004	Debt Arrangement and Attachment (Scotland) Act 2002 (Commencement No.2 and Revocation) Order (SSI 2004/416)	21-02	Sch.1 Form 1	21-63	
2004	Debt Arrangement and Attachment (Scotland) Act 2002 (Transfer of Functions to the Accountant in Bankruptcy) Order (SSI 2004/448)	4-12, 21-13	Sch.5	21-32	
2004	Debt Arrangement Scheme (Scotland) Regulations (SSI 2004/468)	21-08, 21-09, 21-63, 21-71, 21-81	2004	Debt Arrangement Scheme (Scotland) Amendment Regulations (SSI 2004/470)	21-08, 21-30
	reg.5	21-149	2004	Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) Amendment (The Debt Arrangement Scheme (Scotland) Regulations 2004) (SSI 2004/505)	21-81, 21-111
	reg.8(1)	21-15	2005	Teachers' Superannuation Scheme (Scotland) Regulations (SSI 2005/393)	11-114
	(2)	21-15		reg.E38	11-114
	(3)	21-15	2006	Act of Sederunt (Sheriff Court Caveat Rules) (SSI 2006/198)	8-10
	(4)	21-15		r.2	8-10
	reg.9	21-15	2006	Education (Student Loans for Tuition Fees) (Scotland) Regulations (SSI 2006/333)	11-117, 11-118, 17-75
	reg.10	21-15		reg.12	11-117, 11-118, 17-75
	reg.11(1)	21-119	2007	Education (Student Loans) (Scotland) Regulations (SSI 2007/154)	11-117, 11-118, 17-75
	reg.13(1)	21-32		reg.15	11-117, 11-118, 17-75
	(2)	21-32	2007	Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations (SSI 2007/187)	5-12, 21-09, 21-73, 21-81, 21-111, 21-158
	(3)	21-32		reg.3(3)	21-15
	(4)	21-32		(12)	21-54, 21-136
	(5)	21-32		(13)	21-54, 21-136
				(32)(a)	21-158
				(b)	21-158
				(c)	21-158

2007	Debt Arrangement Scheme (Scotland) Amendment Regulations (SSI 2007/262)	21-09, 21-73, 21-82, 21-108, 21-119
	reg.3(2)	21-108
	reg.4	21-108
2008	Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations (SSI 2008/81)	11-193
2008	Bankruptcy (Scotland) Regulations (SSI 2008/82)	8-04, 8-05
2008	Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No.3, Savings and Transitionals) Order (SSI 2008/115)	17-87
2008	Act of Sederunt (Sheriff Court Bankruptcy Rules) (SSI 2008/119)	2-28, 7-38, 7-113, 7-149, 7-188, 8-11, 8-13
	r.15	8-13
	r.16	8-13
	Sch.r.12(2)	7-113, 7-149, 7-188
	(12)	7-38
2008	Act of Sederunt (Rules of the Court of Session Amendment No.3) (Bankruptcy and Diligence etc. (Scotland) Act 2007) (SSI 2008/122)	4-28
2008	Protected Trust Deeds (Scotland) Regulations (SSI 2008/143)	22-06, 22-07, 22-10, 22-46, 22-47, 22-48, 22-60, 22-61, 22-71, 22-128, 22-132
	reg.6(1)	22-46
	(b)	22-71
	reg.8(c)	22-128
	reg.17	22-128
	reg.24	22-151
	reg.26	22-61
	Form 4	22-128
2009	Private Landlord Registration (Modification) (Scotland) Order (SSI 2009/33)	12-18
2009	Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No.4, Savings and Transitionals) Order (SSI 2009/67)	15-23
2009	Debt Arrangement Scheme (Scotland) Amendment Regulations (SSI 2009/234)	21-09, 21-14, 21-22, 21-41, 21-46, 21-66, 21-71, 21-82
	reg.8(b)	21-71
	reg.11	21-82
	reg.13	21-46, 21-66, 21-82
2009	Debt Arrangement Scheme (Scotland) Revocation Regulations (SSI 2009/258)	21-09
2010	Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations (SSI 2010/300)	11-116, 11-117
	reg.2	17-75
	reg.3	17-75
2010	Bankruptcy (Scotland) Amendment Regulations (SSI 2010/367)	11-57
2010	Protected Trust Deeds (Scotland) Amendment Regulations (SSI 2010/398)	22-07, 22-61, 22-71
2011	Debt Arrangement Scheme (Scotland) Regulations (SSI 2011/141)	5-02, 5-12, 21-01, 21-02, 21-09, 21-14-21-16, 21-22, 21-30, 21-32, 21-40, 21-41, 21-44, 21-45, 21-49, 21-54, 21-58, 21-63, 21-64, 21-71-21-74, 21-82, 21-95, 21-108, 21-109, 21-119, 21-122, 21-136, 21-141, 21-143, 21-144
	reg.2	21-13
	(1)	21-21, 21-40, 21-41, 21-51, 21-56, 21-62, 21-64, 21-157
	(1A)	21-40
	reg.3	21-41
	(1)(a)	21-51
	(b)	21-51
	(c)	21-52
	(2)(a)	21-52
	(b)	21-52
	(c)	21-21, 21-52
	(d)	21-52
	reg.4	21-144
	reg.4A(1)	21-141
	(2)	21-141
	(3)(a)	21-141
	(b)	21-141
	(4)	21-141
	reg.5(1)	21-72, 21-109
	(2)	21-72
	(3)	21-72
	(4)	21-72
	reg.7(1)	21-14
	(2)	21-19
	(3)	21-30
	(4)	21-30
	reg.8(a)	21-16
	(b)	21-16
	(c)	21-16
	(d)	21-16
	(e)	21-16
	(f)	21-16
	reg.8A	21-16
	reg.9	21-16
	(1)	21-16

(2)	21-16	(g)	21-147
reg.10(a)	21-17	(h)	21-147
(b)	21-17	(ha)	21-147
(c)	21-17	(hb)	21-147
(d)	21-17	(hc)	21-147
(e)	21-17	(i)	21-147
(f)	21-17	(3)	21-148
(g)	21-17	reg.20(2)(a)	21-48
reg.11	21-17	(b)	21-49
(1)a)	21-28	(c)	21-63
(b)	21-28	(2A)	21-50
(c)	21-29	(2B)	21-56
reg.12	21-22	(2C)	21-62
(1)	21-23	(3)	5-10, 21-73, 21-74
(a)	21-23	(4)	21-79
(b)	21-23	(4A)(b)	21-79
(c)	21-23	(5)	21-49
(d)	21-23	reg.21(1)	21-41
(e)	21-23	(a)	21-41
(f)	21-23	(b)	21-41
(2)	21-21	(2)(a)	21-42
(3)	21-24	(b)	21-42, 22-96
(a)	21-24	(c)	21-42
(b)	21-24	(d)	21-42
(c)	21-24	(e)	21-42
(4)	21-26	(3)	21-41
(5)	21-27	(4)	21-42
reg.12A(a)	21-24	reg.22(1)	21-45
(b)	21-24, 21-119	(2)	21-49
(c)	21-25, 21-119	(3)	21-45
reg.13(1)	21-33	reg.22A(2)(a)	21-49
(2)	21-33	(b)	21-49
reg.14(1)	21-32	(3)	21-49
(2)	21-32	(4)	21-49
(3)	21-32	(5)	21-49
(b)	21-32	(6)	21-49
(4)	21-32	(7)(a)	21-62
(5)	21-32	(b)	21-62
(6)	21-32	(c)	21-62
reg.15	21-32	(8)(a)	21-53
(a)	21-37	(b)	21-53
(b)	21-37	(c)	21-84
(c)	21-37	(9)	21-94, 21-96
(d)	21-37	(10)	21-87, 21-89, 21-110, 21-114, 21-123
reg.16(1)	21-35	(11)	21-88, 21-90, 21-125, 21-132
(a)	21-35	(12)	21-62
(b)	21-35	reg.23(1)	21-63
(c)	21-35	(2)	21-63
(d)	21-35	(3)	21-65
(e)	21-35	(3A)	21-65
(2)	21-38	(4)	21-65
(3)	21-36	(5)	21-66
reg.17(1)(a)	21-34	(6)	21-67
(b)	21-34, 21-72	(7)	21-67
(2)	21-34, 21-72	(8)	21-68
reg.18(1)	21-146	reg.23A	21-80
(2)	21-146	reg.24(1)	21-80
reg.19(1)	21-147	(1A)	21-63
(f)	21-89	(2)	21-86
(2)	21-146, 21-147	reg.25(1)	21-80
(a)	21-147	(2)(za)	21-83
(b)	21-147	(zb)	21-83
(c)	21-147	(a)	21-83
(d)	21-147	(b)	21-83
(e)	21-147		
(f)	21-147		

(c)	21-83	(d)	21-101
(d)	21-83	(2)	21-98
(e)	21-83	(3)	21-99
(f)	21-83	(4)	21-99
(g)	21-83	(6)	21-98
(h)	21-83	reg.34(1)(a)	21-96
(i)	21-83	(b)	21-96
(j)	21-83	(2)	21-96
(3)	21-84	reg.35	21-95
(8)	21-86	reg.36(1)	21-14, 21-103
reg.26(1)	21-87	(a)	21-103
(2)	21-87	(b)	21-103
reg.27(1)	21-85	(2)	21-103
(2)(a)	21-85	(3)	21-106
(b)	21-85	(4)	21-110
(c)	21-64, 21-85	(5)	21-14
(d)	21-85	(a)	21-103
(e)	21-85	(b)	21-103, 21-106
(f)	21-85	reg.36A	21-110
(g)	21-85	(1)	21-106
(h)	21-85	(2)	21-106
(i)	21-85	(3)	21-110
(j)	21-85	reg.37(1)(a)	21-108
(k)	21-85	(b)	21-108
(l)	21-47, 21-85	(c)	21-108
(3)(a)	21-85	(d)	21-108
(b)	21-85	(e)	21-91, 21-108, 21-116, 21-130, 21-142, 21-151
(4)	21-85	(ea)	21-108
reg.28(1)	21-86	(f)	21-91, 21-108, 21-116, 21-130, 21-142, 21-151
(2)(a)	21-86	(g)	21-108
(b)	21-86	(h)	21-108
(c)	21-86	(4)	21-108
(3)	21-86	reg.38(1)	21-111
reg.29(1)	21-87, 21-88	(2)	21-111
(2)	21-87, 21-89	(3)(a)	21-111
(3)(a)	21-87	(b)	21-112
(4)(a)	21-87	(4)	21-113
(b)	21-89	reg.39(1)	21-114
reg.30	8-10, 8-21, 21-73	(2)	21-114
(1)	21-76	reg.40	8-21, 21-95, 21-102
(ba)	7-35, 7-110, 7-146, 7-185, 21-75	(a)	21-118
(c)	21-74, 21-129	(aa)	21-118
(2A)	21-75	(b)	21-118
(a)	21-75	reg.40A	21-118
(b)	21-75	(1)	21-118
(c)	21-75	(2)	21-118
(d)	21-75	reg.41(1)	21-119
(2B)	21-78	(a)	21-119
(3)	21-76	(b)	21-120
(4)	21-76	(2)	21-121
reg.31(1)(a)	21-58	(3)	21-119
(b)	21-58	(b)	21-119
(c)	21-58	reg.42(1)	21-122
(d)	21-58	(2)	21-123
(2)	21-58	(a)	21-122
reg.32	21-139	(b)	21-122
(1)	21-58	(c)	21-122
(2)	21-58	(d)	21-122
(3)	21-58	(e)	21-122
(4)	21-58	(3)	21-122
(5)	21-58	(4)	21-122
(6)	21-58		
reg.33(1)(a)	21-94		
(b)	21-98		
(c)	21-101		

reg.43(1).....	21-124	(2)	21-127
(2)	21-124	(3)	21-127
reg.44(1).....	21-125	(4)	21-127
(2)	21-125	reg.5(1).....	21-127, 21-151, 21-155
reg.44A(1)	21-126	(1A)	21-157
(2)	21-126	(2)	21-157
reg.46(1).....	21-132	(3)	21-157
(2)	21-132	(4)	21-158
reg.46A(1)	21-137	reg.7	21-02
(a)	21-137	2011 Act of Sederunt (Sheriff Court Rules)	
(b)	21-137	(Miscellaneous Amendments)	
(1A)	21-136	(No.2) (SSI 2011/289).....	8-11
(2)	21-137	2012 Bankruptcy Fees etc. (Scotland)	
(3)	21-137	Regulations	
reg.46B(1)	21-138	(SSI 2012/118)	4-32, 4-50
(2)	21-138	reg.12	4-51
(3)	21-138	2013 Debt Arrangement Scheme	
reg.46C	21-133, 21-139	(Scotland) Amendment	
reg.46D(1)	21-105, 21-139	Regulations	
(2)	21-139	(SSI 2013/225)	21-10, 21-54, 21-65, 21-91, 21-95, 21-108, 21-114, 21-116, 21-126, 21-127, 21-130, 21-136, 21-150
reg.47	21-91, 21-116, 21-130, 21-141, 21-147, 21-150	reg.3(3).....	21-93, 21-134
(1)	21-91, 21-151	(4)	21-93
(2)	21-91, 21-151	(5)	21-127, 21-151—21-155, 21-157
(3)	21-91, 21-116, 21-130, 21-142, 21-151	reg.5	21-141
(4)	21-152	reg.6(1).....	21-21, 21-64
(5)	21-153	(2)	21-21, 21-52
reg.47A(a)	21-154	(3)	21-24
(b)	21-154	reg.8(1)(a)	21-35
reg.47B(1)	21-155	(b)	21-35
(2)	21-155	(c)	21-35
reg.47C(1)	21-91, 21-116, 21-130, 21-142, 21-157	(2)	21-35, 21-72
(2)	21-157	reg.9	21-147
(3)	21-158	(a)	21-147
reg.49(1)	21-15	reg.10	21-45
(2)	21-31	reg.11(1)(a)	21-65
reg.50	21-02	(b)	21-66
Sch.A1	21-56	(c)	21-68
Sch.1 Form 1	21-48, 21-56	(2)	21-69
Form 1B	21-48, 21-57	reg.12	21-85
Form 2	21-87	reg.13(1).....	21-104, 21-110
Form 2B	21-87	(2)(a)	21-108
Form 3	21-58	(b)	21-108
Form 4	21-106	(3)	21-114
Form 4B	21-106	reg.14(1).....	21-118
Form 5	21-121	(2)	21-118
Form 5B	21-121	(3)	21-122
Form 6	21-137	(4)	21-125
Form 7	21-62	(5)	21-126
Sch.3	21-16	reg.15	21-105, 21-133, 21-137—21-139
2011 Debt Arrangement Scheme		reg.16(2).....	21-23
(Interest, Fees, Penalties and		reg.17	21-91, 21-116, 21-130, 21-142, 21-151—21-155, 21-157, 21-158
Other Charges) (Scotland)		reg.18(1).....	21-108, 21-121
Regulations		(2)	21-87, 21-106
(SSI 2011/238)	21-01, 21-02, 21-09, 21-108, 21-143	(b)	21-137
reg.3	21-111	reg.19(1).....	21-146
reg.4(1).....	21-93, 21-127, 21-134	(2)	21-132
(1A)	21-93		

	reg.20	21-10	2015	Bankruptcy (Miscellaneous Amendments)	
	reg.47	21-23		(Scotland) Regulations	
2013	Protected Trust Deeds (Scotland) Regulations (SSI 2013/318)	22-10, 22-11, 22-47, 22-48, 22-60, 22-61, 22-71, 22-128, 22-132	2015	Debt Arrangement Scheme (Scotland) Amendment Regulations (SSI 2015/216) . . .	21-10, 21-73
	reg.1	22-61		reg.3	21-53
	reg.23(1)	22-128		reg.5	21-10
	reg.31	22-61	2015	Act of Sederunt (Sheriff Appeal Court Rules) (SSI 2015/356)	8-47
2014	Bankruptcy (Scotland) Regulations (SSI 2014/225)	7-18, 7-65, 7-99, 7-135, 7-174	2016	Act of Sederunt (Lay Representation for Non-Natural Persons) (SSI 2016/243)	8-13
	reg.3(2)	7-18, 7-65, 7-99, 7-135, 7-174	2016	Bankruptcy (Applications and Decisions) (Scotland) Regulations (SSI 2016/295)	4-46, 17-63, 17-73, 17-112
	reg.21	16-104		reg.4	9-26, 9-32, 9-47
2014	Bankruptcy Fees etc. (Scotland) Regulations (SSI 2014/227)	4-32, 10-46, 10-80, 22-129		reg.5(1)	9-26
	regs 3-5	4-49		(b)	10-66
	reg.6	4-49		(c)	10-94
	reg.7	4-50		(d)	10-87
	reg.8	4-51		(e)	10-87
	reg.9	4-51		(f)	12-25
	reg.10	4-50, 22-129		(g)	17-112
	reg.11	4-51		(h)	12-105
	reg.12	4-51		(i)	16-50
	Sch Pt 1	4-49		(2)(a)	10-94
	Pt 2	4-49		reg.6	9-27, 10-87, 10-94
2014	Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No.2, Savings and Transitionals) Order (SSI 2014/261)	16-55		reg.6-8	16-50
	art.4	18-19		reg.7	9-28
2014	Common Financial Tool etc. (Scotland) Regulations (SSI 2014/290)	22-61, 22-128		(2)	9-28
	reg.1	22-61		(3)	9-28
	reg.11	22-61		reg.8	9-28
2014	Debt Arrangement Scheme (Scotland) Amendment Regulations (SSI 2014/294)	21-10, 21-14, 21-16, 21-23-21-25, 21-30, 21-32, 21-40, 21-41, 21-45, 21-47, 21-48, 21-50, 21-53, 21-56, 21-57, 21-62, 21-63, 21-65, 21-73, 21-74, 21-76, 21-79, 21-80, 21-83-21-85, 21-87-21-90, 21-94-21-96, 21-98, 21-103, 21-106, 21-108, 21-110, 21-114, 21-118, 21-119, 21-121-21-123, 21-125, 21-126, 21-128, 21-132, 21-136, 21-146, 21-147, 21-148		reg.9(1)	9-31
	reg.20(1)	21-40		(2)	9-31
	(4A)	21-40		(3)	9-37, 9-45
	reg.21(3)	21-41		(4)	9-39
	reg.23	21-10		(5)	9-39
				(6)	9-35, 9-43, 9-48
				(7)	9-49
				reg.10(1)	12-89
				(2)	12-91
				reg.11(1)	10-65
				(2)	10-67
				(3)	10-68
				(4)	10-68
				reg.12	10-94
				reg.13(1)	10-87
				(2)	10-87
				(3)	10-87
				(4)	10-87
				(5)	10-87
				(6)	10-87
				(7)	10-87
				(8)	10-87
				(9)	10-87
				reg.17(1)	22-156
				(2)	22-158
				(3)	22-158
				reg.18	12-106
				reg.21(1)	9-32, 9-47

(a)	8-44	Ch.10	9-22
(c)	10-29	r.1.4(1)	7-34, 7-38,
(d)	12-91		7-109, 7-113, 7-145,
(e)	10-42		7-149, 7-184, 7-188
(f)	10-47	(2)	8-39, 8-40
(g)	10-69	(3)	7-36, 7-38,
(h)	10-81		7-39, 7-46, 7-48, 7-51,
(i)	10-77		7-53, 7-58, 7-60, 7-75,
(j)	10-96		7-78, 7-83, 7-85, 7-88,
(k)	10-87		7-90, 7-93, 7-95, 7-109,
(l)	10-87		7-111, 7-113, 7-114, 7-120,
(m)	11-162		7-122, 7-125, 7-127, 7-145,
(n)	11-162		7-147, 7-149, 7-150, 7-156,
(o)	12-25		7-158 7-161, 7-163, 7-166,
(p)	16-30		7-168, 7-184, 7-185, 7-188,
(q)	17-63		7-189, 7-195, 7-197, 7-200,
(r)	17-73		7-202, 7-204
(s)	18-10	r.4.1(1)	8-13
(t)	18-15	(2)	8-13
(u)	17-127	(3)	8-13
(v)	12-107	(4)	8-13
(w)	16-51	(5)	8-13
(2)	9-47	r.4.2	8-13
(3)	9-32, 9-47,	r.4.3(1)	8-13
	10-29, 10-42, 10-47,	(2)	8-13
	10-69, 10-77, 10-81,	r.4.4	8-13
	10-87, 10-96, 11-165,	r.4.5	8-13
	12-25, 12-91, 12-107,	r.4.6	8-13
	16-30, 16-51, 17-64,	r.6.1(1)	7-36, 7-46, 7-51,
	17-74, 17-127, 18-10,		7-58, 7-75, 7-83, 7-88,
	18-15		7-93, 7-111, 7-120,
(a)	8-44		7-125, 7-147, 7-150, 7-156,
(b)	8-44		7-161, 7-166, 7-186, 7-195,
(4)	8-44		7-200, 7-202, 7-204
(5)	8-45, 9-32,	(2)	7-39, 7-48,
	9-47, 10-29, 10-42,		7-53, 7-60, 7-78, 7-85,
	10-47, 10-69, 10-77,		7-90, 7-95, 7-114, 7-122,
	10-81, 10-87, 10-96,		7-127, 7-158, 7-163, 7-168,
	11-165, 12-25, 12-91,		7-189, 7-197
	12-107, 16-30, 16-51,	r.6.2	7-34, 7-38,
	17-64, 17-74, 17-127,		7-109, 7-113, 7-145,
	18-10, 18-15		7-149, 7-184, 7-188
(7)	10-87	(2)	7-34, 7-38,
(8)	10-87		7-109, 7-113, 7-145,
(9)	10-87		7-149, 7-184, 7-188
Sch Form 1	9-26, 10-66,	r.6.3	8-11
	10-87, 10-94, 12-25,	(1)	8-11
	12-105, 16-50	(2)	8-11
Form 2	12-89	(a)	8-11
Form 3	8-44, 9-32,	(3)	8-11
	9-47, 10-29, 10-42,	r.6.3—6.6	8-11
	10-47, 10-69, 10-77,	r.6.4	8-11
	10-81, 10-87, 10-96,	r.6.5	8-11
	11-162, 12-25, 12-91,	r.6.6	8-11
	12-107, 16-30, 16-51,	r.6.7	8-50
	17-63, 17-73, 17-127,	(1)(b)	10-12
	18-10, 18-15	(c)	10-21
Form 4	10-65	(2)	10-12, 10-21
Form 5	10-87	r.7.1	10-66, 11-195
Form 6	22-156	(1)	11-166, 12-25,
Form 7	22-158		12-74, 12-94,
2016 Act of Sederunt (Sheriff Court			12-100, 17-99
Bankruptcy Rules)		(2)(a)	12-89
(SSI 2016/313)	7-38,	(b)	12-91
	7-113, 7-149, 7-188,	(f)	12-25
	8-11, 8-13	r.7.4	11-195, 12-100

(1)	11-166, 12-90, 17-99	10-56, 12-75, 13-16,
(3)	12-91	13-17, 13-27, 16-09,
(a)	12-90, 17-99	17-54, 17-59, 17-65,
(b)	12-90, 17-99	17-68, 17-71
(4)	12-90, 12-91	reg.4(a)(i)
r.7.5	10-64	(ii)
r.9.1	8-45, 16-127,	(b)(i)
	16-132, 22-147,	(ii)
	22-148	(iii)
r.9.2	8-45	(iv)
r.9.3	8-45, 16-127,	reg.5(1)(a)
	16-132	(b)
r.10	10-116, 17-124	(c)
r.10.1	8-30	(d)
(1)(b)	8-47	(e)
(2)	8-47	(f)
(3)-(5)	8-47	(g)
(6)(a)	8-47	(h)
Sch. 1 Form 6.1-A	7-36,	(2)
	7-40, 7-46, 7-47,	(3)
	7-50-7-52, 7-58, 7-59,	(4)
	7-75, 7-83, 7-84, 7-88,	reg.6
	7-89, 7-93, 7-94, 7-111,	reg.7(1)
	7-120, 7-125, 7-126, 7-147,	(2)
	7-156, 7-157, 7-161 7-162	(3)
	7-166, 7-167, 7-186, 7-195,	reg.8
	7-196, 7-200, 7-201, 7-204	reg.9
Form 6.1-B	7-39,	reg.10
	7-48, 7-53, 7-60,	reg.11(1)
	7-78, 7-85, 7-90, 7-95,	(2)
	7-114, 7-122, 7-127, 7-150,	reg.12(1)(a)
	7-158, 7-163 7-168, 6-189,	(b)
	7-197, 7-202	7-135, 7-136, 7-174,
Form 6.2	7-34, 7-38,	7-175, 13-16
	7-109, 7-113, 7-145,	(2)
	7-149, 7-184, 7-188	7-102, 7-138, 7-177
Form 6.3-A	8-11	(3)
Form 6.3-B	8-11	(4)
Form 7.5	10-64	(5)
Form 7.1-A	10-66,	(6)
	11-166, 11-195,	(7)
	12-25, 12-74, 12-94,	reg.13
	12-100, 17-99	reg.15(1)
Form 7.1-B	12-25,	(2)
	12-89, 12-91	(3)(a)
Form 9.1	8-45,	(b)
	16-127, 16-132,	(4)
	22-147, 22-148	(5)
Sch.2 para 1	8-39, 8-40	(7)
para.2(1)	8-39	(8)
(2)	8-40	(9)
Appendix Form A	8-39	(10)
Form B	8-40	(11)
Form C	22-59	reg.16
Form D	22-59	reg.17(1)
2016 Bankruptcy (Scotland) Regulations		11-139, 11-163
(SSI 2016/397)	1-08,	(2)
	4-28, 4-29, 7-08,	11-139, 11-163
	7-99, 7-135, 7-174,	(3)
	11-132, 11-133	(4)
reg.2(1)	11-133	reg.19(1)
reg.3	7-18, 7-24,	(2)
	7-37, 7-65, 7-70, 7-99,	reg.20(1)(a)
	7-100, 7-102, 7-135,	(2)(b)
	7-136, 7-138, 7-174,	(3)
	7-175, 7-177, 8-52,	(4)

(5)	11–150	Form 24	13–27
(6)	11–152	Form 25	17–54
(7)	11–151	Form 26	17–59
reg.21	16–11	Form 27	17–65
reg.22	16–12	Form 28	17–68
reg.24(1)	11–175	Form 29	17–68
(2)	11–175	Form 30	17–68, 17–69
(3)	11–175	Form 31	17–71
reg.25	17–133	Form 32	17–71
(a)	17–137	Form 33	5–06
(b)	17–137	Form 34	5–07
reg.26	16–41, 16–107	Sch.2	4–28, 4–29
reg.28	16–124	2016 Protected Trust Deeds	
reg.27	17–68, 17–69	(Forms) (Scotland) Regulations	
reg.29(1)	5–06	(SSI 2016/398)	22–02,
(2)	5–07		22–10
reg.30	4–28, 4–29	reg.2(1)	22–69, 22–83,
(2)	4–31		22–84, 22–86, 22–111,
reg.31	6–09		22–114, 22–125, 22–133,
(1)	7–209, 7–211		22–139, 22–141
(3)(a)	7–211	Sch.1 Form 1	22–83
(b)	7–209	Form 1A	22–69
Sch.1	7–18,	Form 1B	22–114
	7–65, 7–135, 7–174	Form 2	22–84
Form 1	7–18,	Form 2A	22–84
	7–19, 7–21, 7–22, 7–23,	Form 3	22–84, 22–86
	7–25, 7–65, 7–66–7–68	Form 4	22–125, 22–126
Form 2	7–15, 7–18	Form 4A	22–111
Form 3	7–99,	Form 4B	22–111
	7–135, 7–174	Form 4C	22–111
Form 4	7–100, 7–136,	Form 5	22–133
	7–175, 8–55, 13–16	Form 6	22–139, 22–141
Form 5	1–08	2017 Act of Sederunt (Rules of the	
Form 6	7–37	Court of Session 1994 and	
Form 7	8–07	Sheriff Court Rules	
Form 8	8–07	Amendment) (Regulation	
Form 9	8–36	(EU) 2015/848)	
Form 10	13–17	(SSI 2017/202)	2–36
Form 11	16–09	2017 Public Services Reform	
Form 12	7–24, 7–70,	(Corporate Insolvency and	
	7–102, 7–138, 7–177	Bankruptcy) (Scotland)	
Form 13	8–52, 10–56	Order (SSI 2017/209)	2–37,
Form 15	11–175		12–32, 12–33,
Form 16	11–175		12–36, 22–100, 22–106
Form 17	11–138	art.6	12–32
Form 18	11–139	art.7	12–32
Form 19	11–148	2017 Insolvency (Regulation (EU)	
Form 20	11–149	2015/848) (Miscellaneous	
Form 21	11–151	Amendments)	
Form 22	12–75	(Scotland) Regulations	
Form 23	11–153,	(SSI 2017/210)	2–36,
	12–44, 13–20		12–109

TABLE OF EU LAW

Treaties and Conventions

1950	European Convention on Human Rights	14-30
	art.8	12-19, 12-86
	Protocol 1 art.1	12-86, 14-33
1957	Treaty of Rome (EEC)	
	art.220	24-29
1990	Convention on Certain Aspects of Bankruptcy,	
	ETS No.136	24-28
1995	Convention on Insolvency Proceedings (Brussels)	24-29, 25-19

Regulations

2000	Reg.1346/2000 on insolvency proceedings [2000]	
	OJ L160/1	1 08, 2-24, 24-22, 24-24, 24-29, 24-32, 25-04, 25-06, 25-19-25-29, 25-36, 25-60
	Recital 4	25-60
	Recital 19	25-119
	Recital 32	25-19
	Recital 33	25-19
	art.43	25-20
	art.47	2-24
2001	Reg.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I) [2001]	
	OJ L12/1	25-50-25-52
	arts 39-44	25-98
	arts 47-57	25-98
2001	Reg.45/2001 on data protection [2001] OJ L8/1	25 163
2015	Reg.2015/848 on insolvency proceedings (recast) [2015]	
	OJ L141/19	25-23-25-28, 25-30, 25-33, 25-37-25-39, 25-41, 25-48, 25-50, 25-54, 25-71, 25-120, 25-121, 25-195, 25-201, 25-255
	Recital 5	25-61
	Recital 9	25-33
	Recitals 10-17	25-30
	Recital 13	25-54, 25-57
	Recital 19	25 38
	Recital 23	25-40
	Recital 25	25-39
	Recital 26	25-41
	Recital 27	7-215
	Recitals 29-31	25-61
	Recital 37	25-40
	Recital 66	25-68
	Recital 68	25-72, 25-76
	Recitals 68-73	25-71

Recital 70	25-70
Recital 71	25-84
Recital 72	25-86, 25-87
Recital 73	25-93
Recital 87	25-24
Recital 88	25-24
art.1.1	25-30, 25-31
art.1.2	4-29, 25-38
art.2	25 32
(2)	25-38
(4)	4-29, 25-33
(5)	25-34, 25-35
(9)	25-72
(10)	25-65
(11)	25-46
(12)	25-152
art.3	4-29, 25-41, 25-95
art.3.1	1-08, 25-42, 25-54, 25-61
art.3.2	25-43, 25-47
art.3.3	25-44
art.3.4	25-45
art.4	7-215
art.4.1	25-48
art.4.2	25-48
art.5.1	25-49
art.5.2	25-49
art.6.1	25-52
art.6.2	25-52
art.6.3	25-52
art.7	25-69
art.7.1	25-69
art.7.2	25-70
(a)	25-70
(b)	25-70
(c)	25-70
(d)	25-70
(e)	25-70
(f)	25-70
(g)	25-70
(h)	25 70
(i)	25-70
(j)	25-70
(k)	25 70
(l)	25 70
(m)	25-70, 25-75, 25-77, 25-81
arts 7-18	25-68
art.8	25-72, 25-84, 25-117
art.8.1	25-72
art.8.2(a)	25-73
(b)	25-73
(c)	25-73
(d)	25-73
art.8.3	25-74
art.8.4	25 75
art.9	25-77

art.9.1	25-77	art.36.11	25-129
art.9.2	25-77	art.37	7-50, 7-82, 7-87, 7-119, 7-124, 7-155, 7-160, 7-194, 7-199
art.10	25-78, 25-102, 25-117	art.37.1	25-132
art.10.1	25-79	art.37.2	25-133
art.10.2	25-80	art.38.1	25-134
art.10.3	25-81	art.38.2	25-135
art.11	25-82	art.38.3	25-136
art.11.1	25-82	art.38.4	25-137
art.11.2	25-82	art.39	25-138
art.12	25-84	art.41	25-140
art.12.1	25-84	art.41.1	25-140
art.12.2	25-85	art.41.2	25-140
art.13	25-86, 25-90	art.42	25-142
art.13.1	25-86	art.42.1	25-142
art.13.2	25-86	art.42.2	25-142
art.14	25-88	art.42.3	25-142
art.15	25-89	art.43	25-143
art.17	25-92	art.43.1	25-143
art.18	25-93	(a)	25-143
art.19	25-98	(b)	25-143
art.19.1	25-95	(c)	25-143
art.19.2	25-95	art.43.2	25-143
art.20.1	25-100	art.44	25-144
art.20.2	25-101	art.45	25-145
art.21.1	25-102	art.45.1	25-145
art.21.2	25-103	art.45.2	25-145
art.21.3	25-104	art.45.3	25-145
art.22	25-105	art.46	25-146
art.23.1	25-117	art.46.1	25-146
art.23.2	25-117	art.46.2	25-146
art.24.1	25-110	art.47	25-147
art.24.2	25-110	art.47.1	25-147
art.24.3	25-110	art.48	25-148
art.24.4	25-111	art.48.1	25-148
arts 24-27	25-110	art.49	16-112, 25-148
art.25.1	25-112	art.50	25-46, 25-149
art.25.2	25-112	art.51	25-149
art.26.1	25-112	art.51.1	25-46
art.26.2	25-112	art.51.2	25-46
art.27.1	25-113	art.52	25-53
art.27.2	25-113	art.53	25-151
art.27.3	25-113	art.54.1	25-153
art.27.4	25-113	art.54.2	25-154
art.28.1	25-107	art.54.3	25-155
art.28.2	25-107	art.54.4	25-156
art.29.1	25-108	art.55.1	25-157
art.29.2	25-108	art.55.2	25-158
art.30	25-109	art.55.3	25-158
art.31.1	25-115	art.55.4	25-158
art.31.2	25-116	art.55.5	25-159
art.32.1	25-98	art.55.6	25-160
art.32.2	25-98	art.55.7	25-161
art.33	25-99	art.78.1	25-163
art.34	25-118	art.78.2	25-163
art.35	25-121	art.79	25-164
art.36	12-12, 22-109	art.80	25-164
art.36.1	25-122	art.81	25-164
art.36.2	25-123	art.82	25-164
art.36.4	25-124	art.83	25-164
art.36.5	25-124	art.84.1	25-24
art.36.6	25-125	art.84.2	25-24
art.36.7	25-126	art.90	25-26
art.36.8	25-127	art.90.1	25-26
art.36.9	25-127		
art.36.10	25-128		

Annex A	25–32, 25–33, 25–46	2012	Dir.2012/30 Second Company Directive (recast) [2012]
Annex B	25–35, 25–36	2014	OJ L315/74 2–41, 11–14 Dir.2014/49 on deposit guarantee schemes (recast) [2014]
Directives			
1995	Dir.95/46 on data protection [1995] OJ L281/31	2014	OJ L173/149 16–104
	art.3.2 25–163		
2006	Dir.2006/123 on services in the internal market [2006] OJ L376/36		Dir.2014/59 establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L173/190 16–103
	4 72		

TABLE OF UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

1997	UNCITRAL Model Law on Cross-Border Insolvency.....	24-22, 24-25, 24-30, 24-31, 25-04, 25-05, 25-165 25-170, 25-175, 25-179, 25-182-25-188, 25-193, 25-195, 25-196, 25-201, 25-232, 25-233, 25-235
	Ch.II.....	25-191
	Ch.III.....	25-211
	Ch.IV.....	25-231
	Ch.V.....	25-236
	art.1(1).....	25-179
	(2).....	25-183
	(4).....	25-184
	(5).....	25-184
	(6).....	25-184
	(7).....	25-184
	art.2.....	25-172, 25-204
	(a)(i).....	25-173
	(ii).....	25-173
	(b).....	25-185
	(c).....	25-196
	(f).....	25-180
	(g).....	25-195
	(h).....	25-196
	(i).....	25-180
	(j).....	25-180
	(k).....	25-214
	(l).....	25-201, 25-214
	(m).....	25-214
	(n).....	25-214
	art.3.....	25-175
	art.4(1).....	25-188
	(2)(a).....	25-189
	(b).....	25-189
	(3).....	25-190
	art.5.....	25-185
	art.6.....	25-186, 25-204
	art.7.....	25-187
	art.8.....	25-169
	art.9.....	25-192
	art.10.....	25-193
	art.11.....	7-204, 25-194
	art.12.....	25-197
	art.13(1).....	25-198
	(2).....	25-198
	(3).....	25-198
	art.14(1).....	25-199
	(2).....	25-199
	(3).....	25-199
	art.15(1).....	25-201
	(2).....	25-201
	(3).....	25-201
	(4).....	25-201
	art.16(1).....	25-201
	(2).....	25-202
	(3).....	25-195, 25-201
	art.17(1).....	25-204
	(2).....	25-204
	(3).....	25-204
	(4).....	25-209
	art.18.....	25-210
	art.19(1).....	25-212
	(a).....	25-212
	(b).....	25-212
	(c).....	25-212
	(2).....	25-215
	(3).....	25-215
	art.20(1).....	25-216
	(2).....	25-216
	(3).....	25-217
	(4).....	25-217
	(5).....	25-217
	(6).....	25-218
	art.21.....	25-220
	(1).....	25-220
	(a).....	25-220
	(b).....	25-220
	(c).....	25-220
	(d).....	25-220
	(e).....	25-220
	(f).....	25-220
	(g).....	25-220
	(2).....	25-221
	(3).....	25-225
	(4).....	25-220
	art.22(1).....	25-214, 25-215, 25-224
	(2).....	25-215, 25-226
	(3).....	25-215, 25-228
	art.23(1).....	25-229
	(2).....	25-229
	(3).....	25-229
	(5).....	25-229
	(6).....	25-229
	(7).....	25-229
	(8).....	25-229
	art.24.....	25-230
	art.25(1).....	25-232
	(2).....	25-232
	arts 25-27.....	25-238, 25-239
	art.26(1).....	25-233
	(2).....	25-233
	art.27.....	25-234
	art.28.....	25-237
	art.29.....	25-238
	(a).....	25-238
	(b).....	25-238
	(c).....	25-238
	art.30.....	25-239
	(a).....	25-239
	(b).....	25-239
	(c).....	25-239
	art.31.....	25-240
	art.32.....	25-241

CHAPTER 1

THE MEANING OF BANKRUPTCY AND INSOLVENCY

INTRODUCTION

Neither bankruptcy nor insolvency, which are often used interchangeably, 1-01
are technical terms in Scots law and Goudy notes that “[i]nsolvency and bank-
ruptcy, as general terms in the law of Scotland, do not admit of exact definition”.¹
Both terms are commonly used to describe situations where a debtor is in finan-
cial difficulty of one sort or another and situations where there is sequestration
of the debtor’s estates under the bankruptcy legislation or the debtor has utilised
one of the alternatives to sequestration. One consequence of this is that the use
of general terms such as bankruptcy or insolvency without further definition in
situations where they have legal significance can cause problems, for example,
where a contract provides for certain remedies to become available on one
party’s “insolvency” without defining exactly what is meant by that term.

Bankruptcy or insolvency may, however, be defined in a particular way by a 1-02
particular statute for the purpose(s) specified in that statute. For example, the
Partnership Act 1890 provides that in the application of that Act to Scotland,
the bankruptcy of a firm or individual means sequestration under the
Bankruptcy (Scotland) Acts and, in the case of an individual, the issue against
them of a decree of *cessio bonorum*,² while the Sale of Goods Act 1979
provides that a person is deemed to be insolvent within the meaning of that Act
if they have either ceased to pay their debts in the ordinary course of business
or cannot pay their debts as they become due.³

This chapter considers particular types of insolvency and the consequences of 1-03
these for the debtor and others.

ABSOLUTE INSOLVENCY

The term absolute insolvency, sometimes referred to as “balance sheet” insol- 1-04
vency, is generally used to refer to the situation where a debtor’s total liabilities
exceed total assets. For example, the Bankruptcy (Scotland) Act 2016 provides
that any reference in that Act to a debtor being absolutely insolvent is to be
construed as a reference to the debtor’s liabilities being greater than the debt-
or’s assets, with any reference to a debtor’s estate being absolutely insolvent
being construed accordingly.⁴ The debtor may remain able to pay bills as they

¹ Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.15.

² Partnership Act 1890 s.47(1). The procedure of *cessio bonorum* no longer exists, however: see further Ch.2.

³ Sale of Goods Act 1979 s.61(4). This definition is essentially one of practical insolvency: see further below.

⁴ Bankruptcy (Scotland) Act 2016 s.228(5).

fall due and, particularly where this is the case, may continue in a state of absolute insolvency without any immediate consequences. Certain transactions carried out by a debtor who is absolutely insolvent may, however, be open to subsequent challenge in defined circumstances⁵ and contracts, leases and other agreements may allow the termination of the agreement or the exercise of other remedies in the event of the debtor's absolute insolvency.

PRACTICAL INSOLVENCY

- 1-05** The term practical insolvency is generally used to refer to the situation where a debtor is unable to pay bills as they fall due. The debtor may or may not be absolutely insolvent, but has insufficient liquid assets to settle current debts. Particularly in a business context, practical insolvency often results from cash flow problems, where a delay in receiving payments due from others results in the debtor's inability to pay the debtor's own creditors timeously.
- 1-06** A debtor's practical insolvency may entitle a creditor to exercise certain remedies against the debtor. For example, the Sale of Goods Act 1979 makes specific provision for an unpaid seller to exercise certain remedies where the debtor is insolvent and, as noted above, the definition of insolvency for this purpose is in essence one of practical insolvency. In the absence of specific statutory provisions, unpaid creditors may exercise the remedies available to them under the general law. Most will try informal action first. Alternatively, or where informal action is unsuccessful, creditors may seek to enforce any security they have or take court action against the debtor followed by diligence. A creditor may also be entitled to do diligence without first obtaining a court decree in certain circumstances, for example, where the document constituting the debt is registered for execution.⁶ A creditor may also serve on the debtor a statutory demand for payment of debt,⁷ non-compliance with which will render the debtor apparently insolvent and *inter alia* open the door to sequestration of the debtor's estates.⁸ Contracts, leases and other agreements may allow the termination of the agreement or the exercise of other remedies in the event of practical insolvency.
- 1-07** Practical insolvency also entitles a debtor who wishes to apply for sequestration under the bankruptcy legislation to obtain a certificate for sequestration for that purpose.⁹

APPARENT INSOLVENCY

- 1-08** The concept of apparent insolvency was introduced by the Bankruptcy (Scotland) Act 1985 and replaced the concept of notour bankruptcy.¹⁰ The definition of apparent insolvency has been amended on a number of occasions and

⁵ See Ch.14.

⁶ A detailed discussion of diligence is beyond the scope of this book, but the reader may wish to refer to the texts cited in Ch.15.

⁷ Bankruptcy (Scotland) Act 2016 s.16(1)(i), discussed further below.

⁸ See further below.

⁹ Bankruptcy (Scotland) Act 2016 s.9, discussed further in Ch.6.

¹⁰ As to notour bankruptcy, see further Ch.2. Unless the context otherwise requires, any reference in an enactment or document to notour bankruptcy or to a person being notour bankrupt falls to be construed as a reference to apparent insolvency or to a person being apparently insolvent: Bankruptcy (Scotland) Act 2016 s.234(7). Any such reference, however, is now likely to be rare.

is now contained in s.16 of the Bankruptcy (Scotland) Act 2016, in terms of which a debtor's apparent insolvency is constituted or constituted anew in the following circumstances:

- (a) the debtor's estate is sequestrated¹¹;
- (b) the debtor is adjudged bankrupt in England or Wales or Northern Ireland¹²;
- (c) the debtor gives written notice to creditors that the debtor has ceased to make payment of debts in the normal course of business provided that at the time of giving the notice the debtor is not a person whose property is affected by a restraint order, detained under or by virtue of a relevant detention power or subject to a confiscation or charging order¹³;
- (d) the debtor becomes subject to main proceedings in a Member State other than the UK¹⁴;
- (e) the debtor grants a trust deed for creditors¹⁵;
- (f) subject to the proviso referred to below, a duly executed charge for payment of a debt has been served on the debtor and the days of charge expire without payment¹⁶;
- (g) subject to the proviso referred to below, a decree of adjudication of any of the debtor's estate is granted for payment or in security¹⁷;
- (h) subject to the proviso referred to below, a debt payment programme entered into by the debtor under Pt 1 of the Debt Arrangement and Attachment (Scotland) Act 2002, under which any debt constituted by a decree or document of debt as defined in s.10 of that Act is being paid, is revoked¹⁸; and
- (i) a creditor has served on the debtor a statutory demand for payment of debt in the prescribed form and the debtor has failed within three weeks of its service *either* to pay the debt(s) or find security for payment of the debt(s) *or* to intimate to the creditor by recorded

¹¹ Bankruptcy (Scotland) Act 2016 s.16(1)(a). Apparent insolvency may be constituted for the first time by the sequestration of the debtor's estates because apparent insolvency is not a pre-requisite for sequestration in all cases: see further below.

¹² Bankruptcy (Scotland) Act 2016 s.16(1)(b).

¹³ Bankruptcy (Scotland) Act 2016 s.16(1)(c). Restraint order, relevant detention power, confiscation order and charging order are defined in s.16(8).

¹⁴ Bankruptcy (Scotland) Act 2016 s.16(1)(d). "Main proceedings" are defined as proceedings opened in accordance with art.3(1) of the EU insolvency proceedings regulation, falling within the definition of insolvency proceedings in art.2(4) of that regulation and, in relation to another Member State, set out in Annex A to that regulation under the heading relating to that Member State; and "the EU insolvency proceedings regulation" is defined as Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings: Bankruptcy (Scotland) Act 2016 s.228(1). The EU insolvency proceedings regulation replaced Council Regulation (EC) No.1346/2000 of 29 May 2000 on insolvency proceedings. Both regulations are discussed further in Ch.25, although the future of the legislation is currently uncertain following the UK's vote on 23 June 2016 to leave the European Union. This is discussed further in Ch.2.

¹⁵ Bankruptcy (Scotland) Act 2016 s.16(1)(e). Trust deeds for creditors are discussed in detail in Ch.22.

¹⁶ Bankruptcy (Scotland) Act 2016 s.16(1)(f). It has been said obiter that a charge is not duly executed for this purpose where it did not proceed on a valid warrant: *Punch Travers Properties Ltd v Rowe* 17 December 2003 Edinburgh Sheriff Court, available at <http://www.scotcourts.gov.uk/opinions/S69.html> [Accessed 16 September 2017].

¹⁷ Bankruptcy (Scotland) Act 2016 s.16(1)(g). The Bankruptcy and Diligence etc. (Scotland) Act 2007 makes provision for the replacement of adjudication by land attachment and residual attachment, but these provisions are not yet in force.

¹⁸ Bankruptcy (Scotland) Act 2016 s.16(1)(h). Debt payment programmes are discussed in detail in Ch.21.

delivery post that the debtor denies the existence of the debt(s) or that the debt(s) are immediately payable.¹⁹

- 1–09** A statutory demand for payment of debt may only be served by a creditor of the debtor: it is suggested that there must be a legitimate basis on which the person serving the demand can claim to be a creditor of the debtor and, where no such basis exists, the demand will be invalid.²⁰ The current prescribed form of demand is Form 5 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016. Note (f) of the notes for creditors on that form states, *inter alia*, that:

“There must . . . be clear evidence of the existence of the debt, for example, a written admission by the debtor or a document which establishes the debt (such as a court decree or contract).”

- 1–10** In *Lord Advocate v Thomson*,²¹ which concerned identical wording in an earlier version of the form, it was held that notwithstanding that this provision appears only in the notes for creditors on the form, it imposes an obligation on the creditor to refer to the clear evidence of the debt(s) in the demand and failure to do so renders the demand invalid. The decision has been doubted on the basis that the note in question, like other notes on the form, was properly to be regarded as explanatory rather than as imposing any additional requirement on the creditor and, in any event, read in context, the note is attempting to explain in lay terms what is meant by a liquid debt and the words referred to are part of that explanation rather than a direction that clear evidence of the existence of the debt has to be included in or appended to the demand.²² The decision has, however, been followed in subsequent cases.²³
- 1–11** The three week period within which the debtor must respond to the demand is not further defined. It has been held in England in relation to the corresponding provisions for service of a statutory demand for payment of debt on a company,²⁴ which also refer to a three week period, that this means a clear period of 21 days excluding the day on which the demand is served,²⁵ although the view has been expressed in relation to the application of those provisions in Scotland that the three week period will be taken to have expired on the last day of that period.²⁶ However, the notes on the prescribed form of demand in bankruptcy refer to the date of service of the demand as the date *after* which the period of three weeks starts to run. The matter is not, therefore, free from doubt.

¹⁹ Bankruptcy (Scotland) Act 2016 s.16(1)(i), (3).

²⁰ See *Royal Bank of Scotland Plc v Hill* [2012] CSOH 110. Although that case concerned the corresponding provisions for the service of a statutory demand for payment of debt on a company contained in s.123(1)(a) of the Insolvency Act 1986, which differs from the provision under discussion in a number of ways, it is suggested that in this respect, the same principle would apply.

²¹ *Lord Advocate v Thomson*, 1994 S.C.L.R. 96.

²² See the commentary on the case at 1994 S.C.L.R. 100. The requirement for the debt(s) to be liquid is discussed at para.1–13.

²³ See *Liandu v Go Debt Ltd*, 2010 W.L. 3166499.

²⁴ Insolvency Act 1986 s.123(1)(a), referred to above.

²⁵ *Re Lympne Investments Ltd* [1972] 1 W.L.R. 523.

²⁶ See *Palmer's Company Law* (London: Sweet & Maxwell), para.15.613.2 citing *Neil McLeod & Sons, Petitioners*, 1967 S.C. 16 following *Parish Council of Cavers v Parish Council of Smailholm*, 1909 S.C. 195. The latter case sets out the general rules as to the computation of time in Scotland, and in that case, Lord McLaren described the general rule as being that where an interval of time is expressed in terms of a division of the calendar, the interval is to be reckoned from the day when the interval begins to the corresponding day in the next division of the calendar.

The debtor is required to respond to the demand *within* the three week period. **1-12** Paragraph 4 of the prescribed form of demand enjoins the debtor, if the debtor denies the existence of the debt(s) or any part thereof or denies that the debt(s) or any part thereof are immediately payable, to immediately fill in the denial slip at the end of the prescribed form or a copy of it and post it, or a letter to the same effect, to the creditor by recorded delivery post to arrive within three weeks after the date of service of the demand, being the date shown in the docquet of service. The notes on the denial slip itself state similarly that the debtor must fill in and sign the denial slip and post it immediately to the creditor by recorded delivery post to arrive within the three week period mentioned in para.4. The notes for the debtor at the end of the form, however, state that the debtor must fill in the denial slip or a copy of it and post it, or a letter to the same effect, to the creditor by recorded delivery post “immediately and before the end of the three week period mentioned in paragraph 4 of the form”, which is not the same thing. The Interpretation Act 1978 provides that where an Act authorises or requires any document to be sent by post, unless the contrary is proved, service of the document is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.²⁷ The point is important because if the denial is not received in time, it will not prevent the constitution of the debtor’s apparent insolvency and the subsequent sequestration of the debtor’s estates.²⁸ The opinion has been expressed obiter that while the recorded delivery receipt will normally be the best evidence of the debtor’s intimation that they deny the existence of the debt(s) or that the debt(s) are immediately payable, it is not the only competent evidence, the debtor’s oath being an alternative.²⁹ Intimation to the creditor that the debtor denies the existence of the debt(s) or that the debt(s) are immediately payable would appear to prevent the constitution of apparent insolvency by this means even if the denial is subsequently found not to be justified.

A statutory demand for payment of debt may only be served where the creditor is owed a liquid debt or debts amounting to not less than £1,500 or such other sum as may be prescribed.³⁰ What constitutes a liquid debt is not defined, although it is specifically provided that for this purpose it does not include a sum payable under a confiscation order.³¹ Wilson notes that “[t]he concept of a liquid debt is not altogether clear”.³² Note (f) of the notes for creditors on the current prescribed form of demand requires the creditor to insert in the demand the reasons why it is claimed that the debt(s) forming the subject of the demand are liquid and goes on to state that:

“A debt is liquid where it is for a certain settled amount and is immediately payable to the debtor. There must also be clear evidence of the existence of the debt, for example, a written admission by the debtor or a document which establishes the debt (such as a court decree or contract).”

The reference to the debt being payable “to” the debtor is presumably an error, **1-14** an earlier version of the form correctly referring to the debt being payable “by”

²⁷ Interpretation Act 1978 s.7.

²⁸ See *Guthrie Newspaper Group v Morrison*, 1992 G.W.D. 22-1244, discussed further below.

²⁹ *Guthrie Newspaper Group v Morrison*, 1992 G.W.D. 22-1244.

³⁰ Bankruptcy (Scotland) Act 2016 s.16(1)(i). It may be noted that this differs from the amount of debt required to entitle the creditor to petition for the debtor’s sequestration: see further Ch.7.

³¹ Bankruptcy (Scotland) Act 2016 s.16(8).

³² Wilson, WA. *The Scottish Law of Debt*, 2nd edn (Edinburgh: W. Green, 1991), p.9. See also McBryde, WW. *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 3-34 to 3-351 and the dicta of the Sheriff Principal in *Lord Advocate v Thomson*, 1993 S.C.L.R. 677 at 680.

the debtor. In *Lord Advocate v Thomson*,³³ discussed above, the court was concerned with the earlier version of the form in which the wording of note (f) was identical to that contained in the current form apart from the error referred to, and took the view that the part of the note stating that a debt is liquid where it is for a certain settled amount and is immediately payable by the debtor contained “a practical definition of a liquid debt” while, as noted above, the part of the note requiring clear evidence of the debt was interpreted as imposing an obligation on the creditor to refer to the clear evidence of the debt(s) in the demand. The court did not, however, consider further the meaning of a liquid debt and, as already noted, the view has been expressed that the whole of the note is simply an attempt to explain in lay terms what is meant by a liquid debt, the requirement for clear evidence of the existence of the debt being part of that explanation.³⁴ In *Liandu v Go Debt Ltd*,³⁵ the sheriff expressed “grave reservations” as to whether the debt in that case, which consisted of sums which were “in the character of damages for breach of contract”, although described in the relevant agreement as “agreed compensation”, constituted a liquid debt, but did not have to formally decide the matter. The issue of whether a debt is liquid, therefore, remains a matter of difficulty. If the debt(s) in respect of which the demand is served are ultimately found not to be liquid debts, however, this will render the demand invalid.

1–15 The demand must be served by personal service by an officer of court.³⁶ It was held in *Liandu v Go Debt Ltd*³⁷ that there had been no such personal service where a statutory demand had been served by sheriff officers on the petitioner’s son whom they believed erroneously to be the petitioner. Although not specifically relied on by the sheriff in reaching his decision, it may be noted that in his arguments on this point, the petitioner had relied on the case of *Rae v Calor Gas Ltd*,³⁸ in which the Inner House had considered the meaning of personal service in the context of the Sheriff Court Ordinary Cause Rules 1993 and held that it was a method of service which could only be effected in the case of an individual and then only by placing the document in the hands of the individual themselves. If personal service in the context of service of a statutory demand for payment of debt is interpreted in the same way, this would mean that the apparent insolvency of a debtor other than a living individual could not be constituted by the service of a statutory demand for payment of debt since personal service in such a case is not possible. Such a result seems unlikely to have been what was intended, however. It may be noted that the notes for creditors on the prescribed form of demand provide that an additional copy of the demand should be given to the debtor when the demand is served while the notes on the docquet of service section of that form provide that the docquet of service in that additional copy should also be completed. Standing the approach of the court in *Lord Advocate v Thomson*³⁹ to note (f) in the notes for creditors, discussed above, failure to comply with these requirements would seem to result in the demand being invalid.

1–16 The proviso referred to in s.16(i)(f), (g) and (h) is that the debtor’s apparent insolvency will not be constituted or constituted anew where it is shown that

³³ *Lord Advocate v Thomson*, 1994 S.C.L.R. 96.

³⁴ See the commentary on the case at 1994 S.C.L.R. 100.

³⁵ *Liandu v Go Debt Ltd*, 2010 W.L. 3166499.

³⁶ Bankruptcy (Scotland) Act 2016 s.16(1)(i).

³⁷ *Liandu v Go Debt Ltd*, 2010 W.L. 3166499.

³⁸ *Rae v Calor Gas Ltd*, 1995 S.L.T. 244.

³⁹ *Lord Advocate v Thomson*, 1994 S.C.L.R. 96.

at the time of the relevant occurrence, the debtor was able and willing to pay the debtor's debts as they fell due or would have been able to pay them as they fell due but for the debtor's property being affected by a restraint order or subject to a confiscation or charging order.⁴⁰ The onus of establishing this, however, is on the debtor.

The apparent insolvency of a partnership is constituted or constituted anew in any of the ways described above or where any of the partners is apparently insolvent for a debt of the partnership.⁴¹ The apparent insolvency of an unincorporated body is constituted or constituted anew where a person representing the body or holding property of the body in a fiduciary capacity is apparently insolvent for a debt of the body.⁴² In addition, the apparent insolvency of registered companies and other entities in respect of which sequestration is incompetent may be constituted or constituted anew in any of the ways described above in so far as they are relevant notwithstanding that sequestration of the estates of such debtors is not competent.⁴³ 1-17

Once constituted, a debtor's apparent insolvency continues until the debtor becomes able to pay debts and pays them as they fall due, except where the apparent insolvency is constituted by the debtor's sequestration in Scotland or bankruptcy in England, Wales or Northern Ireland, when it continues until the debtor is discharged, or where the apparent insolvency is constituted by main proceedings in a Member State other than the UK, when it continues until these proceedings have ended.⁴⁴ 1-18

The debtor's apparent insolvency may have a number of consequences. Contracts, leases and other agreements may allow termination of the agreement or the exercise of other remedies in the event of apparent insolvency and apparent insolvency affects certain types of diligence done by creditors within certain time limits.⁴⁵ 1-19

Apparent insolvency also opens one of the doors leading to sequestration of the debtor's estate. It is a prerequisite for a creditor application for sequestration,⁴⁶ and once apparent insolvency is constituted a debtor will be able to prevent an award of sequestration only in exceptional circumstances. Where the debtor wishes to challenge the underlying debt or diligence, therefore, this should generally be done prior to the constitution of apparent insolvency. In the case of a statutory demand for payment of debt, the debtor may do this quite simply by returning the denial slip timeously.⁴⁷ In other cases, the debtor may require to raise appropriate court proceedings and obtain appropriate interim orders. The position in such cases was summarised by Lord Hodge in *Aitken v Aitken*,⁴⁸ where the pursuer sought interim suspension of a charge for payment in respect of which the days of charge had already expired and interim interdict preventing sequestration of his estates. Lord Hodge said that interim suspension of the 1-20

⁴⁰ Bankruptcy (Scotland) Act 2016 s.16(2). For the definitions of restraint order, confiscation order and charging order, see Bankruptcy (Scotland) Act 2016 s.16(8).

⁴¹ Bankruptcy (Scotland) Act 2016 s.16(4).

⁴² Bankruptcy (Scotland) Act 2016 s.16(5).

⁴³ Bankruptcy (Scotland) Act 2016 s.16(6).

⁴⁴ Bankruptcy (Scotland) Act 2016 s.16(7).

⁴⁵ See further Ch.15.

⁴⁶ See further Ch.7.

⁴⁷ See above.

⁴⁸ *Aitken v Aitken* [2005] CSOH 105.

charge would not assist the pursuer at this stage because apparent insolvency had already been constituted⁴⁹ and went on to say:

[5] ... As Lord Sutherland pointed out in *Mackay v Bank of Scotland* (1992 S.L.T. 158 at 160) interim interdict is an equitable remedy and it is normally far too late for a debtor to seek such a remedy when he has allowed his apparent insolvency to be constituted and a petition for sequestration to be served. If a debtor is seeking to challenge the debt on which a charge proceeds and suspend the charge, he should do so before the expiry of the days of charge. Other challenges should be mounted before the petition for sequestration is initiated, as in *James Finlay Corporation v McCormack* 1986 S.L.T. 106. Nonetheless the authorities do not absolutely exclude the possibility of a debtor preventing sequestration after the expiry of the days of charge. There may be exceptional circumstances where it is equitable for the court at this late stage to prevent sequestration taking place to allow a challenge to be made to the debt which is the ground of the apparent insolvency and the application for sequestration ...

[6] Sequestration is a summary process and the policy of the law is both to limit the grounds for opposition to an award once the debtor is apparently insolvent and not to permit dilatory proceedings ... The court will rarely allow challenges to the validity of a debt which founded the charge after the expiry of the days of charge. Otherwise a debtor would be able to raise a last minute challenge and delay his sequestration, thereby enabling him to keep control of his assets and to dissipate them to the prejudice of the petitioning creditor and his other creditors.

- 1–21** Lord Hodge went on to hold that there were in fact exceptional circumstances for granting interim interdict in that case,⁵⁰ but in other cases interim interdict has been refused.⁵¹ Cases where the debtor has sought to challenge the underlying debt or diligence in the context of the sequestration proceedings themselves or has sought the later recall or reduction of sequestration on such grounds are discussed further later.⁵²
- 1–22** Apparent insolvency is not a prerequisite for a debtor application for sequestration, but it remains one route into sequestration in such cases.⁵³ The Scottish Government's *Consultation on Bankruptcy Law* reform issued in February 2012 sought views on whether apparent insolvency should be removed as a route into sequestration in the case of debtor applications⁵⁴ and the responses

⁴⁹ *Aitken v Aitken* [2005] CSOH 105, [5], citing *Sutherland v Sutherland* (1843) 5 D. 544, *Wilson v Bank of Scotland*, 1987 S.L.T. 117 and Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.74. Cf *Watson v The Cheque Shop Ltd* [2005] CSOH 114 and *Kipling v Dunbar Bank Plc* [2012] CSOH 40, where proceedings for suspension and interdict were brought before expiry of the days of charge.

⁵⁰ See also *McLaughlin, Petitioner* [2009] CSOH 49, where it is noted that interim orders were granted following the presentation of a petition for sequestration.

⁵¹ See *Holden v Royal Bank of Scotland Plc* [2011] CSOH 84 and *Cowan v Royal Bank of Scotland Plc* [2011] CSOH 85 where it was held that there were no exceptional circumstances justifying the grant of interim orders.

⁵² See Chs 8 and 9.

⁵³ See further Ch.7.

⁵⁴ See Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), available at <http://www.gov.scot/Resource/0038/00388465.pdf> [Accessed 16 September 2017], para.10.5.13 onwards.

to the consultation were relatively evenly split on the issue⁵⁵ but ultimately this was not done. It should be noted, however, that for the purposes of a debtor application, a debtor will not be apparently insolvent by reason only that the debtor has granted a trust deed for creditors or has given written notice to creditors that the debtor has ceased to make payment of debts in the normal course of business.⁵⁶ The original purpose of this provision was to prevent a debtor constituting apparent insolvency by the debtor's own action and thus opening the door to a debtor application for sequestration without the concurrence of a qualified creditor or creditors.⁵⁷ Since the policy regarding debtor access to sequestration has changed over time, however, it is not clear that such a restriction remains necessary.⁵⁸

⁵⁵ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 5.33–5.36.

⁵⁶ Bankruptcy (Scotland) Act 2016 s.2(9). This provision is discussed further in Ch.6.

⁵⁷ See McBryde, WW, *Green's Annotated Acts Bankruptcy (Scotland) Act 1993* (Edinburgh: W. Green, 1993) at pp.6–15. The Bankruptcy (Scotland) Act 1993 introduced for the first time the possibility of a debtor application for sequestration without the concurrence of a qualified creditor providing certain criteria were satisfied, including the debtor's apparent insolvency: see further Ch.7.

⁵⁸ For a full discussion of the changing provisions relating to debtor access to sequestration, see further Ch.7.

CHAPTER 2

HISTORY AND DEVELOPMENT OF BANKRUPTCY LAW

INTRODUCTION

Bankruptcy law in Scotland has a long history, although it has been said that prior to the eighteenth century it presented itself “in a comparatively rude and undeveloped form”.¹ 2-01

As noted in the Preface, bankruptcy law in Scotland is different from bankruptcy law in the other parts of the UK. After the Bankruptcy (Scotland) Act 1913 was enacted, hopes were expressed that this would help to pave the way for a complete bankruptcy code for the UK, particularly since a new Act had also been enacted for England and Wales as a result of which the law in the two jurisdictions had been assimilated “in many particulars”.² No such development has ever taken place, however, and the law of the two jurisdictions remains distinct. It is, however, similar in many respects and, as will be seen below, recent reforms to bankruptcy law in England and Wales have influenced bankruptcy reform in Scotland and vice versa.³ Prior to devolution, bankruptcy law in Scotland was largely within the purview of the Scottish civil service while corporate insolvency law was within the purview of the UK civil service. For these reasons, it is perhaps unsurprising that on devolution, bankruptcy law became largely devolved to the Scottish Parliament. Some important areas are, however, reserved to the UK Parliament, namely: (i) the law relating to preferred debts, the preference of such debts against other such debts and the extent of their preference over other types of debt⁴; (ii) the regulation of insolvency practitioners⁵; and (iii) the co-operation of insolvency courts.⁶ These areas are common to bankruptcy and corporate insolvency law, most of which applies equally to Scotland and is also reserved to the UK Parliament. 2-02

This chapter considers the history and development of bankruptcy law in Scotland. 2-03

¹ Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.1. For an interesting account of the early history, see Hanley, ST, “The development of the Scottish laws of partnership and bankruptcy: a study of assimilation” (Dissertation, University of Michigan, 1984).

² Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.11, referring to the passing in 1913 of a Bankruptcy Act for England. In fact, the Act was the Bankruptcy and Deeds of Arrangement Act 1913, which extended to England and Wales. It was quickly superseded by the Bankruptcy Act 1914.

³ See further McKenzie Skene, DW, “Credit where Credit is Due: The Effect of Devolution on Insolvency Law in Scotland” (2013) 1 NIBLJ 5. For an account of such influences between the two jurisdictions at earlier stages of the development of bankruptcy law, see Lobban, M, “Reshaping Private Law in Victorian Britain: The View From Westminster”, *Miscellany VII*, MacQueen, HL (ed) (Edinburgh: Stair Society, 2015) see Hanley, ST, “The development of the Scottish laws of partnership and bankruptcy: a study of assimilation” (Dissertation, University of Michigan, 1984).

⁴ Preferred debts are discussed in Ch.16.

⁵ The regulation of insolvency practitioners is discussed in Ch.4.

⁶ Scotland Act 1998 Sch.5, Pt II, s.C2. The co-operation of insolvency courts is discussed in Chs 24 and 25.

EARLY LAW

- 2-04** Prior to the development of what might be considered bankruptcy law as such, creditors had a number of remedies for enforcing payment of their individual debts, namely comprising (subsequently adjudication),⁷ which could be used against the debtor's heritable property; poinding and arrestment, which could be used against the debtor's moveable property; and imprisonment, which was intended to act as a compulsor to make the debtor disclose any hidden assets against which the other remedies could then be used.⁸
- 2-05** A debtor who was unable to pay debts could try to negotiate with individual creditors, enter into a composition contract with some or all creditors,⁹ or grant a trust deed for creditors.¹⁰ Such arrangements, however, depended on creditor agreement: creditors who did not wish to enter into an arrangement with the debtor, enter into a composition contract or accede to a trust deed could continue with enforcement action and there was no procedure by which dissenting creditors could be bound.
- 2-06** Furthermore, there was no procedure whereby a debtor could obtain a discharge from debts in exchange for surrendering assets to creditors. The procedure of *cessio bonorum*, which according to Bell was adopted from Roman law as early as the fourteenth century,¹¹ allowed a debtor to avoid, or be released from, imprisonment by surrendering their assets to their creditors, but they remained liable for any unpaid balance of their debts and any assets they subsequently acquired would therefore be open to the diligence of those creditors with any part of their debts still unpaid. Absent the agreement of their creditors, therefore, the debtor was unable to make a fresh start.
- 2-07** The law also allowed individual creditors to pursue such remedies as were open to them without regard for other creditors, thus creating a "race of diligence" in which those creditors who were able to act more swiftly could gain an (unfair) advantage over others.¹²

EARLY BANKRUPTCY LEGISLATION

- 2-08** The earliest bankruptcy legislation as such was concerned with the problem of debtors attempting to put their assets beyond the reach of their creditors or some of them. The common law remedies for conduct of this kind, although they remain in existence to this day, seem to have been regarded as inadequate to deal with the issue and the Bankruptcy Act 1621 was enacted to deal with the problem of gratuitous alienations by debtors to "conjunct and confident" persons and other voluntary alienations after the commencement of diligence. This was followed in due course by the Bankruptcy Act 1696, which dealt with the distinct but related problem of debtors favouring particular creditors at the expense of the general body of creditors within a short period prior to the debtor's "notour bankruptcy".¹³

⁷ See the Adjudications Act 1672.

⁸ See Lord Dunedin in *Caldwell v Hamilton*, 1919 S.C. (HL) 100 at 106.

⁹ Compositions are discussed in Ch.20.

¹⁰ Trust deeds are discussed in Ch.22.

¹¹ Bell's *Commentaries on the Law of Scotland*, 2nd edn, (1810), p.x.

¹² See Lord Dunedin in *Caldwell v Hamilton*, 1919 S.C. (HL) 100 at 106.

¹³ The Bankruptcy Act 1696 laid down a number of criteria by which it could be determined that the debtor was publicly or "notoriously" bankrupt. The Bankruptcy (Scotland) Act 1985 replaced

In the intervening period, the first legislation to regulate competing diligence was enacted, although it applied only to diligence against heritage. The Diligence Act 1661 made provision for the *pari passu* ranking of comprisings (subsequently adjudications). The Judicial Sale Act 1681 subsequently introduced the process of ranking and sale whereby land which was the subject of competing adjudications could be sequestrated, that is put into the hands of the court, which then arranged for the land to be factored (if necessary) and sold, and for the creditors to be ranked on the proceeds.¹⁴ A similar form of process was subsequently introduced in relation to moveable property by the Bills of Exchange (Scotland) Act 1772, which provided, *inter alia*, for the sequestration of a debtor's moveable estate, its management by a factor (who later became known as a trustee), its subsequent sale, and the distribution of the proceeds among the debtor's creditors, all under the supervision of the court. The introduction of this process sought to remedy what the preamble to the Bills of Exchange (Scotland) Act 1772 referred to as "the injustice and inequality" of the race of diligence referred to above and to render the payment of creditors "more equal and expeditious". This process is regarded as the genesis of the modern process of sequestration under the bankruptcy legislation. 2-09

SUBSEQUENT DEVELOPMENT OF BANKRUPTCY LEGISLATION

The Bills of Exchange (Scotland) Act 1772 was a temporary statute which was originally enacted for a period of seven years but was subsequently extended until it was replaced by the Payment of Creditors (Scotland) Act 1783. The preamble to the Payment of Creditors (Scotland) Act 1783 noted that the Bills of Exchange (Scotland) Act 1772 had been found by experience to be in some respects insufficient for its intended purpose, that it was expedient that the plan of the Act should be varied and that some additional rules and regulations should be introduced and, accordingly, it made a number of changes to the sequestration process, extended it to include the debtor's heritable property and introduced for the first time a mechanism for discharge of the debtor without the consent of all creditors, albeit limited in effect. Thus the key elements of the modern process of sequestration under the bankruptcy legislation were now in place, although the Payment of Creditors (Scotland) Act 1783 limited the availability of that process to traders. 2-10

The Payment of Creditors (Scotland) Act 1783 was also a temporary statute which was originally enacted for a period of seven years but was subsequently extended until it was replaced by the Payment of Creditors (Scotland) Act 1793. The Payment of Creditors (Scotland) Act 1793 made further changes to improve the sequestration process, removed the limitation of the Payment of Creditors (Scotland) Act 1783 on the debtor's discharge and introduced the option of discharge on composition. 2-11

the concept of notour bankruptcy with the concept of apparent insolvency, although it may be noted that for the purposes of the current statutory provisions on challengeable transactions, it is not the date of apparent insolvency which is relevant but the date of sequestration, the date of granting of a trust deed which has become protected or the date of death. Apparent insolvency is discussed in Ch.1; challengeable transactions are discussed in Ch.14.

¹⁴ Although the term sequestration is now most familiar in the context of bankruptcy as the process whereby the estate of a debtor is placed in the hands of a trustee under the bankruptcy legislation, it was originally, and still remains, a general term meaning the taking of possession of the property of a person by the court and the placing of that property in the hands of a person appointed by the court to manage it: see further Ch.23, where the concept of sequestration is discussed further in the context of judicial factories.

- 2-12 The Payment of Creditors (Scotland) Act 1793 was also a temporary statute which was originally enacted for a period of five years but was subsequently extended on a number of occasions until it was replaced by the Bankruptcy Act 1814. The Bankruptcy Act 1814 also made further changes to improve the sequestration process.
- 2-13 The Bankruptcy Act 1814 was also a temporary statute which was enacted for a period of seven years but was subsequently extended on a number of occasions until the Bankruptcy (Scotland) Act 1839 was enacted as a permanent measure.
- 2-14 The Bankruptcy (Scotland) Act 1839 was passed following an extensive review of the law commenced in 1833.¹⁵ It made a number of further improvements to the sequestration process, although it retained the same basic approach, and was said to show "a great superiority over the earlier statutes".¹⁶
- 2-15 The Bankruptcy (Scotland) Act 1839 was amended in a number of respects by the Bankruptcy (Scotland) Act 1853 and then replaced by the Bankruptcy (Scotland) Act 1856. The Bankruptcy (Scotland) Act 1856 was a consolidating statute, but also made a number of important changes to the law, including the removal of the restriction of the sequestration process to traders, the extension of the role of the sheriff court, the re-introduction of some limitations on discharge without composition and the creation of the office of Accountant in Bankruptcy (AiB).¹⁷
- 2-16 The Bankruptcy (Scotland) Act 1856 was itself amended on a number of occasions and was eventually replaced by the Bankruptcy (Scotland) Act 1913. In the interim, the Debtors Act 1880 abolished civil imprisonment for debt with some exceptions and introduced a new form of the *cessio bonorum* procedure which could be instituted by creditors as well as the debtor; the Bankruptcy and Cessio (Scotland) Act 1881 made changes to the discharge procedure in sequestration and introduced similar provisions for discharge into the *cessio bonorum* procedure; the Bankruptcy Frauds and Disabilities (Scotland) Act 1884 disqualified undischarged bankrupts from holding certain public offices and made it an offence for an undischarged bankrupt to obtain credit beyond a specified amount without disclosing their status; and the Judicial Factors (Scotland) Act 1889 combined the office of the AiB with that of the Accountant of Court, both offices being held by the Accountant of Court.¹⁸
- 2-17 The Bankruptcy (Scotland) Act 1913 was passed following a review of bankruptcy law by the Cullen Committee, which recommended some improvements to the law but no fundamental change.¹⁹ The Bankruptcy (Scotland) Act 1913 abolished the *cessio bonorum* procedure; introduced a process of summary sequestration for dealing with small assets cases; introduced the first statutory provisions regulating voluntary trust deeds for creditors; and expanded the role of the AiB somewhat.

¹⁵ See Bell, GJ, *Commentaries on Recent Statutes Relative to Diligence or Execution Against the Moveable Estate; Imprisonment; Cessio Bonorum; and Sequestration in Mercantile Bankruptcy* (Edinburgh, 1840), pp.38-41.

¹⁶ Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.4.

¹⁷ The history of the office of the Accountant in Bankruptcy is discussed in Ch.4.

¹⁸ See further Ch.4.

¹⁹ *Report of the Committee Appointed by the Secretary of State for Scotland to Inquire into the Bankruptcy Law of Scotland and Its Administration* (Cd 5201, 1910).

MODERN BANKRUPTCY LEGISLATION

The Bankruptcy (Scotland) Act 1913 was amended in a number of minor **2-18** respects by various different statutes and was ultimately replaced by the Bankruptcy (Scotland) Act 1985 following an extensive review of bankruptcy law and related matters by the Scottish Law Commission.²⁰ The Scottish Law Commission noted that there had been no thorough examination of bankruptcy law since that which had led to the Bankruptcy (Scotland) Act 1839 and considered that it would not be carrying out its duties if it failed

“to re-appraise in the light of present business needs and social attitudes the policies of bankruptcy law and the administrative structure required to give effect to those policies”.²¹

The Bankruptcy (Scotland) Act 1985 made some major changes to the law, but **2-19** in other respects retained the basic structure of the sequestration process established in the earlier legislation. As already noted, it replaced the concept of notour bankruptcy with that of apparent insolvency. It made numerous changes to the process of sequestration itself. It repealed the Bankruptcy Act 1621 and the Bankruptcy Act 1696 and introduced new statutory provisions on the challenge of prior transactions. It abolished the summary sequestration procedure introduced by the Bankruptcy (Scotland) Act 1913, but introduced a new procedure for what became known as “small assets cases” and made provision for the payment of the expenses of sequestration in such cases to be made from public funds where the debtor’s estate was insufficient to meet them. It made provision for the automatic discharge of the debtor and introduced new provisions for the protection of the debtor’s family where the debtor was a living individual. It also introduced additional provisions relating to voluntary trust deeds for creditors, including a procedure whereby a trust deed could become protected with the result that non-acceding creditors would be bound by it.

Other important changes were brought about by the Insolvency Act 1986, **2-20** which also reformed the law of bankruptcy in England and Wales and corporate insolvency law in both jurisdictions. In particular, that Act introduced for the first time provisions for the regulation of those acting as insolvency office-holders, including trustees in sequestration and trustees under a trust deed for creditors. It also enacted provisions relating to the enforcement within the UK of orders made by a court in any part of the UK in the exercise of its jurisdiction in relation to insolvency law and provisions for co-operation between the courts having such jurisdiction in the UK and between the courts having such jurisdiction in the UK and the courts having such jurisdiction in any relevant country or territory.²²

Before long, the Bankruptcy (Scotland) Act 1985 was substantially amended **2-21** by the Bankruptcy (Scotland) Act 1993, largely as a result of the unforeseen consequences of the introduction of the provision for the payment of the expenses of sequestration in small assets cases to be made from public funds where the debtor’s estate was insufficient to meet them, which had resulted in considerable expenditure of public funds. The Bankruptcy (Scotland) Act 1993

²⁰ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

²¹ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.2.7 and see further Ch.3.

²² Insolvency Act 1986 s.426. These provisions are discussed in detail in Ch.25.

removed that provision and instead made provision for the AiB to become trustee in those sequestrations where no other trustee was appointed.²³ It made further changes to the sequestration procedure and introduced a new summary administration procedure in addition to the small assets procedure. It also altered the provisions whereby a trust deed could become protected to make the obtaining of protection easier.

- 2-22** In 1997, the Scottish Office published a consultation paper entitled *Apparent Insolvency: A Consultation Paper on amending the Bankruptcy (Scotland) Act 1985*²⁴ seeking views on possible reforms to the concept of apparent insolvency to resolve problems which had been identified with regard to debtor access to sequestration. This was followed in 1998 by a further Scottish Office paper entitled *A Consultation Follow-up: Protected Trust Deeds and Other Issues*,²⁵ which reported the outcome of the earlier consultation and set out details of a number of proposed reforms to the Bankruptcy (Scotland) Act 1985. It also sought views on further issues with regard to trust deeds for creditors, the residence requirements for trustees under such deeds, the payment of dividends in sequestration and the qualifying debt level for sequestration. Legislation did not follow at that time as a result of the intervention of devolution. Following devolution, however, extensive reform of bankruptcy law has taken place as part of a wider programme of reform relating to devolved aspects of debt and enforcement generally, which has resulted in extensive reform of the wider law of diligence and aspects of debtor protection as well as reform of bankruptcy law. The reforms to bankruptcy law must be seen in that wider context.
- 2-23** The first stage of the post-devolution reforms saw the replacement of the old diligence of poinding and warrant sale with the new diligence of attachment and exceptional attachment and the introduction of provision for a statutory debt arrangement scheme for individual debtors as an alternative to sequestration or a trust deed for creditors by the Debt Arrangement and Attachment (Scotland) Act 2002. The Debt Arrangement and Attachment (Scotland) Act 2002 also extended the list of items exempt from attachment and thus from sequestration.²⁶ The history of the debt arrangement scheme and the Debt Arrangement and Attachment (Scotland) Act 2002 is set out in detail in Ch.21.
- 2-24** The same year also saw the passing of the Enterprise Act 2002 by the UK Parliament which, inter alia, abolished Crown preference in sequestration. It also saw the coming into force of the EC Council Regulation on insolvency proceedings.²⁷ That regulation came into force on 31 May 2002²⁸ in all Member States except Denmark.²⁹ Its aim was to provide for the efficient and effective operation of cross-border insolvency proceedings within the EU, but it also had a direct effect on purely domestic insolvencies. Although it was directly effective in UK law,³⁰ certain consequential amendments were made to inter alia the bankruptcy legislation and relevant rules of court with the aim of

²³ See further Ch.4.

²⁴ Scottish Office, *Apparent Insolvency: A Consultation Paper on amending the Bankruptcy (Scotland) Act 1985* (July 1997).

²⁵ Scottish Office, *A Consultation Follow-up: Protected Trust Deeds and Other Issues* (July 1998).

²⁶ Property exempt from sequestration is discussed further in Ch.11.

²⁷ EC Council Regulation 1346/2000 (OJ L160, 30.6.2000, p.1), discussed further in Ch.25.

²⁸ EC Council Regulation 1346/2000 (OJ L160, 30.6.2000, p.1) art.47.

²⁹ See further Ch.25.

³⁰ EC Council Regulation 1346/2000 art.47.

ensuring that there was no conflict between it and domestic law and generally providing for it.

The second stage of the post-devolution reforms saw the reform of almost all other aspects of the law of diligence (although at the time of writing a number of these reforms remain unimplemented and are the subject of review)³¹ and major reform of the law relating to sequestration and protected trust deeds as well as some changes to the debt arrangement scheme by the Bankruptcy and Diligence etc. (Scotland) Act 2007 and related legislation. These reforms followed a series of consultations which commenced in April 2002 with the Scottish Executive's consultation paper, *Enforcement of Civil Obligations in Scotland*,³² which sought views on the introduction of a debt arrangement scheme and wider reform of the law of diligence.³³ In November 2003, this was followed by a further consultation paper, *Personal Bankruptcy Reform in Scotland: A Modern Approach*³⁴ (the 2003 consultation paper), which sought views on a wide range of proposals for reform of bankruptcy law. The 2003 consultation paper identified two "drivers for change". The first was the importance of having an integrated debt management framework in Scotland within which the various available debt management tools worked together to form a comprehensive package of solutions for debtors.³⁵ The second was what was described as "developments", namely the introduction of the debt arrangement scheme and the consequent need to consider its fit with sequestration³⁶; the need to consider whether action was still required in relation to the issues raised in the Scottish Office consultations referred to above³⁷; and the significant changes to bankruptcy law in England and Wales that had also been brought about by the Enterprise Act 2002.³⁸ The proposed reforms were not, however, intended to rewrite the whole structure and content of bankruptcy law, which was seen as unnecessary, but to develop and refine the existing law taking into account the needs of debtors, creditors and small businesses and policy developments in other areas: they aimed to reduce the stigma of bankruptcy and encourage responsible risk-taking while providing an effective regime to protect the public from fraudulent or culpable bankrupts. The 2003 consultation paper was followed in July 2004 by a further consultation paper and draft Bill, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation*³⁹ (the 2004 consultation paper). This set out firm proposals for bankruptcy reform and further proposals for consultation as well as proposals for the reform of diligence. The Scottish Executive also established a working group on debt relief chaired by the writer to consider further the issues relating to debtor access to sequestration and debtors with little or no

³¹ See para.2–39.

³² Scottish Executive, *Enforcement of Civil Obligations in Scotland* (April 2002).

³³ See further Ch.21.

³⁴ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003) available at <http://www.scotland.gov.uk/Resource/Doc/1097/0030743.pdf> [Accessed 16 September 2017].

³⁵ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (2003), para.3.1.

³⁶ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (2003), para.3.3.

³⁷ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (2003), para.3.4.

³⁸ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (2003), para.3.5.

³⁹ Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004) available at <http://www.scotland.gov.uk/Resource/Doc/203606/0054275.pdf> [Accessed 16 September 2017].

assets or income; the Working Group's report was published on the Scottish Executive website during 2005 but was not the subject of formal consultation.⁴⁰ As the proposals developed, further consultations followed on draft secondary legislation designed to implement particular aspects of the reforms.⁴¹

- 2–26** The Bankruptcy and Diligence etc. (Scotland) Act 2007 and related legislation made extensive changes to the law. These changes included changes to the sequestration process and its administration, including shifting the responsibility for determination of debtor applications for sequestration from the court to the AiB and removing almost entirely the role of the Court of Session in sequestrations; changes to the provisions for income contributions in sequestration; the introduction of provisions for reversion of certain assets to the debtor in sequestration; the abolition of summary administration and small assets cases in sequestration; the introduction of provisions for access to sequestration by low income, low assets debtors; changes to the provisions for automatic discharge of the debtor in sequestration, including the reduction of the period for the automatic discharge of the debtor; the introduction of a new bankruptcy restrictions regime in sequestration; changes to the provisions on protected trust deeds, which were largely removed from the Bankruptcy (Scotland) Act 1985 to secondary legislation⁴²; and changes to the debt arrangement scheme including the introduction of an element of debt relief.⁴³
- 2–27** While the Scottish Parliament was taking forward the second stage of its post-devolution reforms, the UK Parliament passed the Cross-Border Insolvency Regulations 2006.⁴⁴ These enacted, with modifications, the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 2007 and provide that the Model Law in the form set out in Sch.1 to the Regulations (the Model Law as enacted) has the force of law in Great Britain.⁴⁵
- 2–28** The next stage of post-devolution reform commenced with the Home Owner and Debtor Protection (Scotland) Act 2010, which had its genesis in fears of a rise in repossession resulting from the credit crunch and recession.⁴⁶ The

⁴⁰ *Report of the Working Group on Debt Relief* (2005), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0016112.pdf> [Accessed 16 September 2017].

⁴¹ See Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), available at <http://www.scotland.gov.uk/Resource/Doc/89955/0021680.pdf> [Accessed 16 September 2017], Scottish Executive, *Protected Trust Deeds: Partial Regulatory Impact Assessment* (January 2006), available at <http://www.scotland.gov.uk/Resource/Doc/92494/0022197.pdf> [Accessed 16 September 2017], Scottish Executive, *Protected Trust Deeds—Consultation on Draft Regulations and Partial Regulatory Impact Assessment: Analysis of responses* (June 2006), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0031324.pdf> [Accessed 16 September 2017], Accountant in Bankruptcy, *Low Income, Low Assets—A New Route into Bankruptcy: Consultation on Proposed Regulations* (April 2007), available at <http://www.scotland.gov.uk/Resource/Doc/174131/0048565.pdf> [Accessed 16 September 2017] and Accountant in Bankruptcy, *Low Income, Low Assets—A New Route into Bankruptcy: Report on Public Consultation* (February 2008), available at <http://www.aib.gov.uk/Resource/Doc/4/0000580.pdf> [Accessed 16 September 2017].

⁴² See further Ch.22.

⁴³ See further Ch.21.

⁴⁴ Cross-Border Insolvency Regulations 2006 (SI 2006/1030), discussed in detail in Ch.25.

⁴⁵ Cross-Border Insolvency Regulations 2006 reg.2(1) Sch.1.

⁴⁶ See in particular the Debt Action Forum Final Report (June 2009), available at <https://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000813.pdf> [Accessed 16 September 2017] and the Scottish Government Response, available at <https://www.aib.gov.uk/about/debt-action-forum/debt-action-forum-report-scottish-government-response> [Accessed 16 September 2017].

changes to bankruptcy law brought about by the Home Owner and Debtor Protection (Scotland) Act 2010 included further extending debtor access to sequestration via a new certificated route into sequestration, allowing the exclusion of the family home from protected trust deeds and extending the existing protections for the family home in sequestration to protected trust deeds where they were not so excluded.

The Home Owner and Debtor Protection (Scotland) Act 2010 was intended to be followed by further reform of protected trust deeds and a wider consultation and further legislation on the treatment of the family home in the context of diligence and bankruptcy. A Protected Trust Deed Working Group was established in March 2010 and published its final report in June 2010,⁴⁷ and a consultation paper entitled *Protected Trust Deeds—Improving the Process* was issued in October 2011⁴⁸ and followed by a *Report on Public Consultation: Protected Trust Deeds—Improving the Process* in May 2012.⁴⁹ The proposed consultation on the family home, however, was put on hold pending wider consultation on the reform of bankruptcy law as a whole. 2–29

During 2011 further changes were made to the debt arrangement scheme⁵⁰ and the Scottish Law Commission published its *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland* together with a draft Bankruptcy (Scotland) Bill 2011, a draft Bankruptcy (Scotland) Act 2011 (Consequential Provisions and Modifications) Order 2011 (which was necessary to restate those provisions which required to have effect outside Scotland⁵¹) and draft tables of destinations and derivations.⁵² Work on a consolidation, which was beyond doubt sorely needed following the extensive amendments to the Bankruptcy (Scotland) Act 1985 resulting from the various reforms discussed above, had commenced following a suggestion of the AiB approved by the Scottish Executive in October 2008.⁵³ It was, however, delayed to take account of the changes made by the Home Owner and Debtor Protection (Scotland) Act 2010. The consultation paper also sought views on a number of proposed amendments intended to remove anomalies, treat like cases alike and omit provisions no longer of any practical utility prior to consolidation⁵⁴ and invited suggestions for any other changes.⁵⁵ The Scottish Law Commission published its *Report on Consolidation of Bankruptcy Legislation in Scotland*,⁵⁶ which incorporated a draft Bankruptcy (Scotland) Bill 2013, draft Bankruptcy (Scotland) Act 2013 (Consequential Provisions and Modifications) Order 2013 and draft tables of destinations and derivations, in May 2013, although by then 2–30

⁴⁷ Available at <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0001023.doc> [Accessed 16 September 2017] and see further Ch.22.

⁴⁸ Scottish Government, *Protected Trust Deeds—Improving the Process* (October 2011).

⁴⁹ Scottish Government, *Report on Public Consultation: Protected Trust Deeds—Improving the Process* (May 2012).

⁵⁰ See further Ch.21.

⁵¹ Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland*, para.1.10.

⁵² The consultation was electronic only and the consultation paper and draft Bill, order and tables can be found on the Scottish Law Commission website.

⁵³ Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland*, para.1.1.

⁵⁴ Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland*, paras 1.7, 2.2.

⁵⁵ Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland*, para.1.7.

⁵⁶ Scottish Law Commission, *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, 2013).

it was clear that there would be yet further reform to the law as a result of the wider consultation on the reform of bankruptcy law as a whole referred to above.

2-31 That wider consultation commenced with the Scottish Government's consultation paper *Consultation on Bankruptcy Law Reform* issued in February 2012. This proceeded on the basis that the recent reforms to bankruptcy legislation had focused on specific issues such as low income, low asset debtors and that the opportunity was now to be taken "for the first time in a generation" to consider the principles and concept of bankruptcy and other debt management solutions.⁵⁷ The specific proposals consulted on were wide-ranging, and included further reforms to sequestration, protected trust deeds and the debt arrangement scheme; the introduction of a business debt arrangement scheme for sole traders and partnerships; the regulation of insolvency practitioners in Scotland (although a reserved area); and the introduction of an official receiver in Scotland. The consultation did not, however, deal as might have been expected with the family home: notwithstanding that any changes to the way in which the family home is dealt with might be regarded as fundamental to wider bankruptcy law reform, the consultation paper indicated that this was intended to be the subject of a separate consultation at a later stage. Following the consultation, the majority of the proposals were confirmed as going ahead, although some were set aside to be the subject of further development in future and a number which had proved to be particularly controversial were dropped either immediately or as the reform process progressed.⁵⁸

2-32 The resulting Bankruptcy and Debt Advice (Scotland) Act 2014 and related legislation, some of which was enacted and brought into force prior to the passing of the Bankruptcy and Debt Advice (Scotland) Act 2014 itself, brought about further wide-ranging changes to the law, including the introduction of a mandatory requirement for a debtor to obtain debt advice prior to making a debtor application for sequestration; the introduction of an optional pre-application moratorium where the debtor intends to apply for sequestration or a debt payment programme under the debt arrangement scheme or to grant a trust deed for creditors which is intended to become protected; the introduction of a common financial tool for calculating debtor contributions in sequestration, the debt arrangement scheme and protected trust deeds; the extension of formal provisions for payment holidays across sequestration, the debt arrangement scheme and protected trust deeds; changes to the level of qualifying debt in sequestration; changes to the provisions for access to sequestration by low income, low asset debtors and the introduction of a new minimal asset procedure for such debtors; the extension of the periods for making income contributions, capturing *acquirenda* and the reversion of assets; the transfer of further functions from the court to the AiB, including the determination of applications for sequestration by executors; the introduction of provisions for review of decisions made by AiB prior to any appeal to the court; changes to the debtor's discharge in sequestration; the introduction of a requirement for financial education in certain circumstances in sequestration; changes to the register of insolvencies; further changes to the debt arrangement scheme including the introduction of a business debt arrangement scheme for those

⁵⁷ The principles of bankruptcy law are considered further in Ch.3.

⁵⁸ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), The Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* (2012) and Accountant in Bankruptcy, *Bankruptcy Law Reform—Update* (February 2013).

legal persons in respect of whom sequestration is competent; and further changes to the provisions for protected trust deeds. A number of technical changes were also made in anticipation of the consolidation of the legislation.

The consolidation of the law finally took place with the enactment of the Bankruptcy (Scotland) Act 2016 and the Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016,⁵⁹ which came into force on 30 November 2016. The relevant secondary legislation was also consolidated. The consolidated legislation applies to sequestrations in respect of which the petition for sequestration is presented, or the debtor application is made, on or after that date⁶⁰ and to trust deeds for creditors executed on or after that date.⁶¹ This book is concerned with the law as so consolidated. The law as it stood prior to that date continues to apply to sequestrations and trust deeds prior to that date⁶² and reference is made to the previous law where appropriate. Specific provision is made for continuity of the law. The Bankruptcy (Scotland) Act 2016 provides, *inter alia*, that the repeal and re-enactment of a provision by the Bankruptcy (Scotland) Act 2016 does not affect the continuity of the law⁶³; anything done or having effect as if done by virtue of a provision repealed by Bankruptcy (Scotland) Act 2016, which was in force or effective immediately before the coming into force of Bankruptcy (Scotland) Act 2016 has effect after the coming into force of the Bankruptcy (Scotland) Act 2016 as if done by virtue of the corresponding provision of Bankruptcy (Scotland) Act 2016⁶⁴; any reference, express or implied, in the Bankruptcy (Scotland) Act 2016 or any in any other enactment or document to a provision of the Bankruptcy (Scotland) Act 2016 is to be construed, in so far as the context permits, as including, in relation to specified matters, a reference to the corresponding repealed provision⁶⁵; and any reference, express or implied, in any enactment or document to a provision repealed by the Bankruptcy (Scotland) Act 2016 is to be construed, in so far as the context permits, as including, in relation to specified matters, a reference to the corresponding provision of the Bankruptcy (Scotland) Act 2016.⁶⁶

A number of other changes had also taken place in the meantime. The Financial Services (Banking Reform) Act 2013 enacted by the UK Parliament made further changes to the provisions on preferred debts in sequestration.⁶⁷

The Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015, also enacted by the UK Parliament, made important changes to the provisions for the regulation of insolvency officeholders⁶⁸ and the latter also

⁵⁹ Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 (SI 2016/1034).

⁶⁰ Bankruptcy (Scotland) Act 2016 s.236.

⁶¹ Bankruptcy (Scotland) Act 2016 s.162 and see further Ch.22.

⁶² Bankruptcy (Scotland) Act 2016 s.234(3).

⁶³ Bankruptcy (Scotland) Act 2016 s.235(1).

⁶⁴ Bankruptcy (Scotland) Act 2016 s.235(2).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.235(3).

⁶⁶ Bankruptcy (Scotland) Act 2016 s.235(4). These provisions have effect in place of specified provisions of the Interpretation and Legislative Reform (Scotland) Act 2010. Bankruptcy (Scotland) Act 2016 s.235(5). They are without prejudice to other transitional provisions or savings in the Bankruptcy (Scotland) Act 2016: s.235(6). The references to the Bankruptcy (Scotland) Act 2016 in these provisions include references to subordinate legislation made under or by virtue of Bankruptcy (Scotland) Act 2016: s.235(7).

⁶⁷ See further Ch.16.

⁶⁸ See further Ch.4.

contained provisions remedying certain problems with the bankruptcy restrictions regime.⁶⁹

- 2–36 The European Commission embarked in 2012 on a review of the EC Council Regulation on insolvency proceedings as provided for by that regulation. It published proposals for reform in December 2012⁷⁰ and this ultimately resulted in a recast of the regulation⁷¹ to which the UK opted in.⁷² The recast regulation came into force for the most part on 26 June 2017 and consequential amendments to the bankruptcy legislation and relevant rules of court were duly made to provide for the changes it brought about.⁷³ On 23 June 2016, however, the UK voted to leave the European Union. While the recast regulation will continue to apply until the UK does, in fact, do so, what happens thereafter will depend on what, if anything, is agreed as to its future as part of the “Brexit” negotiations. This is discussed further in Ch.25.
- 2–37 Finally, following changes to the statutory provisions for the protection of essential supplies in corporate insolvency enacted by the UK Parliament, the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017⁷⁴ made corresponding changes to the bankruptcy legislation in Scotland.⁷⁵

FUTURE BANKRUPTCY LEGISLATION

- 2–38 Despite the recent extensive reform of bankruptcy law which has taken place, yet further reform remains in prospect.
- 2–39 There are a number of ongoing consultations, etc. which may give rise to further legislation. In 2016, the AiB issued consultations on the debt arrangement scheme and protected trust deeds as well as a diligence review which encompassed both the diligence reforms that have already been implemented and those which have not.⁷⁶ An interim report on the consultation on the debt arrangement scheme, which also sought further views on particular issues, was published in July 2017 and is likely to result in further legislation in the near future.⁷⁷ A final report on the consultation on the debt arrangement scheme and the outcome of the other consultations is awaited. In 2017, the AiB also issued a consultation on the common financial tool and the outcome of that consultation is also awaited.

⁶⁹ See further Ch.17.

⁷⁰ See European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No.1346/2000 of 29 May 2000 on insolvency proceedings* (COM, 2012) 743 final, *Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No.1346/2000 on insolvency proceedings* (COM, 2012) 744 final and accompanying *Impact Assessment* (SWD, 2012) 416 final.

⁷¹ Council Regulation (EU) 2015/848 on insolvency proceedings (recast), OJ L141, 5.6.2015, p.19.

⁷² See further Ch.25.

⁷³ See the Insolvency (Regulation (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/210) and the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Regulation (EU) 2015/848) 2017 (SSI 2017/202).

⁷⁴ Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 (SSI 2017/209).

⁷⁵ See further Chs 12 and 22 respectively.

⁷⁶ See further Chs 21, 22 and 15 respectively.

⁷⁷ See further Ch.21.

Also in 2016, the Insolvency Service issued a call for evidence on bonding arrangements for insolvency officeholders. In September 2017, it published a summary of the responses,⁷⁸ which indicated that it would continue to liaise with stakeholders to develop changes to the system and that further consideration would be given to the costs and benefits of legislative change that, if taken forward, would be preceded by further consultation to commence by the end of 2017. 2-40

Also in 2016, the European Commission issued a proposal for a Directive on preventative restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. This contains, inter alia, provisions relating to the discharge of entrepreneurs following bankruptcy. The proposal followed the Commission's recommendation of 12.3.2014 on a new approach to business failure and insolvency. The need to implement any changes which may be necessary to comply with the resulting Directive will, however, again depend on the terms, and the timing, of "Brexit". 2-41

The matter of the debtor's family home, on which further consultation was promised, also remains outstanding. Finally, the Scottish Law Commission has for some time been working on a project on moveable transactions which has the potential to impact on, inter alia, bankruptcy law.⁷⁹ 2-42

It therefore seems that bankruptcy law is likely to continue to be subject to change in the foreseeable future. 2-43

⁷⁸ Insolvency Service, Summary of Responses: Bonding arrangements for insolvency practitioners (September 2017).

⁷⁹ See Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Discussion Paper No.151, 2011). A report is expected during 2017.

CHAPTER 3

THEORY AND PRINCIPLES OF BANKRUPTCY LAW

INTRODUCTION

As already noted, the insolvency of a debtor raises important and difficult economic and social issues as well as legal issues.¹ Important decisions, therefore, have to be made as to how these issues should be addressed. As Wood observes: **3-01**

“Insolvency law is the root of commercial and financial law because it obliges the law to choose. There is not enough money to go round and so the law must choose who to pay. The choice cannot be avoided, compromised or fudged. On insolvency, commercial law is at its most ruthless: it must decide who is to bear the risk so that there is always a winner and a loser, a victor and a victim. On bankruptcy, it is difficult to split the difference. That is why bankruptcy is the most crucial indicator of the attitudes of a legal system in its commercial aspects and arguably the most important of all commercial legal disciplines.”²

How, then, is the law to choose? Should there be special rules and procedures which apply on insolvency and, if so, what form should they take, to which debtors should they apply, when should they apply, and to what extent should they displace the rules which would otherwise apply with the result that otherwise settled rights and expectations are upset? The answers to these questions depend on the answers to other questions, such as how insolvent debtors should be treated, whether different types of debtor should be treated differently and where the balance between the rights of the different parties affected by the insolvency should lie. These are fundamental questions of policy which in turn raise other questions about the underlying purpose of the law and the principles which should underpin it, an understanding of which is important for an understanding of the law as a whole. **3-02**

This chapter considers the justifications for insolvency law generally, different theories of insolvency law and the theory and principles on which bankruptcy law in Scotland is based. **3-03**

JUSTIFICATIONS FOR INSOLVENCY LAW

It is evident that Scots law does have special rules and procedures which apply on insolvency and it seems clear that this must therefore be regarded as justifiable in some way. It is important, however, to consider what the underlying justifications are. **3-04**

¹ See Preface.

² Wood, PR, *Principles of International Insolvency*, 2nd edn (London: Sweet & Maxwell, 2007), para. 1-001.

3-05 Goudy said that

"bankruptcy law is based on the principle that, so soon as a man becomes insolvent, his estate becomes the property of his creditors, and ought to be distributed among them according to their several rights and preferences. And it seems a legitimate extension of this principle that the debtor, upon surrendering his estate, should receive a discharge from the creditors' claims. *But these are legal conceptions by no means self evident.* The natural and immediate view . . . is that the creditor should be allowed to enforce payment of his debt by all lawful means, and that he has no concern with claims by other creditors. If he can obtain payment or security by means of diligence, or through his debtor's voluntary act, why should he have to give up his advantage, and be compelled to share with more dilatory or less fortunate creditors?"³ [*emphasis supplied*]

3-06 It has been said in relation to corporate insolvency law that:

"It cannot be assumed that since corporate managerial power in a going concern requires legitimation, insolvency regimes and powers automatically require legitimation. Insolvency processes do, however, impinge strongly upon the public interest in so far as decisions are made about the lives or deaths of enterprises and those decisions affect livelihoods and communities. Insolvency processes also have dramatic import for private rights in so far as, for instance, pre-insolvency property rights and securities can be frozen and individual efforts to enforce other legal rights constrained. *On both public and private interest grounds, accordingly, the powers involved in insolvency processes can be seen as requiring strong justification.*"⁴ [*emphasis supplied*]

3-07 This book is, of course, concerned with bankruptcy law and not corporate insolvency law as such, and it is accepted that corporate insolvency raises different issues to some extent. However, the Scottish Law Commission in its *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland*⁵ considered that in the case of a trading debtor the form of the business might be fortuitous and the arrangements for dissolving a business should therefore proceed as far as possible on the same principles irrespective of whether bankruptcy or liquidation was involved.⁶ This point was repeated in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation*,⁷ where it stated that despite differences between bankruptcy and liquidation, there were certain areas in which substantially the same rules ought to apply.⁸ Just as in corporate insolvency law, bankruptcy law in Scotland may also involve decisions about the life or death of enterprises, since bankruptcy law applies to individuals who are traders as well as consumers and to partnerships (other

³ Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.1.

⁴ Finch, V, "The Measures of Insolvency Law" 1997 OJLS 227 at p.246.

⁵ Scottish Law Commission, *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland* (Memorandum No.16, 1971).

⁶ Scottish Law Commission, *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland* (Memorandum No.16, 1971), para.13.

⁷ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

⁸ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68), para.1.6.

than limited liability partnerships) and certain other entities.⁹ Whether it should do so is another matter: the law differs in different jurisdictions but in England and Wales, for example, bankruptcy law applies only to individuals and other entities are subject to a modified version of corporate insolvency law, which may be regarded as more appropriate in some respects, particularly where, as in modern times, most individual debtors are consumers and not traders.¹⁰ Be that as it may, however, for the present bankruptcy law in Scotland may be equally concerned with the life and death of enterprises. It also unquestionably affects private rights. The need for justification on these grounds therefore applies equally to bankruptcy law.

The underlying justifications for bankruptcy law in Scotland have been described by Goudy as being, in essence, their utility and fundamental equity: 3-08

“It is not until the matter is examined by the light of experience—the experience especially, which mercantile affairs and commercial intercourse with other nations afford—that the fundamental equity of the bankrupt laws is fully perceived.”¹¹

THEORIES OF INSOLVENCY LAW

There are a number of theories about the proper purpose of bankruptcy or insolvency law. Many of these have been developed in the context of, or focus on, corporate insolvency law but are equally relevant to non-corporate insolvency law. The main theories have been classified broadly by a leading author on corporate insolvency law under the headings of creditor wealth maximisation and the creditors’ bargain, the broad-based contractarian approach, the communitarian vision, the forum vision, the ethical vision and the multiple values/eclectic approach, to which she adds her own explicit values approach.¹² 3-09

The theories differ widely. For example, the creditor wealth maximisation theory considers the purpose of the law solely in terms of maximising the return to creditors.¹³ It therefore sees the proper form of procedure as a compulsory, collective procedure for gathering in the assets of the debtor for distribution to the creditors. It also advocates that insolvency should not create any new rights and thus that distributions to the creditors should be in accordance with their existing pre-insolvency rights. This theory emphasises creditors’ rights and rejects the rights of others affected by the insolvency and the public interest (except in so far as it is served by the maximisation of returns to creditors) to the extent that these have not already been taken into account by allocation of rights prior to insolvency which can still be enforced on insolvency. In contrast, the communitarian approach emphasises community rights, i.e. the public interest, above all else. It therefore allows procedures designed to rehabilitate commercial enterprises where this would have a better result for the community, for example, by preserving jobs, even at the expense of some other 3-10

⁹ See further Preface and Ch.6.

¹⁰ This is discussed further in Ch.6.

¹¹ Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.1.

¹² Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, 2nd edn (Cambridge: CUP, 2009), Ch.2.

¹³ The principal proponent of this theory is the US commentator Thomas H. Jackson: see his book *The Logic and Limits of Bankruptcy Law* (Maryland: Beard Books, 2001) and earlier works referred to therein.

rights. It also allows for the alteration of pre-insolvency rights on insolvency. A different type of approach is exemplified by the multiple values/eclectic approach, which sees the purpose of the law as being to reflect a variety of values and policies. It sees the law as being multi-purpose, providing rules and procedures which reflect different values and policies, as opposed to only one (as in the creditor wealth maximisation approach). Each of the theories has attracted a greater or lesser degree of criticism.¹⁴

- 3-11 There has been little discussion of the underlying theory, as opposed to the principles, of bankruptcy law in Scotland. It is suggested, however, that it can best be seen as an example of the multiple values/eclectic approach in view of the different values and policies which it reflects as seen further below.

THE GENERAL PRINCIPLES OF BANKRUPTCY LAW

- 3-12 There is no legislative statement of the principles of bankruptcy law in Scotland. As seen above, Goudy characterised the underlying principle of bankruptcy law in Scotland as the principle that when a person becomes insolvent, their estate becomes the property of their creditors and should be distributed among them according to their several rights and preferences with the debtor receiving a discharge from the creditors' claims in return for surrendering their estate. Despite successive reforms of bankruptcy law this remains the case, but it is not the whole story.
- 3-13 The principles or aims of bankruptcy law have received more systematic consideration on a number of occasions, in particular by the Scottish Law Commission as part of the work which led ultimately to the enactment of the Bankruptcy (Scotland) Act 1985. In 1971, at the beginning of that work, the Scottish Law Commission in its *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland*¹⁵ set out four objectives which it thought the law of bankruptcy should and did seek to attain:

- “(1) To promote commercial morality by providing, in a situation of insolvency, adequate safeguards against alienation of the debtor's property to the disadvantage of his creditors or the creation of preferences for particular creditors, and by making information as to undischarged bankrupts available for the protection of persons who might otherwise enter into transactions with them.
- (2) To provide efficient machinery, available in all circumstances of insolvency, whereby a debtor or his creditors may secure the transfer of the debtor's assets to an impartial person for realisation and distribution among his creditors.
- (3) To adjudicate fairly amongst the creditors inter se by providing for equalisation of diligences, the protection of security and other rights and preferences lawfully obtained or created and the recognition of claims which may properly be treated as preferential and, subject thereto, the distribution of any remaining assets amongst the general creditors in proportion to the amounts of their respective claims.

¹⁴ For a useful summary, see Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, 2nd edn (Cambridge: CUP, 2009), Ch.2.

¹⁵ Scottish Law Commission, *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland* (Memorandum No.16, 1971).

- (4) To enable a bankrupt who has made a full disclosure of the state of his affairs to obtain, with the minimum of humiliation and delay, a discharge of his liabilities and the opportunity to make a fresh start.”¹⁶

When it published its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation*¹⁷ 11 years later in 1982 after completing a root and branch review of the law,¹⁸ it set out an extended list of the objectives behind its recommendations for reform:

- “1. To preserve the rights of creditors to come to voluntary arrangements with insolvent debtors for resolving their indebtedness.
2. To preserve, where voluntary arrangements are not made, and so far as consistent with the humane treatment of the debtor, the effectiveness of the system of sequestration as a support for the system of commercial credit.
3. To ensure that, in so far as the law does not otherwise direct, sequestration should be available in all cases of insolvency.
4. To protect creditors by ensuring that the bankrupt makes a full disclosure of his estate, wherever situated, and by providing procedures by which the extent of that estate may be verified.
5. To ensure that the estate may be rapidly recovered and distributed among the creditors.
6. To protect creditors, also, by retaining those rules of bankruptcy law designed to ensure that disposals of property made by the debtor before the sequestration and likely to have been made in contemplation of it may be reduced for the benefit of the creditors.
7. To promote equality among the creditors as a class by reducing the categories of preferential creditors, by retaining provision for cutting down preferences to individual creditors, by ensuring that diligences effected within a short period prior to the sequestration are cut down, and by providing appropriate rules for the valuation of debts and appropriate machinery for adjudication upon them.
8. To protect the interests of the debtor so far as the fulfilment of the preceding objectives allows. In particular, the law should not discourage the bankrupt from earning his living during the sequestration or prevent him retaining sufficient income to aliment himself and his family.
9. To facilitate the discharge of the bankrupt and to ensure that bankrupt debtors do not remain indefinitely subject to the disqualifications of a bankrupt.
10. To strengthen the law relating to bankruptcy offences, but to ensure, also, that the civil law of bankruptcy is not used as an instrument of penal policy.
11. To provide an efficient and expeditious machinery for attaining the preceding objects; to ensure, also, that this machinery is adaptable to the circumstances of particular cases.
12. To provide a clear and comprehensive statement of the relevant law.”¹⁹

¹⁶ Scottish Law Commission, *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland* (Memorandum No.16, 1971), para.5.

¹⁷ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

¹⁸ See Ch.2.

¹⁹ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.2.49.

3-15 As already noted, that report led to the enactment of the Bankruptcy (Scotland) Act 1985 which, despite successive reforms, remains the basis of bankruptcy law in Scotland as now consolidated in the Bankruptcy (Scotland) Act 2016.

3-16 Most recently, the Scottish Government's *Consultation on Bankruptcy Law Reform* issued in February 2012 set out to review "for the first time in a generation . . . the principles and concept of bankruptcy and other debt management solutions", on the basis that although the bankruptcy legislation had been the subject of amendment in recent times, these amendments had been designed only to solve specific issues of the time.²⁰ It set out proposals intended to provide a new model of debt advice, debt management and debt relief fit for the twenty-first century in the form of a "financial health service" providing "rehabilitation to individuals and organisations from their financial pressures, while acknowledging their financial responsibilities".²¹ The key principles on which this new model was to be based were set out as follows²²:

- ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management;
- those debtors who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses; and
- securing the best return for creditors by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses.

3-17 The proposals sought to take account of best practice in other countries (while acknowledging the dangers involved in so doing) and to align Scots law with international standards in the form of the principles and recommendations set out in the INSOL International Consumer Debt Report.²³ That report is one of a number of publications which have been produced by international bodies over the years which seek to set out principles and recommendations for the enactment or reform of insolvency law.²⁴ With the exception of the

²⁰ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Executive Summary and para.1.2.

²¹ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Executive Summary and Pt 5.

²² Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Executive Summary and Pt 5.

²³ See Scottish Executive, *Consultation on Bankruptcy Law Reform* (February 2012), as above, Introduction, Pt 4. It may be noted that the citation for the INSOL International Consumer Debt Report in the consultation paper is incomplete. There have, in fact, been two editions of the Report, the first published in 2001 and the second in 2011; it was the second edition which was being referred to in the consultation paper. For an analysis of how bankruptcy law in Scotland, England and Wales prior to the issue of the consultation paper benchmarked against the principles set out in the first edition of the Report, see McKenzie Skene, DW and Walters, A, "Consuming Passions: Benchmarking Consumer Bankruptcy Law Systems" in Omar, P (ed), *International Insolvency Law: Themes and Perspectives* (Oxford: Routledge, 2008).

²⁴ See European Bank for Reconstruction and Development, *Core Principles for an Insolvency Law Regime*, available at <http://www.ebrd.com/what-we-do/sectors/legal-reform/debt-restructuring-and-bankruptcy.html> [Accessed 16 September 2017]; International Monetary Fund, *Orderly and Effective Insolvency Procedures* (1999), available at <http://www.imf.org/external/pubs/ft/orderly> [Accessed 16 September 2017]; UNICTRAL, *Legislative Guide on Insolvency Law*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html [Accessed 16 September 2017]; World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (2001) and revised draft (2005), available at <http://www.worldbank.org/> [Accessed 16 September 2017]; and World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013), available at <http://www.worldbank.org/> [Accessed 16 September 2017].

World Bank's *Report on the Treatment of the Insolvency of Natural Persons*,²⁵ however, which post-dated the consultation paper, these other publications are concerned primarily with corporate or business insolvency law, and while the INSOL International Consumer Debt Report is concerned only with consumer bankruptcy, most debtors in Scotland are, in practice, consumers.

In its *Response to the Consultation on Bankruptcy Law Reform*, the Scottish Government indicated its intention to bring forward legislation based on the principles referred to above²⁶ and, as already noted, this resulted in the enactment of the Bankruptcy and Debt Advice (Scotland) Act 2014 and associated legislation. However, despite the numerous and in some cases far-reaching changes to the detail of the law brought about by that legislation, which are discussed throughout this book, it is suggested that the underlying principles and concept of bankruptcy law in Scotland have not in fact changed fundamentally, and the principles set out in the *Consultation on Bankruptcy Law Reform*, although fewer in number and more generally expressed than those set out in the Scottish Law Commission's *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation*, continue to reflect what are in fact long-established principles of Scottish bankruptcy law.²⁷ 3-18

²⁵ World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013), available at <http://www.worldbank.org/> [Accessed 16 September 2017].

²⁶ See the Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* (November 2012).

²⁷ For a full discussion, see McKenzie Skene, DW, "Plus Ça Change, Plus C'est La Même Chose? The Reform of Bankruptcy Law in Scotland" (2015) 3 NIBLeJ 15.

CHAPTER 4

THE ACCOUNTANT IN BANKRUPTCY AND INSOLVENCY PRACTITIONERS

INTRODUCTION

Historically, the administration of the estates of insolvent debtors in Scotland 4-01 was carried out by private individuals selected by the creditors or appointed by the court; there was no public official who undertook the administration of the estates of insolvent debtors. The office of the Accountant in Bankruptcy (AiB) was created by the Bankruptcy (Scotland) Act 1856,¹ but until relatively recently its functions were limited to certain supervisory and record-keeping functions.² Its functions have, however, been progressively expanded and now include inter alia the administration of the sequestrated estates of debtors in specified circumstances.³ In many cases, however, the administration of the estates of insolvent debtors will continue to be carried out by private insolvency practitioners who are now subject to regulation as such.

This chapter considers the office and functions of AiB and the regulation of 4-02 insolvency practitioners.

THE ACCOUNTANT IN BANKRUPTCY

History of the office

As already noted, the office of AiB was created by the Bankruptcy (Scotland) 4-03 Act 1856.⁴ It was subsequently combined with that of the Accountant of Court, which had been created by the Judicial Factors Act 1849,⁵ by the Judicial Factors (Scotland) Act 1889, which provided for both offices to be held by the Accountant of Court.⁶ This remained the position until the changes introduced by the Bankruptcy (Scotland) Act 1993, which once again separated the two offices and began the progressive expansion of AiB's functions.

¹ Bankruptcy (Scotland) Act 1856 s.156. The history of the office is described below.

² For a description of the functions of the Accountant in Bankruptcy under the Bankruptcy (Scotland) Act 1856, see Alexander, W, *Digest of the Bankruptcy (Scotland) Act 1856* (Edinburgh: Gale, 1856), Ch.29; for a description of the functions of the Accountant in Bankruptcy under the Bankruptcy (Scotland) Act 1913, which replaced the Bankruptcy (Scotland) Act 1856, see Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), Ch.32; and for a description of the functions of the Accountant in Bankruptcy under the Bankruptcy (Scotland) Act 1985, which replaced the Bankruptcy (Scotland) Act 1913, as originally enacted, see McBride, W.W, *Bankruptcy Law in Scotland*, 1st edn (Edinburgh: W. Green, 1985), Ch.2.

³ The expansion of the functions of the Accountant in Bankruptcy began with the changes made by the Bankruptcy (Scotland) Act 1993 and has continued with subsequent bankruptcy legislation. The successive changes are noted in the context of the detailed discussion of the current statutory functions of the Accountant in Bankruptcy below.

⁴ Bankruptcy (Scotland) Act 1856 s.156.

⁵ See Judicial Factors Act 1849 s.9.

⁶ Judicial Factors (Scotland) Act 1889 s.1.

Appointment and status of AiB

- 4-04** AiB is appointed by the Scottish Ministers.⁷ At the time of writing, AiB is Dr Richard Dennis.
- 4-05** The Scottish Ministers are empowered to appoint a member of AiB's staff as Depute AiB to exercise the functions of AiB at any time when AiB is unable to do so.⁸ At the time of writing, the Depute AiB is John Cook.
- 4-06** AiB is an officer of the court.⁹ This provision was added by the Bankruptcy and Diligence etc. (Scotland) Act 2007 as a consequence of the expansion of AiB's statutory functions to include the determination of debtor applications for sequestration and was intended to make clear that AiB has duties to the court in the same way as a solicitor or advocate would have.¹⁰
- 4-07** AiB is also the chief executive of the Scottish Government Executive Agency Accountant in Bankruptcy, which was established in 2002 and, *inter alia*, carries out the statutory functions of AiB. The framework within which the agency operates is set out in the AiB Agency Framework Document 2016, which sets out, *inter alia*, the role, purpose and key functions of the agency; the roles and responsibilities of the persons involved, including the Scottish Ministers and the chief executive; the accountability of the agency to the public through the Scottish Ministers and the Scottish Parliament; detailed financial accountability mechanisms; management arrangements for the agency; and the agency's relationships with other bodies.¹¹
- 4-08** It is important to distinguish between AiB's statutory functions and the functions of AiB as an executive agency, as they are not the same: the latter includes, but is wider than, the former. Both are discussed in detail below.

Statutory functions of AiB

- 4-09** The Bankruptcy (Scotland) Act 2016 confers a number of functions on AiB. These may be categorised broadly as supervisory functions; the determination of debtor applications for sequestration; the maintenance of the register of insolvencies; the preparation of an annual report; acting as interim trustee and trustee in sequestration in specified cases; exercising the functions of commissioners in sequestrations where there are no commissioners; the determination of specified applications made in relation to sequestrations; functions in relation to the debtor's discharge and bankruptcy restrictions; the review of specified decisions; and determining specified appeals. AiB is also required to transmit certain notices received by them under the Insolvency Act 1986.¹² AiB's functions are discussed further below and in context throughout this book. Additional functions may be conferred on AiB by the Scottish Ministers from time to time.¹³

⁷ Bankruptcy (Scotland) Act 2016 s.199(1).

⁸ Bankruptcy (Scotland) Act 2016 s.199(2).

⁹ Bankruptcy (Scotland) Act 2016 s.199(1).

¹⁰ See the Explanatory Notes to the Bankruptcy and Diligence etc. (Scotland) Act 2007, para.81.

¹¹ The Agency Framework Document can be found on the AiB's website: <http://www.aib.gov.uk> [Accessed 16 September 2017].

¹² See Bankruptcy (Scotland) Act 2016 s.202.

¹³ Bankruptcy (Scotland) Act 2016 s.200(1)(e).

The Scottish Ministers, following consultation with the Lord President of the Court of Session, may give AiB general directions as to the performance of their functions under the Bankruptcy (Scotland) Act 2016.¹⁴ Such directions may apply to all cases or specified types of cases, but not to individual cases¹⁵ and AiB is under an obligation to comply with them.¹⁶ 4–10

The functions of AiB, with the exception of those conferred by s.200 of the Bankruptcy (Scotland) Act 2016, may be carried out by any member of their staff authorised to do so.¹⁷ AiB may also appoint, on such terms and conditions as they consider appropriate, such persons as they consider fit to perform on their behalf any of their functions in respect of the sequestration of the estate of any debtor.¹⁸ They may pay such persons such fee as they consider appropriate¹⁹ and such persons must comply with such general or specific directions as AiB may give them from time to time.²⁰ These provisions allow AiB to appoint, inter alia, agents to perform AiB's duties as interim trustee and trustee in sequestration in any cases where AiB is appointed as such. In practice, such appointments are made after an appropriate procurement process and appointees enter into an agency contract on standard terms. AiB may also authorise a person to appear on their behalf to conduct civil proceedings in the sheriff court which relate to any of AiB's functions, including those conferred by s.200 of the Bankruptcy (Scotland) Act 2016.²¹ For this purpose, "civil proceedings" are proceedings which are not in respect of an offence.²² This provision was introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014, having been added to that Act by amendment at Stage 3, in order to ensure that a person other than a legal representative who was authorised by AiB could conduct civil proceedings in the sheriff court in relation to AiB's functions.²³ 4–11

AiB is also the debt arrangement scheme administrator for the purposes of the Debt Arrangement and Attachment (Scotland) Act 2002²⁴ and the recipient of certain documents relating to corporate insolvency under the Insolvency Act 1986.²⁵ 4–12

Supervisory functions

AiB is required to supervise the performance of, and investigate any complaints against, interim trustees and trustees in sequestration other than themselves, trustees under protected trust deeds and commissioners in sequestration.²⁶ 4–13

¹⁴ Bankruptcy (Scotland) Act 2016 s.203(1).

¹⁵ Bankruptcy (Scotland) Act 2016 s.203(2).

¹⁶ Bankruptcy (Scotland) Act 2016 s.203(3).

¹⁷ Bankruptcy (Scotland) Act 2016 s.201(1).

¹⁸ Bankruptcy (Scotland) Act 2016 s.201(2).

¹⁹ Bankruptcy (Scotland) Act 2016 s.201(4).

²⁰ Bankruptcy (Scotland) Act 2016 s.201(3).

²¹ Bankruptcy (Scotland) Act 2016 s.204(1).

²² Bankruptcy (Scotland) Act 2016 s.204(2).

²³ See Scottish Parliament, *Official Report Meeting of the Parliament* (20 March 2014), col.29263.

²⁴ See Debt Arrangement and Attachment (Scotland) Act 2002 s.8 and Debt Arrangement and Attachment (Scotland) Act 2002 (Transfer of Functions to the Accountant in Bankruptcy) Order 2004 (SSI 2004/448). The functions of AiB as debt arrangement scheme administrator are discussed in detail in Ch.21.

²⁵ Scotland Act 1998 Sch.8, para.23. These documents are also included in the register of insolvencies which AiB is required to maintain under the Bankruptcy (Scotland) Act 2016: see para.4–26.

²⁶ Bankruptcy (Scotland) Act 2016 s.200(1).

- 4-14** AiB produces *Notes for Guidance* designed to provide those concerned with the administration of bankruptcy and protected trust deeds with AiB's interpretation of the relevant process and information about relevant sources of information. There are *Notes for Guidance for Trustees*, which include information about the functions of AiB and guidance for interim trustees, trustees, commissioners and agents of AiB in sequestration, and *Notes for Guidance for Trustees under Protected Trust Deeds*, which provide additional guidance specifically for trustees under protected trust deeds. As a result of the successive reforms, there are now several versions in each case dealing with the applicable law for different periods of time. The *Notes for Guidance* are available on AiB's website. AiB also writes regularly to agents and trustees to advise them of changes in policy and changes within AiB. These "Dear Trustee" letters are also available on AiB's website.
- 4-15** The statutory provisions relating to sequestrations and protected trust deeds provide for AiB to receive a wide variety of documents from various sources which in practice assist them in carrying out their supervisory functions. These are not listed separately here but are discussed in context throughout. In exercising their supervisory functions, AiB may also request other documents to be sent to them, and the *Notes for Guidance for Trustees* contain lists of documents (statutory or otherwise) to be sent to AiB by interim trustees and trustees in sequestration. Interim trustees and trustees in sequestration have a statutory duty to supply AiB with such information as they consider necessary to enable them to discharge their functions even where they are no longer acting in the sequestration.²⁷
- 4-16** A trustee in sequestration is required to consult with AiB about the exercise of their functions to recover, realise and manage the debtor's estate as soon as may be after their appointment and, subject to certain provisos, must comply with any general or specific direction given to them by AiB as to the exercise of such functions.²⁸ The first proviso is that the trustee may sell perishable goods without complying with such a direction where they consider that compliance would adversely affect the sale.²⁹ The second proviso is that the trustee is to act in the management and realisation of the debtor's estate only in so far as, in their view, it would be of financial benefit to the estate and in the interests of creditors.³⁰
- 4-17** AiB has the power to give directions to a trustee under a protected trust deed in relation to the administration of the trust deed.³¹ A direction may be issued by AiB *ex proprio motu* or, at their discretion, on the request of the debtor, any creditor or the trustee themselves.³² The terms of the direction are to be intimated to the debtor and the creditors.³³ The trustee is required to comply with the direction within 30 days beginning with the date on which it is given unless they appeal against it,³⁴ in which case, they will be required to comply with it

²⁷ Bankruptcy (Scotland) Act 2016 ss.53(2) (interim trustee in sequestration) and 50(1)(g) (trustee in sequestration).

²⁸ Bankruptcy (Scotland) Act 2016 s.109(1), (2). This obviously does not apply where the trustee is the AiB themselves: Bankruptcy (Scotland) Act 2016 s.109(4). As to the functions of the trustee, see further Ch.10.

²⁹ Bankruptcy (Scotland) Act 2016 s.109(9).

³⁰ Bankruptcy (Scotland) Act 2016 s.109(12).

³¹ Bankruptcy (Scotland) Act 2016 s.179(1).

³² Bankruptcy (Scotland) Act 2016 s.179(3).

³³ Bankruptcy (Scotland) Act 2016 s.179(2).

³⁴ Bankruptcy (Scotland) Act 2016 s.179(4).

only if the appeal is dismissed or withdrawn and then within 30 days beginning with the day of the dismissal or withdrawal.³⁵ An appeal against a direction may be made to the sheriff by the trustee, the debtor or any creditor,³⁶ but in the case of an appeal by the debtor or a creditor, only where they are able to satisfy the sheriff that they have, or are likely to have, a pecuniary interest in the outcome of the appeal.³⁷ The appeal is made to the sheriff to whom a petition for sequestration of the debtor's estates would have been made at the date the trust deed was granted³⁸ and must be made no later than 21 days after the date on which the direction was made.³⁹ The sheriff's decision is final.⁴⁰ Where it appears to AiB that the trustee has failed to comply with a direction without reasonable excuse, they may report the matter to the sheriff.⁴¹ The sheriff, after hearing the trustee, may censure them or make such other order as the circumstances of the case require.⁴²

Where it appears to AiB that an interim trustee in sequestration, a trustee in sequestration, a trustee under a protected trust deed or a commissioner has failed without reasonable excuse to perform any of their duties, they must report the matter to the sheriff.⁴³ The sheriff, after hearing the person, may remove them from office, censure them or make such other order as the circumstances of the case require.⁴⁴ 4-18

In addition, where AiB has reasonable grounds to suspect that an interim trustee in sequestration, a trustee in sequestration, a trustee under a protected trust deed or a commissioner has committed an offence in the performance of their functions, they must report the matter to the Lord Advocate.⁴⁵ 4-19

AiB must also report the matter to the Lord Advocate where they have reasonable grounds to suspect that an offence has been committed in relation to a sequestration by the debtor, in respect of their assets, their dealings with their assets or their conduct in relation to their business or financial affairs, or by a person other than the debtor in relation to that person's dealings with the debtor, interim trustee or trustee in respect of the debtor's assets, business or financial affairs.⁴⁶ One source of information about such suspected offences is a trustee in sequestration other than AiB, who is required to report the matter to AiB where they have reasonable grounds to suspect that an offence has been committed in relation to a sequestration by the debtor, in respect of their assets, their dealings with their assets or their conduct in relation to their business or financial affairs, or by a person other than the debtor in relation to that person's dealings with the debtor, interim trustee or trustee in respect of the debtor's assets, business or financial affairs.⁴⁷ Where AiB is themselves the trustee in sequestration, they may uncover suspected offences in the course of their 4-20

³⁵ Bankruptcy (Scotland) Act 2016 s.179(5).

³⁶ Bankruptcy (Scotland) Act 2016 s.188(1)(c), (2).

³⁷ Bankruptcy (Scotland) Act 2016 s.188(2).

³⁸ Bankruptcy (Scotland) Act 2016 s.188(6).

³⁹ Bankruptcy (Scotland) Act 2016 s.188(5).

⁴⁰ Bankruptcy (Scotland) Act 2016 s.188(7).

⁴¹ Bankruptcy (Scotland) Act 2016 s.179(6).

⁴² Bankruptcy (Scotland) Act 2016 s.179(6).

⁴³ Bankruptcy (Scotland) Act 2016 s.200(4).

⁴⁴ Bankruptcy (Scotland) Act 2016 s.200(4).

⁴⁵ Bankruptcy (Scotland) Act 2016 s.200(5)(a), (6).

⁴⁶ Bankruptcy (Scotland) Act 2016 s.200(5)(b), (6).

⁴⁷ Bankruptcy (Scotland) Act 2016 s.50(3)(a). The trustee's report is absolutely privileged: Bankruptcy (Scotland) Act 2016 s.50(4). AiB has produced a suspected offences report form for use by trustees which is included in the *Notes for Guidance for Trustees* referred to at para.4-14.

administration of the debtor's estate, but the decision whether to report the matter to the Lord Advocate is taken in their supervisory capacity and not in their capacity as trustee.⁴⁸

- 4-21 Where they consider that their conduct warrants it, AiB may decide to report an interim trustee in sequestration, trustee in sequestration or a trustee under a protected trust deed to the recognised professional body which authorises them to act as an insolvency practitioner⁴⁹ and, if different, their professional body.
- 4-22 AiB is given a number of specific powers to act in relation to sequestrations and protected trust deeds, including powers to audit accounts in specified circumstances. These are not listed separately here but discussed in context throughout.
- 4-23 The Scottish Government's *Consultation on Bankruptcy Law Reform* in 2012 noted that AiB's supervisory powers had not always been widely used and proposed that a more proactive approach to the use of those powers be taken in future.⁵⁰ The intended changes were to be mainly to procedure and practice rather than legislative,⁵¹ but views were also sought on a proposal to establish a panel to review cases where directions issued by AiB to trustees in sequestration or trustees under protected trust deeds had not been followed and (possibly) decide on an appropriate course of action.⁵² The consultation responses were divided on the issue of AiB taking a more proactive approach to the use of existing supervisory powers and the majority were not in favour of the establishment of the proposed review panel.⁵³ The Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* included under the heading of issues not requiring legislation AiB's intention to take a more proactive approach to supervisory functions,⁵⁴ but made no mention of the establishment of a review panel and, ultimately, this was not taken forward in this context.

Determining debtor applications

- 4-24 As a result of changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, where a living debtor or an entity in respect of which sequestration is competent wishes to apply for sequestration of the debtor's own estate, this is now done by way of a debtor application to AiB rather than, as previously, by a petition to the court.⁵⁵ Similarly, as a result of further changes made by the Bankruptcy and Debt Advice (Scotland) Act 2014, where an executor or person entitled to be appointed executor on the estates of a deceased debtor wishes to apply for sequestration of the deceased debtor's estate, this is also now done by way of a debtor application to AiB rather than, as previously, by a petition to the court.⁵⁶ AiB is required to determine such applications.⁵⁷

⁴⁸ Mitchell, *Appellant* 27 September 2010 Edinburgh Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/SQ538_07.html [Accessed 16 September 2017].

⁴⁹ See further at para.4-68.

⁵⁰ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), para.15.5.1.

⁵¹ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), para.15.6.6.

⁵² Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), para.15.6.8.

⁵³ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), para.11.14.

⁵⁴ Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (2012) para.7.

⁵⁵ See Bankruptcy (Scotland) Act 2016 ss.2(1)(a) (living debtor) and 6(3), (4) and (7) (entities) and Ch.7.

⁵⁶ See Bankruptcy (Scotland) Act 2016 s.5(a) and Ch.6.

⁵⁷ Bankruptcy (Scotland) Act 2016 s.200(1)(b).

The procedure for determining debtor applications is discussed in detail 4–25
in Ch.8.

Register of insolvencies

AiB is required to maintain a register, referred to as the register of insolvencies, in the prescribed form.⁵⁸ The register is required to contain particulars of: 4–26

- (a) persons who are the subject of notices under the provisions for a pre-application moratorium on diligence⁵⁹;
- (b) estates which have been sequestrated⁶⁰;
- (c) trust deeds which have been sent to AiB for registration.⁶¹ There is no requirement, or indeed provision, for the registration of trust deeds which have not become protected, and the register therefore contains details of protected trust deeds only. It is thought, however, that the numbers of trust deeds which do not become protected, whether intentionally or otherwise, is small⁶²;
- (d) bankruptcy restrictions orders and interim bankruptcy restrictions orders.⁶³ Prior to the changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014, the legislation also made provision for bankruptcy restrictions undertakings. These were abolished by the Bankruptcy and Debt Advice (Scotland) Act 2014, but undertakings prior to that time will remain in the register until removed. Bankruptcy restrictions are discussed further in Ch.17;
- (e) the winding up and receivership of business associations which the Court of Session has jurisdiction to wind up.⁶⁴ For this purpose, “business association” has the same meaning as in s.C2 of Pt II of Sch.5 to the Scotland Act 1998⁶⁵; and
- (f) any other document specified in the regulations made under s.200 or any other enactment.⁶⁶

The register of insolvencies does not contain details of debt payment 4–27
programmes entered into under the debt arrangement scheme: these are contained in a separate debt arrangement scheme register.⁶⁷ The amalgamation of the registers was considered as part of the most recent reforms but not taken forward. This means that anyone wishing to find out whether a debtor is subject to any of the available processes and, if so, which, will need to search both registers.

⁵⁸ Bankruptcy (Scotland) Act 2016 s.200(1)(c).

⁵⁹ Bankruptcy (Scotland) Act 2016 s.200(2)(a). The provisions for a pre-application moratorium on diligence are discussed in Ch.5.

⁶⁰ Bankruptcy (Scotland) Act 2016 s.200(2)(b).

⁶¹ Bankruptcy (Scotland) Act 2016 s.200(2)(c).

⁶² See further Ch.22.

⁶³ Bankruptcy (Scotland) Act 2016 s.200(2)(d).

⁶⁴ Bankruptcy (Scotland) Act 2016 s.200(2)(e).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.200(9). Section C2 of Pt II of Sch.5 to the Scotland Act 1998 provides that “business association” has the meaning given in s.C1 of Pt II of Sch.5, but does not include any person whose estate may be sequestrated under the Bankruptcy (Scotland) Act 1985 or any public body established by or under an enactment. Section C1 of Pt II of Sch.5 provides that “business association” means “any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit” and defines “business” as including the provision of benefits to the members of an association. The reference to the Bankruptcy (Scotland) Act 1985 should now, of course, be read as a reference to the Bankruptcy (Scotland) Act 2016.

⁶⁶ Bankruptcy (Scotland) Act 2016 s.200(2)(f).

⁶⁷ See further Ch.21.

4-28 The form of the register is prescribed by Bankruptcy (Scotland) Regulations 2016.⁶⁸ Prior to changes made by the Bankruptcy and Debt Advice (Scotland) Act 2014, the form of the register was prescribed by Act of Sederunt.⁶⁹ The Scottish Government's *Consultation on Bankruptcy Reform* in 2012 noted that this required any changes to the form of the register to be put before the Sheriff Court Rules Council and sought views on relocating the relevant provisions to regulations made by the Scottish Ministers under the bankruptcy legislation.⁷⁰ The great majority of consultees were in favour of this change,⁷¹ which was duly made by the Bankruptcy and Debt Advice (Scotland) Act 2014.

4-29 The Bankruptcy (Scotland) Regulations 2016⁷² now require the following information to be included in the register:

- (a) Sequestrations: name of debtor; debtor's date of birth (where known); debtor's residence and any former residence within the past five years and principal place of business (if any) at date of sequestration or date of death; date of death in case of deceased debtor; occupation of debtor; whether sequestration awarded by sheriff or AiB; date of any order converting protected trust deed to sequestration; whether sequestration is a minimal asset process; name and address of petitioner for sequestration (where applicable); court by which sequestration awarded (where applicable); date of presentation of petition (where applicable); date of first order (where applicable); date of award of sequestration; particulars of petition for recall of sequestration (where applicable); date of recall of sequestration (where applicable); name and address of trustee and date of appointment; level of debt when trustee's statement of debtor's affairs is produced; level of assets when trustee's statement of debtor's affairs is produced; name and address of trustee (or replacement trustee) and date of confirmation of appointment; particulars of notice of public examination of debtor or relevant person (where applicable); if the minimal asset process ceases to apply; issue of certificate deferring debtor's discharge indefinitely (where applicable); particulars of any application for removal of trustee and any order removing trustee or declaring office vacant; date of debtor's discharge and whether on composition or by operation of law; date of trustee's discharge and of any decision to grant or refuse certificate of discharge; period of any minimal asset process bankruptcy credit restriction following discharge.
- (b) Protected trust deeds: name and address of granter of trust deed; granter's date of birth (where known); address of the centre of main interests and all establishments of the granter of the trust deed in terms of Regulation (EU) 2015/848, unless the granter of the trust

⁶⁸ See Bankruptcy (Scotland) Act 2016 s.200(1)(c) and Bankruptcy (Scotland) Regulations 2016 reg.30 and Sch.2.

⁶⁹ Immediately prior to the changes, the provisions relating to sequestrations, protected trust deeds and bankruptcy restrictions were contained in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 (SSI 2008/119) while the provisions relating to the winding up and receivership of business associations were contained in the Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443) as amended by the Act of Sederunt (Rules of the Court of Session Amendment No.3) (Bankruptcy and Diligence etc. (Scotland) Act 2007) 2008 (SSI 2008/122).

⁷⁰ See Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), paras 14.5.1-14.5.3.

⁷¹ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses*, para.9.11.

⁷² Bankruptcy (Scotland) Regulations 2016 reg.30 and Sch.2.

deed is an undertaking as described in art.1(2) of that regulation; whether the protected trust deed is considered to be main or territorial proceedings within the meaning of that regulation; the location and nature of any other insolvency proceedings; name and address of trustee under deed; date (or dates) of execution of trust deed; date on which copy deed and certificate of accession was registered; date of registration of statement indicating how the estate was realised and distributed and certificate to the effect that the distribution was in accordance with the trust deed; date of trustee's discharge; date of registration of copy of order of court that non-acceding creditor is not bound by trustee's discharge.

- (c) Bankruptcy restrictions orders, interim bankruptcy restrictions orders and bankruptcy restrictions undertakings: name of debtor, debtor's date of birth (where known); date of sequestration; date of making of bankruptcy restrictions order or interim bankruptcy restrictions order; date of acceptance of bankruptcy restrictions undertaking; date of order varying bankruptcy restrictions order or bankruptcy restrictions undertaking (where applicable); date of annulment or revocation of bankruptcy restrictions order or bankruptcy restrictions undertaking (where applicable); date of discharge of bankruptcy restrictions undertaking (where applicable); date bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking ceased to have effect.
- (d) Pre-application moratorium: notice of intention to apply—moratorium on diligence (where applicable).
- (e) Winding up and receivership of business associations: company number; company name; type of proceedings; name of office holder(s); date of appointment of office holder(s); date of termination of appointment of office holder(s); date of winding-up order (for compulsory liquidations); court by which company wound up.

The information contained in the register has been expanded over time, in part 4-30 to reflect changes introduced as a result of reforms and in part as a result of the outcome of consultation as to the inclusion of additional information in the register.⁷³ Some of the information to be included in the register may cause difficulties. For example, in relation to sequestration, none of the prescribed forms for debtor applications for sequestration or petitions for sequestration specifically require the debtor's *principal* place of business (where relevant) to be identified, and in any event this might be unknown to a petitioner for sequestration. Nor would this necessarily be evident from any of the other documents initially sent to AiB, although it may be ascertained thereafter. The same applies in relation to the occupation of debtor. Similarly, in relation to protected trust deeds, there are a variety of styles of trust deed in use and neither the trust deed itself nor any of the other documents initially sent to AiB may specifically identify the address of the debtor's centre of main interests/establishments in terms of the EU insolvency proceedings regulation or the location and nature of any other insolvency proceedings.⁷⁴ These difficulties could be partly resolved by ensuring that all of the information which is to be included in the register is specifically required to be provided in the prescribed

⁷³ See Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), para.14.5.4.

⁷⁴ The position here may be assisted to some extent by the introduction of linked insolvency registers by the EU insolvency proceedings regulation: see further Ch.25.

forms or, in the case of protected trust deeds, in the trust deed itself or one of the other documents which must be sent to AiB along with the trust deed. This would not, however, solve the problem where the information required may not be known to the person providing information, e.g. a petitioner for sequestration, and the information to be included in the register might usefully be reviewed with this in mind. It is suggested that the register should also contain relevant information relating to the EU insolvency proceedings regulation for sequestrations as well as protected trust deeds.

4–31 The Bankruptcy and Debt Advice (Scotland) Act 2014 introduced provisions allowing certain information not to be included in the register in certain circumstances. The Scottish Government's *Consultation on Bankruptcy Law Reform* in 2012 noted that the fact that the register is a free, searchable public register might lead to a reluctance on the part of an individual to initiate an insolvency process because of the fear of their details becoming publically available, in particular where the individual was at risk of violence.⁷⁵ It therefore proposed to make specific provision to allow certain details to be withheld from the register, in particular where an individual was in fear of violence to themselves or a member of their household, noting that similar provision existed in the insolvency regimes in England and Wales and Northern Ireland, as well as in other legislation relating to public registers and in company legislation.⁷⁶ It was accepted that this could result in difficulties for users of the register who had a legitimate interest in obtaining that information, but proposed that where a creditor could demonstrate such an interest or potential interest, the information could be released after appropriate investigation.⁷⁷ The vast majority of consultees were in favour of the proposals,⁷⁸ which were duly implemented. Accordingly, it is now provided that information need not be included in the register where AiB is of the opinion that inclusion of the information would be likely to put any person at risk of violence or otherwise jeopardise the safety or welfare of any person.⁷⁹ No specific provision is made, however, for the release of any omitted information to anyone who is able to demonstrate a legitimate interest in obtaining the information.

4–32 AiB is required to make the register available for inspection at all reasonable times⁸⁰ and to provide any person with a certified copy of an entry in the register on request.⁸¹ The register is now available online and may be searched free of charge without creating an account.⁸² A commercial data download service is also available. The register is updated daily and searches of the register will return details of all "live" sequestrations and sequestrations which were awarded within the preceding five years; all "live" protected trust deeds and protected trust deeds discharged in the preceding year; and "live" receiver-

⁷⁵ See Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), paras 14.5.5.

⁷⁶ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), para.14.5.6.

⁷⁷ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), para.14.5.7.

⁷⁸ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses*, para.9.14–9.16.

⁷⁹ See Bankruptcy (Scotland) Act 2016 s.200(8) and Bankruptcy (Scotland) Regulations 2016 reg.30(2).

⁸⁰ Bankruptcy (Scotland) Act 2016 s.200(7)(a).

⁸¹ Bankruptcy (Scotland) Act 2016 s.200(7)(b). Previously, the Bankruptcy Fees etc. (Scotland) Regulations 2012 (SSI 2014/118), prescribed a fee for the provision of a certified copy of an entry in the register, but the current Bankruptcy Fees etc. (Scotland) Regulations 2014 (SSI 2014/227), make no such provision.

⁸² The register and a link to an accompanying user guide is available at <https://roi.aib.gov.uk/roi/> [Accessed 16 September 2017].

ships and liquidations and receiverships and liquidations which ended in the preceding year.⁸³ Users may print extracts from the register.⁸⁴ An extract from the register bearing to be signed by AiB is sufficient evidence of the facts stated therein.⁸⁵

It may be noted that certain information relating to sequestrations also appears 4-33 in the register of inhibitions and adjudications and some information about trust deeds may also appear in that register. Reference is made to such cases where relevant throughout this book.

Annual report

AiB is required to prepare an annual report to be presented to the Scottish 4-34 Ministers and the Court of Session.⁸⁶ The report must contain:

- (a) statistical information relating to the state of all sequestrations, and the winding up and receivership of business associations, in respect of which particulars have been registered in the register of insolvencies during the year to which the report relates.⁸⁷ For this purpose, “business association” has the same meaning as in s.C2 of Pt II of Sch.5 to the Scotland Act 1998⁸⁸;
- (b) particulars of trust deeds registered as protected trust deeds in that year⁸⁹; and
- (c) particulars of the performance of AiB’s functions under the Bankruptcy (Scotland) Act 2016.⁹⁰

AiB’s annual report and accounts is published on AiB’s website. 4-35

Acting as interim trustee and trustee in sequestration

As already noted, AiB was first given the function of acting as interim and 4-36 permanent trustee in sequestration (as the roles then were) in specified cases as a result of changes made by the Bankruptcy (Scotland) Act 1993. The Bankruptcy and Diligence etc. (Scotland) Act 2007 made substantial changes to these roles and to the cases in which AiB acted as interim trustee and trustee in sequestration (as the roles then became and are now).

The Scottish Government’s *Consultation on Bankruptcy Law Reform* in 2012 4-37 sought views on whether AiB should continue to act as interim trustee and

⁸³ See Online Register of Insolvencies User Guide, available at <http://roi.aib.gov.uk/roi/> [Accessed 16 September 2017].

⁸⁴ See *Online Register of Insolvencies User Guide*, available at <http://roi.aib.gov.uk/roi/> [Accessed 16 September 2017].

⁸⁵ Bankruptcy (Scotland) Act 2016 s.210(8).

⁸⁶ Bankruptcy (Scotland) Act 2016 s.200(1)(d) and (3).

⁸⁷ Bankruptcy (Scotland) Act 2016 s.200(3)(a).

⁸⁸ Bankruptcy (Scotland) Act 2016 s.200(9). Section C2 of Pt II of Sch.5 to the Scotland Act 1998 provides that “business association” has the meaning given in s.C1 of Pt II of Sch.5, but does not include any person whose estate may be sequestrated under the Bankruptcy (Scotland) Act 1985 or any public body established by or under an enactment. Section C1 of Pt II of Sch.5 provides that “business association” means “any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit” and defines “business” as including the provision of benefits to the members of an association. The reference to the Bankruptcy (Scotland) Act 1985 must now, of course, be read as a reference to the Bankruptcy (Scotland) Act 2016.

⁸⁹ Bankruptcy (Scotland) Act 2016 s.200(3)(b).

⁹⁰ Bankruptcy (Scotland) Act 2016 s.200(3)(c).

trustee in sequestration.⁹¹ This was generally supported by consultees⁹² and AiB therefore retains this function. The cases in which AiB now acts as interim trustee and trustee in sequestration are discussed fully in Ch.10.

- 4-38 As noted above, AiB may appoint agents to carry out any of their functions in respect of the sequestration of the estate of any debtor on their behalf.

Exercising the functions of commissioners in sequestration

- 4-39 The Bankruptcy (Scotland) Act 2016 provides for certain functions which fall to be carried out by the commissioners in sequestration to be carried out by AiB in those cases in which there are no such commissioners. The relevant provisions are discussed as appropriate in the context in which they arise.

Determining specified matters in relation to sequestrations

- 4-40 The Scottish Government's *Consultation on Bankruptcy Law Reform* in 2012 sought views on whether the responsibility for making decisions on matters relating to sequestration which were then matters for the court should be transferred from the court to AiB.⁹³ Consultees supported this approach in relation to some but not all such matters,⁹⁴ and the Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* indicated that the resulting legislation would include provision for AiB rather than the court to make certain decisions including those relating to the timing of the debtor's discharge, the recall of sequestration, the making of income payments orders (now debtor contribution orders) and the making of bankruptcy restrictions orders. Decisions relating to the family home, however, would be retained by the court.⁹⁵
- 4-41 In the event, the Bankruptcy and Debt Advice (Scotland) Act 2014 did make provision for AiB rather than the court to make decisions on a number of matters, although in some cases to a more limited extent than initially indicated. These included certain matters relating to the debtor's discharge; certain applications for recall of sequestration; the making of debtor contribution orders; the revival of the sequestration process following the discharge of the debtor and the trustee in certain cases; applications for directions by trustees; the appointment of replacement trustees, the removal of trustees and trustees not acting; the trustee's powers in relation to the debtor's contracts; bankruptcy restrictions in certain cases; the conversion of a protected trust deed into sequestration; applications to cure defects in procedure; and the valuation of debts depending on contingency. The relevant provisions are discussed in detail in the context in which they arise.

The debtor's discharge

- 4-42 The Scottish Government's *Consultation on Bankruptcy Law Reform* in 2012 sought views on the particular issue of whether AiB's functions should

⁹¹ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012) paras 15.4.1–15.4.5.

⁹² Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses*, para.11.1 onwards.

⁹³ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), paras 14.11.1–14.11.15.

⁹⁴ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), paras 10.1–10.9.

⁹⁵ Scottish Government, *Response to the Consultation on Bankruptcy Law Reform*, para.5.

be extended to include deferral of the debtor's discharge in cases of non-cooperation without the need to refer the matter to the sheriff.⁹⁶ This proposal was supported by the majority of consultees⁹⁷ and the Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* noted that appropriate provision would be made in the resulting legislation.

In the event, the Bankruptcy and Debt Advice (Scotland) Act 2014 made a number of significant changes to the provisions for the debtor's discharge, as a result of which AiB now has various functions in relation to this. The relevant provisions are discussed in detail in Ch.17. 4-43

Bankruptcy restrictions

The Bankruptcy and Diligence etc. (Scotland) Act 2007 introduced provision for the imposition in certain circumstances of bankruptcy restrictions beyond discharge on a debtor whose estate had been sequestrated through the making of a bankruptcy restrictions order by the sheriff or the acceptance of a bankruptcy restrictions undertaking by AiB. Prior to the changes made by the Bankruptcy and Debt Advice (Scotland) Act 2014, it was the function of AiB to make any application for a bankruptcy restrictions order (and only AiB might make such an application); AiB also had the function of considering whether to accept a bankruptcy restrictions undertaking from the debtor instead of applying for a bankruptcy restrictions order. As referred to above, the Scottish Government's *Consultation on Bankruptcy Law Reform* in 2012 sought views on whether the responsibility for making decisions on matters relating to sequestration which were then matters for the court should be transferred from the court to AiB, including decisions on bankruptcy restrictions, and the Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* indicated that the resulting legislation would include provision for AiB rather than the court to make certain decisions which included decisions on bankruptcy restrictions orders. In the event, the Bankruptcy and Debt Advice (Scotland) Act 2014 made provision for AiB to make bankruptcy restrictions orders in certain cases while the making of such orders in other cases remained a matter for the sheriff. Bankruptcy restrictions undertakings were abolished. AiB retains the function of making an application to the sheriff for a bankruptcy restrictions order in those cases where the matter remains one for the sheriff. Bankruptcy restrictions are discussed in detail in Ch.17. 4-44

A trustee in sequestration other than AiB is required to make a report to AiB where they have reasonable grounds to believe that any behaviour on the part of the debtor is of a kind which would result in a sheriff granting an application for a bankruptcy restrictions order under s.156(1) of the Bankruptcy (Scotland) Act 2016.⁹⁸ Oddly, this provision refers only to the potential making of a bankruptcy applications order by the sheriff, which suggests that it does not apply where the trustee believes that a bankruptcy restrictions order might be made by AiB rather than the sheriff, although s.156(1) in fact refers to the making of a bankruptcy restrictions order by AiB or the sheriff. There is no prescribed form for the report, but AiB has produced a form of report for the use of trustees. The trustee's report is absolutely privileged.⁹⁹ Where AiB are themselves 4-45

⁹⁶ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), para.13.2.

⁹⁷ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses*, para.8.4.

⁹⁸ Bankruptcy (Scotland) Act 2016 s.50(3)(b).

⁹⁹ Bankruptcy (Scotland) Act 2016 s.50(4).

the trustee in sequestration, they may discover relevant behaviour of the debtor in the course of their administration of the debtor's estate. It is suggested that, as in the case of a decision whether to report suspected offences to the Lord Advocate discussed above, the decision whether to make or apply for a bankruptcy restrictions order as a result of discovering such behaviour is not taken in AiB's capacity as trustee but in their capacity as AiB exercising a statutory function.¹⁰⁰

Review of decisions

- 4-46** As a result of changes made by the Bankruptcy and Debt Advice (Scotland) Act 2014, provision is now made for the review by AiB of certain decisions made by AiB prior to any appeal to the court. In carrying out this function, AiB may take account of the views of any independent person appointed for this purpose.¹⁰¹
- 4-47** These provisions mean that there is an opportunity to have a decision reviewed without having to resort to an appeal to the court with its attendant time and expense. At the same time, however, they add a further layer of administration with attendant delay if an appeal still remains necessary after review. Details of reviews undertaken are published on AiB's website. The relevant provisions for review are discussed in detail in the context in which they arise.

Determining appeals

- 4-48** AiB is the person to whom an appeal against a determination of the commissioners fixing the remuneration and outlays of a trustee in sequestration is made.¹⁰²

Fees

- 4-49** AiB when acting as interim trustee and/or trustee in sequestration is entitled to payment of their fees and outlays out of the sequestrated estate.¹⁰³ In cases where AiB has appointed agents to act on their behalf in carrying out these functions, AiB will pay those agents in accordance with the terms of their contract,¹⁰⁴ which may differ from the statutory fees and outlays payable to AiB and chargeable to the sequestrated estate.
- 4-50** Fees are payable to AiB in respect of the exercise of AiB's functions other than acting as interim trustee and trustee in sequestration.¹⁰⁵ Such fees must also be paid by AiB when acting as interim trustee and trustee in sequestration.¹⁰⁶ The fees are payable whether or not there are funds in the debtor's estate to meet them.¹⁰⁷

¹⁰⁰ *Mitchell*, Appellant 27 September 2010 Edinburgh Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/SQ538_07.html [Accessed 16 September 2017].

¹⁰¹ See the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.23, discussed further below.

¹⁰² Bankruptcy (Scotland) Act 2016 s.134(1)(a).

¹⁰³ Bankruptcy Fees etc. (Scotland) Regulations 2014 (SSI 2014/227) regs 3–5 and Pt 1 of the Table of Fees in the Schedule thereto.

¹⁰⁴ See above.

¹⁰⁵ Bankruptcy Fees etc. (Scotland) Regulations 2014 reg.6 and Pt 2 of the Table of Fees in the Schedule thereto.

¹⁰⁶ Bankruptcy Fees etc. (Scotland) Regulations 2014 reg.7.

¹⁰⁷ Bankruptcy Fees etc. (Scotland) Regulations 2014 reg.10. This provision appeared for the first time in the Bankruptcy Fees etc. (Scotland) Regulations 2012 (SSI 2012/118), in order to clarify the position following doubts being raised as to whether this was in fact the case. It was

AiB may not waive the payment of fees.¹⁰⁸ There is provision for the time at which payment of fees is due¹⁰⁹ and for the repayment of the fee relating to an application for a bankruptcy restrictions order in certain cases where such an order is refused.¹¹⁰ The fee for a debtor application is not repayable if the application is refused.¹¹¹ 4–51

The fees are normally reviewed annually. It is now Scottish Government policy to set fees at a level aimed at allowing full cost recovery for the functions carried out. 4–52

Advice

It has never been a function of AiB to give advice to debtors. The Scottish Government's *Consultation on Bankruptcy Law Reform* in 2012 sought views on whether AiB's functions should be extended to include the giving of advice to debtors,¹¹² but this was not supported by consultees¹¹³ and the proposal was not taken forward. There was support, however, for the development of a triage system designed to signpost debtors to suitable advice¹¹⁴ and AiB subsequently launched a 12 month pilot of an online money advice triage tool. AiB's website now provides extensive information on the various solutions available to debtors and sources of advice and AiB has also been working in partnership with the North Ayrshire Citizens Advice Service, which has provided independent money advice from within AiB's premises since April 2012. 4–53

Possible areas for future development

The Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* acknowledged that some issues consulted on in the *Consultation on Bankruptcy Law Reform* acknowledged that some required further consideration by a wider cross-section of interested parties.¹¹⁵ 4–54

One of these issues was the regulation of insolvency practitioners.¹¹⁶ The *Consultation on Bankruptcy Law Reform* acknowledged that this is currently a reserved area, but sought views on whether power for the Scottish Ministers to regulate Scottish insolvency practitioners should be part of any proposals for further devolution and also on some areas where it was considered that improvements to the current system could be made even without any such change, namely seeking a redrafting of the memorandum of understanding between the Insolvency Service and the recognised professional bodies to allow AiB to receive information on regulatory activity in Scottish cases and the creation 4–55

subsequently confirmed that it was in *Accountant in Bankruptcy v Pattullo* unreported 23 October 2012 Glasgow Sheriff Court.

¹⁰⁸ Bankruptcy Fees etc. (Scotland) Regulations 2014 reg.11.

¹⁰⁹ Bankruptcy Fees etc. (Scotland) Regulations 2014 reg.8.

¹¹⁰ Bankruptcy Fees etc. (Scotland) Regulations 2014 reg.12. The Bankruptcy Fees etc. (Scotland) Regulations 2012 reg.12 also made provision for the repayment of the supervision fee on failure of a protected trust deed but this provision does not appear in the current regulations.

¹¹¹ Bankruptcy Fees etc. (Scotland) Regulations 2014 reg.9.

¹¹² Scottish Government, *Consultation on Bankruptcy Law Reform* (2012) paras 6.2, 6.3.

¹¹³ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), para.1.7.

¹¹⁴ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), para.1.7.

¹¹⁵ Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (2012), para.8.

¹¹⁶ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012) paras 15.7.1–15.7.20. The regulation of insolvency practitioners is discussed in detail below.

of an information-sharing agreement between AiB and the recognised professional bodies. The consultation responses were split on the issue of whether the Scottish Ministers should have power to regulate Scottish insolvency practitioners in future, but supported the other proposals.¹¹⁷ The Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* accordingly identified all of these issues as ones on which they would work with UK Ministers and stakeholders with regard to future legislation. There have, however, been no further developments in this area to date although there have been other changes to certain aspects of insolvency practitioner regulation which are discussed further below.

- 4-56 The other issue was the establishment of an Official Receiver in Scotland.¹¹⁸ The Scottish Law Commission had previously considered whether the office of Official Receiver should be adopted into Scots law,¹¹⁹ but rejected this in favour of an improved system of administration of insolvent estates which remained based on the appointment of private insolvency practitioners. The *Consultation on Bankruptcy Law Reform* revisited the question and sought views on whether there should be an official receiver in Scotland and, if so, whether the functions of the official receiver should be carried out by AiB. The consultation responses were split on the introduction of an Official Receiver, but supported AiB having this role if it were to be introduced.¹²⁰ The Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* accordingly identified this issue as one on which they would work with UK Ministers and stakeholders with regard to future legislation. There have, however, been no further developments in this area to date.

Issues arising from statutory functions

- 4-57 The progressive expansion of the statutory functions of AiB gives rise to a number of issues. In particular, it gives rise to potential conflicts of interest where AiB is acting in more than one capacity, for example, on the one hand as interim trustee and/or trustee in sequestration and on the other hand as the person supervising the sequestration process, determining debtor applications for sequestration, exercising the functions of commissioners in sequestration where there are none, making decisions in relation to the sequestration and making decisions in relation to the debtor's discharge and bankruptcy restrictions. Furthermore, the opportunity for independent review, which was originally built into the statutory processes, has in some cases been effectively negated because different stages originally designed to be carried out by different persons are now carried out by the same person albeit acting in different capacities. For example, in the process for reporting suspected offences discussed above, a trustee other than AiB who considers that they have reasonable grounds to suspect that an offence has been committed is required to submit a report to that effect to AiB, who then decides whether to report the matter to the Lord Advocate. If the trustee is AiB, however, there is no formal report as it is the same person who is carrying out both stages albeit in a different capacity (as trustee at the first stage and as AiB exercising their supervisory functions at the

¹¹⁷ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), para.11.24.

¹¹⁸ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), paras 15.8.1-15.8.27.

¹¹⁹ See Scottish Law Commission, *Report on Bankruptcy and related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982) especially para.2.25 onwards.

¹²⁰ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Summary of Responses* (2012), para.11.35.

second stage). In the case of the new provisions for the review by AiB of certain decisions made by AiB prior to any appeal to the court discussed above, the concerns about conflicts of interest were particularly acute and led to a commitment by the Scottish Government to make provision for the involvement of external persons by creating a role for independent experts in the review process and, thus, to the introduction of the provisions referred to above whereby AiB in carrying out this function may take account of the views of any independent person appointed for this purpose.¹²¹ Measures have also been put in place within AiB's office to establish "Chinese walls" with a view to ensuring that potentially conflicting functions/different stages of a process are separated/carried out by different individuals within AiB's office. While the issues and concerns have, therefore, been accepted and acted on to some extent, the effectiveness of these measures remains to be seen and legitimate questions about the concentration of so many functions in one person remain. There may also be issues about resources and expertise, particularly where potential conflicts do require the separation of functions/processes within AiB's office.

Functions of AiB executive agency

As an executive agency, AiB is required to operate impartially while remaining directly accountable to the Scottish Ministers for its performance and use of public funds.¹²² Its stated mission is to ensure access to fair and just processes of debt relief and debt management for the people of Scotland, which takes account of the rights and interests of those involved.¹²³ **4-58**

The agency framework document identifies the key functions of the agency as being to deliver, with stakeholders, a range of options for individuals seeking debt relief and debt management; to supervise the bankruptcy process; to provide statutory information on the public registers; to support Ministers to develop and refine policy; and to ensure best value services for customers.¹²⁴ **4-59**

The policy function of the agency encompasses personal and corporate insolvency, diligence, the debt arrangement scheme, and debt advice.¹²⁵ The functions of supervising the bankruptcy process and delivering options for individuals seeking debt relief and debt management are, in effect, the statutory functions of AiB, discussed in detail above. The function of ensuring best value services for customers is defined in terms of reducing the requirement for public funding and embedding efficient systems and processes.¹²⁶ **4-60**

AiB as the chief executive of the agency is accountable to Scottish Ministers for the delivery of its functions, its performance and for planning its future development.¹²⁷ The chief executive is supported by an advisory board whose role is to provide advice to the chief executive about discharging their functions.¹²⁸ The board comprises executive and non-executive members, with the non-executive members being appointed to bring an independent, external **4-61**

¹²¹ See the Policy Note accompanying the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2015, which introduced the relevant provision. AiB duly established a subcommittee of its Policy and Cases Committee consisting of external members to carry out this function.

¹²² Accountant in Bankruptcy, *Agency Framework Document 2016*, para.1.

¹²³ Accountant in Bankruptcy, *Agency Framework Document 2016*, para.3.

¹²⁴ Accountant in Bankruptcy, *Agency Framework Document 2016*, para.5.

¹²⁵ Accountant in Bankruptcy, *Agency Framework Document 2016*, para.5.

¹²⁶ Accountant in Bankruptcy, *Agency Framework Document 2016*, para.5.

¹²⁷ Accountant in Bankruptcy, *Agency Framework Document 2016*, para.13.

¹²⁸ Accountant in Bankruptcy, *Agency Framework Document 2016*, para.14.

perspective to the work of the agency.¹²⁹ The advisory board is supported by a senior management team. There is also an audit committee, whose main function is to oversee and review the risk, control and governance processes of the agency and the associated assurance processes, and a policy and cases committee, whose main function is to provide AiB with advice on challenging cases and policy issues.¹³⁰

- 4–62 In order to carry out its functions effectively, the agency is structured with three main business areas: policy and compliance; case operations; and corporate services. Each area is represented by members of the senior management team.¹³¹ The policy and compliance area is responsible for policy development, legislation, legislative consultation, operational policy, guidance and publications, the policy and cases committee, compliance audit and bankruptcy restrictions. The case operations area is responsible for accounts, case management, case administration, the debt arrangement scheme, debtor applications and management of the insolvency services contract. The corporate services area is responsible for finance, facilities management, change management, development of the case management system, business modelling, projects, business planning and reporting, communications, corporate governance and human resources, learning and development and procurement management.
- 4–63 In the same way that there are potential conflicts between some of AiB's statutory functions, there are also potential conflicts between AiB's statutory functions and AiB's other functions as an executive agency. For example, the requirement to incur expense in carrying out AiB's statutory functions may give rise to a potential conflict with the executive agency's function of ensuring best value for customers, defined as it is in terms which include reducing the requirement for public funding. There are also potential conflicts of interest within the executive agency's functions, for example, in formulating policy which will almost inevitably affect the other functions of the agency to a greater or lesser degree. There is also a tension in the requirement for the agency to operate impartially while remaining directly accountable to the Scottish Ministers.

INSOLVENCY PRACTITIONERS

Background

- 4–64 Historically, there was no regulation of insolvency officeholders as such and no statutory requirement for insolvency officeholders to have any professional qualifications or expertise. Those who were members of professions, for example, solicitors or accountants, were subject to regulation as such by their professional bodies, but might have little or no practical experience in insolvency matters.
- 4–65 The Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* in 1982¹³² considered the issue of the qualifications of interim and permanent trustees in sequestration (as it

¹²⁹ Accountant in Bankruptcy, *Agency Framework Document 2016*, para.15.

¹³⁰ The terms of reference of these committees can be found on AiB's website.

¹³¹ See previous paragraph. A diagram of the organisational structure of the agency is available on AiB's website.

¹³² Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

recommended the relevant offices should be). It recommended that, as was already the case in relation to trustees in sequestration as they then existed, certain persons should be disqualified from acting as interim or permanent trustee and that a new requirement should be introduced for interim and permanent trustees to possess such professional and other qualifications and fulfil such other conditions as might be prescribed.¹³³ It envisaged that the persons concerned would be accountants or solicitors holding recognised and current qualifications to practice in Scotland.¹³⁴ It also recommended that, as was already the case in relation to trustees in sequestration as they then existed, both interim and permanent trustees should be required to find caution for their intromissions with the debtor's estate.¹³⁵ Interestingly, however, it did not consider that it was necessary for persons appointed as trustees under protected trust deeds to possess professional qualifications: it hoped that in the majority of cases they would do so, but did not consider it a necessary feature since it thought it might, on occasion, be convenient to select a trustee who was thoroughly conversant with the debtor's affairs but not professionally qualified.¹³⁶

The Cork Committee also considered the issue of the qualifications of insolvency officeholders, whom it referred to as insolvency practitioners, in its report *Insolvency Law and Practice: Report of the Review Committee* in 1982.¹³⁷ While it was satisfied that the majority of insolvency practitioners carried out their duties in a way which gave no justifiable cause for complaint,¹³⁸ it found it "alarming" that, with a few exceptions, anyone might act as an insolvency practitioner without either practical experience or professional qualification.¹³⁹ It also recommended that, as was already to some extent the case, certain persons should be disqualified from acting as insolvency practitioners,¹⁴⁰ and that some minimum professional qualification and control was required.¹⁴¹ It considered that the existing system was too open to abuse to command public confidence and it was essential that measures were introduced to ensure a high standard of competence as well as integrity in insolvency officeholders.¹⁴² It therefore recommended that, subject to certain transitional provisions, an insolvency practitioner should be required to be a member of a professional body approved by the Department of Trade (as it then was) and satisfying certain other conditions and to have been in general practice for five years

¹³³ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 4.11 (interim trustee) and 4.20–4.21 (permanent trustee).

¹³⁴ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.4.21.

¹³⁵ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 4.13 (interim trustee) and 4.22–4.23 (permanent trustee).

¹³⁶ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.24.23.

¹³⁷ See *Insolvency Law and Practice: Report of the Review Committee* (the Cork Report) (Cmnd 8558, 1982), Ch.15.

¹³⁸ See *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982), para.735.

¹³⁹ See *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982), para.736.

¹⁴⁰ See *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982), para.748 onwards.

¹⁴¹ See *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982), para.756 onwards.

¹⁴² See *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982), para.756.

prior to acting as an insolvency practitioner.¹⁴³ It also recommended that, as was already the case in some cases, all insolvency practitioners should be covered by appropriate insurance and bonding (the equivalent of caution in Scotland) against all types of fraud, dishonesty and professional negligence.¹⁴⁴ It considered, however, that the involvement of the Department of Trade (as it then was) in the control of insolvency practitioners should be kept to a minimum.¹⁴⁵

4-67 Following the acceptance of the majority of these recommendations, the Insolvency Act 1985 introduced a new statutory framework for insolvency practitioners which was almost immediately consolidated in the Insolvency Act 1986 where it remains. The relevant provisions are to be found in Pt XIII of the Insolvency Act 1986 as amended and related secondary legislation.

4-68 The regulatory model adopted was one of dual regulation, combining self-regulation by the profession (through the process of authorisation of insolvency practitioners described below) with oversight regulation by the government (through its regulation of the authorising bodies). The new statutory framework required those acting in specified capacities to be qualified to act as an insolvency practitioner. In order to be qualified to act as an insolvency practitioner, a person had to satisfy a number of requirements which can conveniently be considered under the headings of status, authorisation and caution. Status concerns those categories of person who are and are not qualified to act as an insolvency practitioner. Authorisation concerns the need for a person to be authorised (or, as it is sometimes referred to, licensed) to act as an insolvency practitioner. When the regime was introduced, provision was made for a person to be authorised to act as an insolvency practitioner by either a recognised professional body of which they were a member or a relevant (subsequently competent) authority.¹⁴⁶ Recognised professional bodies were bodies which fulfilled certain specified conditions and were declared to be such by order made by the Secretary of State¹⁴⁷ and there were originally seven of them,¹⁴⁸ while a relevant (subsequently competent) authority was the Secretary of State or any other body or person specified by the Secretary of State as such,¹⁴⁹ although no other body or person was ever specified as such. Subsequent developments as to those by whom authorisation might be granted are discussed further below. A person could be authorised to act as an insolvency practitioner only if, inter alia, they were a fit and proper person to act as an insolvency practitioner and possessed specified qualifications in relation to education, practical training and experience.¹⁵⁰ Caution concerns the need for the authorised person to have in place caution meeting specified requirements for the proper performance of their functions as an insolvency practitioner.¹⁵¹

¹⁴³ See *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982), para.758.

¹⁴⁴ See *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982), para.763 onwards.

¹⁴⁵ See *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, 1982), para.768 onwards.

¹⁴⁶ Insolvency Act 1985 s.2(2), which became Insolvency Act 1986 s.390(2); the latter, however, referred to a competent authority rather than a relevant authority.

¹⁴⁷ Insolvency Act 1985 s.3(2), Insolvency Act 1986 s.391(1) as enacted.

¹⁴⁸ The number has since been reduced: see further at para.4-81.

¹⁴⁹ Insolvency Act 1985 s.11, Insolvency Act 1986 s.392(2) as enacted.

¹⁵⁰ Insolvency Act 1985 ss.3(3) and 5(2), Insolvency Act 1986 ss.391(4) and 393(2).

¹⁵¹ Insolvency Act 1985 s.2(3), Insolvency Act 1986 s.390(3) as enacted.

The statutory framework has been subject to a number of changes over time and these are discussed further in the next section. As will be seen, however, its essential structure remains the same. The component elements of status, authorisation and caution are discussed further below. 4-69

Changes to the statutory framework

The statutory framework was first reviewed after 10 years by the Insolvency Regulation Working Party, which published its report entitled *Insolvency Practitioner Regulation Ten Years On* in 1999. That report resulted in a number of changes to the regulatory regime including the establishment of two new bodies: the Joint Insolvency Committee, the remit of which included the maintenance and development of insolvency standards and guidance; and the Insolvency Practices Council, which was intended to provide external input into insolvency standards. These bodies are discussed further below. 4-70

In November 2004, the Insolvency Service consulted on, and subsequently implemented, a number of further changes which were intended to result in the “fine-tuning” of what was seen as an essentially successful regulatory regime.¹⁵² 4-71

In December 2009, further amendments were made to the legislation in order to implement Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market¹⁵³ in so far as it related to insolvency practitioners, including the introduction of a new provision to the effect that a person was authorised to act as an insolvency practitioner in Great Britain if that person was authorised by the Department of Enterprise, Trade and Investment for Northern Ireland to act as an insolvency practitioner in Northern Ireland under art.352 of the Insolvency (Northern Ireland) Order 1989.¹⁵⁴ 4-72

In the meantime, in November 2009, the Office of Fair Trading had launched a market study into the market for corporate insolvency practitioners. The resultant report, *The market for corporate insolvency practitioners: A market study*, was published in June 2010 and contained a number of recommendations for reform of the regulatory regime, including the establishment of an independent complaints body, setting clear objectives for the regulatory regime and the amendment of a number of detailed regulations.¹⁵⁵ Although the study was concerned with the market for corporate insolvency practitioners, the report acknowledged that some of its recommendations for reform to the regulatory regime would also affect non-corporate insolvency since insolvency practitioners could and did carry out both types of work.¹⁵⁶ In addition, although the study focused on England and Wales, the report considered that the same issues and potential solutions were relevant to a large extent in 4-73

¹⁵² The consultation package consisted of a cover letter dated 5 November 2004, draft Insolvency Practitioners Regulations 2005, draft proposed amendment to the Insolvency Regulations 1994, notes to the draft Insolvency Practitioners Regulations 2005, a timetable and a list of consultees.

¹⁵³ Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, OJ No.L 376, 21.12.2006, p.36.

¹⁵⁴ Insolvency Act 1986 s.390(2)(c) added by the Services (Insolvency Practitioners) Regulations 2009 (SI 2009/3081).

¹⁵⁵ Office of Fair Trading, *The market for corporate insolvency practitioners: A market study* (June 2010, OFT 1245).

¹⁵⁶ Office of Fair Trading, *The market for corporate insolvency practitioners: A market study* (June 2010, OFT 1245), paras 2.9–10

Scotland (and Northern Ireland).¹⁵⁷ It has already been noted that the regulation of insolvency practitioners is a reserved matter.¹⁵⁸

4–74 In response to the Office of Fair Trading report, the Insolvency Service published its *Consultation Paper on Reforms to the Regulation of Insolvency Practitioners* in February 2011 seeking views on whether and, if so, how to, implement its recommendations. The consultation paper too acknowledged that although the Office of Fair Trading report was concerned with the market for corporate insolvency practitioners, most of the recommendations extended to the market for non-corporate insolvency as the regulatory framework was the same.¹⁵⁹ It sought views inter alia on the establishment of an independent complaints body and related matters and possible changes to the regulatory structure including changes to the role of the Secretary of State, the replacement of the Joint Insolvency Committee and the folding of the Insolvency Practices Council. The responses to the consultation, published in December 2011, were mixed.¹⁶⁰ In a statement published on the same day as the responses to the consultation, the Minister for Employment Relations, Consumers and Postal Affairs acknowledged that the regulatory regime was a complex one, involving as it did a number of regulators and a dual role for government as both a direct and oversight regulator.¹⁶¹ He said that he was satisfied the regulatory regime had worked reasonably well, and that the Government recognised the benefits of self-regulation, but in the light of the consultation responses, more could be done to improve the effectiveness of, and confidence in, the regime. He therefore announced the Government's intention to make a number of changes to the regulatory regime to ensure that it was transparent, consistent, accessible, independent and accountable. He acknowledged that there was strong support for an independent single regulator as a means of achieving this, but said that while moving to a single regulator had not been ruled out, the Government wished to work with the profession and interested bodies to see if there was a way of reforming the system without such a significant change. He said that the Government would also explore with interested parties how best to strengthen and simplify the procedures for handling complaints and achieving consistent and transparent sanctions. This was an issue which had caused concern because each recognised professional body and the Secretary of State as competent authority had its own procedures and rules for dealing with complaints against persons authorised by it to act as insolvency practitioners which could result in confusion and inconsistent outcomes. Significantly, this was an issue which could be addressed without legislative change. Other proposed changes would require legislation, however, and it was announced that when legislative time permitted, steps would be taken to remove the Secretary of State's power, as a competent authority, to authorise insolvency practitioners directly; to ensure the powers of the Secretary of State as oversight regulator were appropriate; and to ensure that the objectives of the regulatory regime were clear. It was also announced that the Insolvency Practices Council would be disbanded on the basis that although it had made useful contributions since its introduction, there was no longer a

¹⁵⁷ Office of Fair Trading, *The market for corporate insolvency practitioners: A market study* (June 2010, OFT 1245), para.2.8.

¹⁵⁸ See para.2–02.

¹⁵⁹ See Insolvency Service, *Consultation Paper on Reforms to the Regulation of Insolvency Practitioners* (February 2011), Executive Summary, para.(v).

¹⁶⁰ See *Consultation on Reforms to the Regulation of Insolvency Practitioners: Summary of Consultation Responses* (December 2011).

¹⁶¹ Statement published on 20 December 2011.

need for it and its functions would be better placed elsewhere within the regulatory and policy structure. The statement concluded with the warning that more might need to be done by way of legislation if these changes did not deliver the desired outcomes. These changes, together with some other changes arising from subsequent developments, have now been implemented, albeit in a somewhat piecemeal fashion.

With regard to the Insolvency Practices Council, this was duly disbanded in 2012.¹⁶² 4–75

With regard to the commitment to strengthen and simplify the procedures for handling complaints and achieve consistent and transparent sanctions, a package of measures was duly announced in December 2012 by the then Minister for Employment Relations and Consumer Affairs. This consisted of the introduction of a single gateway for complaints against insolvency practitioners to be operated by the Insolvency Service, the introduction of common sanctions guidance to be referred to by regulators when deciding on sanctions, the publication by the Insolvency Service of all sanctions imposed by the regulators and the use of common decision-makers for appeals (whether by complainants or insolvency practitioners) where permitted by the rules of the regulators.¹⁶³ These measures were noted and welcomed by the House of Commons Business, Innovation and Skills Committee when it considered the issue of reforms to the regulation of insolvency practitioners in its *Sixth Report of Session 2012–2013* on the Insolvency Service, published in February 2013,¹⁶⁴ and they were duly introduced later that year, although without the participation of two of the then recognised professional bodies, namely the Law Society of Scotland and the Law Society of England and Wales, in the single complaints gateway.¹⁶⁵ The operation of the complaints gateway is regulated by a memorandum of understanding entered into between the Secretary of State and the participating recognised professional bodies,¹⁶⁶ in accordance with which complaints submitted through the gateway are subject to initial review by a member of the Insolvency Service staff and, if considered to be within the scope of the complaints system, are passed on to the relevant authorising body for further enquiry. That body will then follow its normal procedure for investigating the complaint. If the complaint is found to be justified, the authorising body in imposing any sanctions will consider the common sanctions guidance, although this is not binding, and the sanctions imposed will be published on the Insolvency Service website. It may be noted that since 2009, the Insolvency Service has published an annual review of insolvency practitioner regulation.¹⁶⁷ A report on the first year of the operation of the complaints gateway was published in 2014.¹⁶⁸ 4–76

¹⁶² See further at para.4–104.

¹⁶³ See House of Commons Business, Innovation and Skills Committee, *Sixth Report of Session 2012–2013* on the Insolvency Service (HC 675), para.96.

¹⁶⁴ See House of Commons Business, Innovation and Skills Committee, *Sixth Report of Session 2012–2013* on the Insolvency Service (HC 675), para.97.

¹⁶⁵ The recognised professional bodies are discussed in more detail below.

¹⁶⁶ Memorandum of understanding between the Secretary of State for Business, Innovation and Skills and the Institute of Chartered Accountants in England and Wales, the Insolvency Practitioners Association, the Association of Chartered Certified Accountants, the Institute of Chartered Accountants of Scotland and the Institute of Chartered Accountants in Ireland as regards the Provision of a Complaints Gateway: the current version applies from 1 January 2015 and can be found on the Insolvency Service website.

¹⁶⁷ The reports can be found on the Insolvency Service website.

¹⁶⁸ Insolvency Service, *Report on the first year of the Complaints Gateway* (August 2014), available on the Insolvency Service website.

4-77 With regard to the proposal to ensure that the powers of the Secretary of State as oversight regulator were appropriate, the House of Commons Business, Innovation and Skills Committee had also welcomed this proposal¹⁶⁹ and the government response to that report in April 2013 confirmed that the role of oversight regulator was already being strengthened and that it still intended to strengthen the powers of the oversight regulator as soon as legislative time permitted.¹⁷⁰ This was an issue because under the then existing provisions, the only sanction available to the Secretary of State where it was considered that regulatory failure had occurred was to revoke a recognised professional body's status as such, a rather extreme measure. In February 2014, the Insolvency Service issued a consultation entitled *Strengthening the regulatory regime and fee structure for insolvency practitioners*,¹⁷¹ which sought views on a number of proposed additional powers for the Secretary of State.¹⁷² The consultation paper also sought views on proposed regulatory objectives¹⁷³ and the introduction of a reserve power to introduce a single regulator in the future if this should become necessary, subject to a commitment not to do this without further analysis and consultation.¹⁷⁴ Following the consultation, it was announced in June 2014 that measures would be brought forward to introduce regulatory objectives and new powers for the Secretary of State as oversight regulator¹⁷⁵ and these measures, together with the reserve power to introduce a single regulator, were duly implemented by the Small Business, Enterprise and Employment Act 2015. They are discussed further below.

4-78 With regard to the proposal to remove the Secretary of State's power, as a competent authority, to authorise insolvency practitioners directly, this was ultimately implemented by the Deregulation Act 2015. This was an issue because of the potential conflict of interest inherent in the dual role of the Secretary of State in authorising insolvency practitioners directly and carrying out the function of oversight regulator of authorising bodies. That potential conflict of interest had previously been sought to be addressed by the arrangements within the Insolvency Service, who exercise the Secretary of State's functions in this respect, for the different functions to be carried out by different units within the Insolvency Service.¹⁷⁶ The use of such "Chinese walls" is not, however, wholly satisfactory and it is considered that the removal of the Secretary of State's power to authorise insolvency practitioners directly is a positive development. The new provisions are discussed further below.

¹⁶⁹ See House of Commons Business, Innovation and Skills Committee, *Sixth Report of Session 2012–2013 on the Insolvency Service* (HC 675), para.97.

¹⁷⁰ See House of Commons Business, Innovation and Skills Committee, 6th Report of Session: *The Insolvency Service: Government Response to the Committee's Sixth Report of Session 2012–2013* (HC 1115), paras 57 and 74 respectively.

¹⁷¹ Insolvency Service, *Strengthening the regulatory regime and fee structure for insolvency practitioners* (February 2014).

¹⁷² Insolvency Service, *Strengthening the regulatory regime and fee structure for insolvency practitioners* (February 2014), paras 45–83.

¹⁷³ Insolvency Service, *Strengthening the regulatory regime and fee structure for insolvency practitioners* (February 2014), paras 47–54.

¹⁷⁴ Insolvency Service, *Strengthening the regulatory regime and fee structure for insolvency practitioners* (February 2014), paras 45, 84–87.

¹⁷⁵ See *Public responses to consultation* and Ministerial Statement, *Way forward on insolvency practitioner regulation and pre-packs*, both published on 16 June 2014, available at <https://www.gov.uk/government/consultations/insolvency-practitioner-regulation-and-fee-structure> [Accessed 16 September 2017].

¹⁷⁶ The Secretary of State's functions as a competent authority authorising persons to act as insolvency practitioners were carried out by the Insolvency Service Insolvency Practitioner Unit, while their functions as oversight regulator of the recognised professional bodies were carried out by the Insolvency Service Practitioner Policy Unit.

The Deregulation Act 2015 also introduced new provisions for the partial 4–79
 authorisation of insolvency practitioners. The original regime introduced by the Insolvency Act 1986 envisaged that persons would be authorised to act as insolvency practitioners in all types of insolvency proceedings, corporate and non-corporate, and the required qualifications in relation to education, practical training and experience reflected this. There has always been debate, however, as to whether a person might be authorised to act as an insolvency practitioner in relation to some types of insolvency proceedings only or be authorised to act in certain capacities without being qualified to act as an insolvency practitioner. With regard to the latter, it may be noted that the Insolvency Act 2000 introduced provisions allowing persons other than insolvency practitioners who satisfied certain requirements to be authorised to act as nominees and supervisors of company voluntary arrangements under Pt I of the Insolvency Act 1986 and individual voluntary arrangements under Pt VIII of the Insolvency Act 1986.¹⁷⁷ No such authorisations were ever granted, however, and the provisions were repealed by the Deregulation Act 2015. With regard to the former, the Insolvency Service sent a consultation letter to key stakeholders in March 2010 inviting views on proposals for partial authorisation.¹⁷⁸ This was followed by a stakeholder meeting in April 2010.¹⁷⁹ The Insolvency Service considered that there was broad support for the proposal and commenced work on a cost/benefit analysis, and it was ultimately decided that the proposal should be taken forward.¹⁸⁰ It subsequently became part of the insolvency Red Tape Challenge,¹⁸¹ which is referred to further below. As a consequence, when the draft Deregulation Bill—which ultimately became the Deregulation Act 2015—was published in 2013, it included provision for the partial authorisation of insolvency practitioners, enabling persons to be authorised to act as insolvency practitioners in relation to companies only or individuals only.¹⁸² However, the report of the Joint Committee on the draft Bill¹⁸³ noted that a number of concerns had been raised about this provision, including the fact that it would not work in Scotland.¹⁸⁴ It concluded that the prior consultation on this provision (amongst others) had been inadequate and recommended that further consultation be carried out.¹⁸⁵ The Insolvency Service accordingly wrote to stakeholders on 23 January 2014, the same day on which the Deregulation Bill was introduced to Parliament, seeking further views on the provisions and noting that some changes had already been made to the provisions to reflect the different treatment of insolvent partnerships in Scotland and England and Wales. Following the consultation, the Insolvency

¹⁷⁷ See Insolvency Act 1986 s.389A as inserted by the Insolvency Act 2000 s.4(1), (4). Company voluntary arrangements obviously relate to corporate insolvency rather than bankruptcy while individual voluntary arrangements are not relevant to Scotland.

¹⁷⁸ See the written evidence of the Insolvency Service to the Joint Committee on the Draft Deregulation Bill 2013, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-deregulation-bill-committee/draft-deregulation-bill/written/3378.html> [Accessed 16 September 2017].

¹⁷⁹ See the written evidence of the Insolvency Service to the Joint Committee on the Draft Deregulation Bill 2013.

¹⁸⁰ See the written evidence of the Insolvency Service to the Joint Committee on the Draft Deregulation Bill 2013.

¹⁸¹ See the written evidence of the Insolvency Service to the Joint Committee on the Draft Deregulation Bill 2013.

¹⁸² Draft Deregulation Bill cl.9.

¹⁸³ Joint Committee on the Draft Deregulation Bill, *Draft Deregulation Bill*, Report Session 2013–2014 (HL Paper 101, HC 925).

¹⁸⁴ Joint Committee on the Draft Deregulation Bill, *Draft Deregulation Bill*, Report Session 2013–2014 (HL Paper 101, HC 925), paras 210–214.

¹⁸⁵ Joint Committee on the Draft Deregulation Bill, *Draft Deregulation Bill*, Report Session 2013–2014 (HL Paper 101, HC 925), paras 169–170 and 214.

Service published a summary of the consultation responses and the Government response,¹⁸⁶ which indicated that while the proposal remained controversial, it was intended to proceed with it notwithstanding. As noted, the provision was duly enacted in the Deregulation Act 2015. It remains to be seen how many insolvency practitioners will seek to take advantage of partial authorisation and what the result of that will be in practice.

4–80 Separately from these developments, in April 2011 the Government had embarked on a Red Tape Challenge, designed to reduce the burden of regulation. Insolvency was the topic of the Red Tape Challenge in August–September 2012, with one of its three main themes being the regulation of insolvency practitioners.¹⁸⁷ As noted above, the provision for partial authorisation of insolvency practitioners ultimately became part of the Red Tape Challenge measures, and in July 2013, the Insolvency Service also published a consultation entitled *Red Tape Challenge—changes to insolvency law to reduce unnecessary regulation and simplify procedures* in which it sought views on, inter alia, a number of deregulatory technical changes to the regulations affecting insolvency practitioners.¹⁸⁸ Although no formal response to the consultation was published, an impact assessment was published in February 2015¹⁸⁹ indicating that the relevant measures would be introduced in October 2015. These are discussed further in context where relevant.

4–81 Most recently, there has been a reduction in the numbers of the recognised professional bodies: two of the original seven recognised professional bodies, the Law Society of Scotland and the Law Society, have ceased, at their own request, to be recognised professional bodies.¹⁹⁰

4–82 Further changes may be in prospect. The Insolvency Service published a review of the complaints handling process in September 2016, which considered the progress and outcomes of complaints made since the introduction of the complaints gateway, the reasons for any delays in complaint progress and resolution and the level of consistency in disciplinary outcomes under the common sanctions guidance.¹⁹¹ It made a number of recommendations and identified areas for improvement of the current processes. In addition, following on issues raised during the Red Tape Challenge referred to above, it also published a call for evidence on the bonding arrangements for insolvency practitioners in September 2016 seeking views on the current arrangements and possible improvements.¹⁹² In September 2017, it published a summary of

¹⁸⁶ Insolvency Service, *Partial Authorisation of Insolvency Practitioners: Summary of consultation responses and Government response* (March 2014).

¹⁸⁷ See Insolvency Service Consultation *Red Tape Challenge—changes to insolvency law to reduce unnecessary regulation and simplify procedures* (July 2013), Executive Summary, para.3.

¹⁸⁸ *Red Tape Challenge*, Pt 1.

¹⁸⁹ Insolvency Service, *Impact Assessment: Technical changes to IP regulations and the appointment of an administrator* (February 2015), available at <https://www.gov.uk/government/consultations/changes-to-insolvency-law-to-reduce-unnecessary-regulation-and-simplify-procedures#history> [Accessed 16 September 2017].

¹⁹⁰ See the Insolvency Practitioners (Recognised Professional Bodies) (Revocation of Recognition) Order 2015 (SI 2015/2067) and the Insolvency Practitioners (Recognised Professional Bodies) (Revocation of Recognition) Order 2016 (SI 2016/403) respectively. The revocation of recognition at a body's own request is discussed further at para.4–100.

¹⁹¹ Insolvency Service, *Review of handling of complaints about Insolvency Practitioners* (September 2016).

¹⁹² Insolvency Service, *Call for Evidence: Bonding arrangements for insolvency practitioners* (September 2016).

the responses,¹⁹³ which indicated that it would continue to liaise with stakeholders to develop changes to the system and that further consideration would be given to the costs and benefits of legislative change that, if taken forward, would be preceded by further consultation to commence by the end of 2017. 2016 and a response is awaited. This may, however, result in changes to the requirements in relation to caution in future.

The following sections consider the provisions on the regulation of insolvency practitioners in so far as they are relevant to bankruptcy. **4-83**

Scope of provisions

Interim trustees and trustees in sequestration other than AiB and trustees under protected trust deeds are required to be qualified to act as an insolvency practitioner.¹⁹⁴ **4-84**

It is an offence for a person to act as an insolvency practitioner in relation to a debtor at a time when they are not qualified to do so.¹⁹⁵ A person is defined as acting as an insolvency practitioner in relation to any debtor within the meaning of the Bankruptcy (Scotland) Act 2016 if they act as the debtor's interim trustee or trustee in sequestration or as trustee under a trust deed for creditors.¹⁹⁶ **4-85**

These provisions do not, however, apply to AiB, who is not required to be a qualified insolvency practitioner and does not therefore commit an offence when acting as interim trustee or trustee in sequestration without being a qualified insolvency practitioner.¹⁹⁷ **4-86**

It may be noted that there appears to be a discrepancy in these provisions in relation to trustees under trust deeds for creditors. As noted above, there is a specific requirement to be qualified to act as insolvency practitioner in the case of a trustee under a protected trust deed, but there is no such requirement in the case of a trust deed which is not protected. It is provided, however, that it is an offence to act as a trustee under a trust deed for creditors at a time when the trustee is not qualified to act as an insolvency practitioner, the reference to a trust deed for creditors not being qualified in any way and thus applying to any trust deed for creditors and not only a protected trust deed for creditors. The result would appear to be that notwithstanding that there is no specific requirement to that effect, a trustee under a trust deed for creditors is in effect required to be qualified to act as an insolvency practitioner whether the trust deed is protected or not. **4-87**

¹⁹³ Insolvency Service, *Summary of Responses: Bonding arrangements for insolvency practitioners* (September 2017).

¹⁹⁴ See Bankruptcy (Scotland) Act 2016 s.51(1), (2), (5) and (6) (trustee in sequestration appointed by the sheriff on making the award of sequestration); s.51(8), (9) (trustee in sequestration appointed by AiB on making the award of sequestration); s.54(2) (interim trustee appointed by the sheriff); s.49(3), (5) (replacement trustee in sequestration elected following a trustee vote); s.55(10) (interim trustee appointed following removal, resignation, etc. of interim trustee); s.66(5) (trustee in sequestration appointed by AiB under provisions on replacement of trustee in more than one sequestration); s.69(5) and (7) (trustee in sequestration elected or appointed following the resignation or death of trustee); ss.74 and 75 (trustee in sequestration elected or appointed following removal of trustee where trustee unable to act or should no longer continue to act or otherwise); s.165 (trustee under a protected trust deed).

¹⁹⁵ Insolvency Act 1986 s.389.

¹⁹⁶ Insolvency Act 1986 s.388(2)(a), (b) and (3) as amended inter alia by the Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 (SI 2016/1034).

¹⁹⁷ Insolvency Act 1986 ss.388(5) and 389(2).

Qualification to act as an insolvency practitioner

4-88 As noted above, in order to be qualified to act as an insolvency practitioner, a person must satisfy a number of requirements which may conveniently be considered under the headings of status, authorisation and caution.

Status

4-89 Only an individual is qualified to act as an insolvency practitioner.¹⁹⁸

4-90 A person is not qualified to act as an insolvency practitioner at any time at which:

- (a) they have been made bankrupt in England, Wales or Northern Ireland or their estate has been sequestrated and they have not been discharged¹⁹⁹;
- (b) they are subject to a moratorium period under a debt relief order in England, Wales or Northern Ireland²⁰⁰;
- (c) they are subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986 or the Company Directors Disqualification (Northern Ireland) Order 2002²⁰¹;
- (d) they are a patient within the meaning of s.329(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 or have had a guardian appointed to them under the Adults with Incapacity (Scotland) Act 2000²⁰²;
- (e) they lack capacity (within the meaning of the Mental Capacity Act 2005) to act as an insolvency practitioner²⁰³; and
- (f) a bankruptcy restrictions order made under the Insolvency Act 1986, the Bankruptcy (Scotland) Act 1985, the Bankruptcy (Scotland) Act 2016 or the Insolvency (Northern Ireland) Order 1989 or a debt relief restrictions order made under the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989 is in force in relation to them.²⁰⁴ The current version of this provision was substituted for the previous version by the Small Business, Enterprise and Employment Act 2015 following the (belated) recognition that the latter, in so far as it related to bankruptcy restrictions orders, did not achieve its intended effect. The provision was first introduced by the Enterprise Act 2002 following the introduction by that Act of bankruptcy restrictions orders and undertakings in England and Wales.²⁰⁵ As originally enacted, it referred to bankruptcy restrictions orders only, the reference to debt relief restrictions orders being added later by the Tribunals, Courts and Enforcement Act 2007.²⁰⁶ The original provision therefore clearly encompassed bankruptcy restrictions orders (and undertakings) in England and Wales.²⁰⁷ As previously referred

¹⁹⁸ Insolvency Act 1986 s.390(1).

¹⁹⁹ Insolvency Act 1986 s.390(4)(a).

²⁰⁰ Insolvency Act 1986 s.390(4)(aa).

²⁰¹ Insolvency Act 1986 s.390(4)(b).

²⁰² Insolvency Act 1986 s.390(4)(c).

²⁰³ Insolvency Act 1986 s.390(4)(d).

²⁰⁴ Insolvency Act 1986 s.390(5) as substituted by the Small Business, Enterprise and Employment Act 2015 with effect in relation to any such order made after 1 October 2015.

²⁰⁵ See Enterprise Act 2002 s.257(3), Sch.21, para.4.

²⁰⁶ See Tribunals, Courts and Enforcement Act 2007 s.108(3), Sch.20, Pt I, paras 1, 6(1), 6(3).

²⁰⁷ The bankruptcy restrictions legislation specifically provides that a reference in an enactment to a bankruptcy restrictions order includes a reference to a bankruptcy restrictions undertaking: see Insolvency Act 1986 Sch.4A, para.8.

to,²⁰⁸ Scottish bankruptcy restriction orders and undertakings were subsequently introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, which made specific provision for the effects of such orders and undertakings in devolved areas but made no corresponding provision for their effects in reserved areas, which includes insolvency practitioner regulation. It was originally anticipated that appropriate amendments would be made to the relevant legislation in reserved areas, including this provision, in order to ensure that a person was not qualified to act as an insolvency practitioner at any time at which a Scottish bankruptcy restrictions order or undertaking was in force in relation to them. No such amendments were ultimately made, however: it was subsequently concluded that they were unnecessary because the references to bankruptcy restrictions orders added to relevant legislation when the English and Welsh regime was introduced were *habile* to include the subsequently-introduced Scottish bankruptcy restrictions orders and undertakings.²⁰⁹ It was considered by the writer (among others) that this was incorrect, however, since the relevant references had been added by legislation applying exclusively in England and Wales, consequent to the introduction of a regime applying exclusively in England and Wales, and prior to the existence of the corresponding Scottish regime. This argument was eventually accepted and led to the replacement of the provision with the current provision by the Small Business, Enterprise and Employment Act 2015 as described above, which finally ensures that a person who is subject to Scottish bankruptcy restrictions is not qualified to act as an insolvency practitioner.²¹⁰

Authorisation

A person is not qualified to act as an insolvency practitioner unless they are duly authorised to act as such.²¹¹ Since the changes introduced by the Deregulation Act 2015 referred to above, such authorisation may now be either full (allowing the person to act as insolvency practitioner in relation to all types of debtor) or partial (allowing the person to act as an insolvency practitioner in relation to certain types of debtor only). Partial authorisation may allow a person to act as an insolvency practitioner in relation to companies only or in relation to individuals only,²¹² but the Insolvency Act 1986 provides that acting as an insolvency practitioner in relation to an individual includes acting as an insolvency practitioner in relation to any debtor within the meaning of the Bankruptcy (Scotland) Act 2016.²¹³ Thus, a partial authorisation to act as an insolvency practitioner in relation to individuals only will allow the person so authorised to act as an insolvency practitioner in relation to any entity whose estate can be sequestrated under the Bankruptcy (Scotland) Act 2016. Special rules apply in relation to a person who is partially authorised acting as an insolvency practitioner in relation to a debtor who is or was a member of a partnership.²¹⁴

4-91

²⁰⁸ See Ch.2.

²⁰⁹ Previous version of Insolvency Service, *Technical Manual*, para.42.97.

²¹⁰ See Explanatory Notes to the Small Business, Enterprise and Employment Act 2015 para.708.

²¹¹ Insolvency Act 1986 s.390(2).

²¹² Insolvency Act 1986 s.390A(1).

²¹³ Insolvency Act 1986 s.388(2), (3).

²¹⁴ Insolvency Act 1986 s.390B.

- 4-92** A person is fully authorised to act as an insolvency practitioner if *either* they are a member of a recognised professional body which has been declared to be a body which is capable of providing its insolvency specialist members with full or partial authorisation and they are permitted to act as an insolvency practitioner for all purposes by or under the rules of that body *or* they hold an authorisation granted by the Department of Enterprise, Trade and Investment in Northern Ireland under art.352 of the Insolvency (Northern Ireland) Order 1989.²¹⁵
- 4-93** A person is partially authorised to act as an insolvency practitioner if they are *either* a member of a recognised professional body which has been declared to be a body which is capable of providing its insolvency specialist members with full or partial authorisation and they are permitted to act as an insolvency practitioner in relation only to specified types of debtor by or under the rules of that body *or* they are a member of a recognised professional body which has been declared to be a body which is capable of providing its insolvency specialist members with partial authorisation of a specified type and they are permitted to act as an insolvency practitioner by or under the rules of that body.²¹⁶
- 4-94** With regard to the recognition of professional bodies, it is provided that, provided certain specified conditions are satisfied, the Secretary of State may by order declare a body to be *either* a recognised professional body which is capable of providing its insolvency specialist members with full or partial authorisation *or* a recognised professional body which is capable of providing its insolvency specialist members with partial authorisation of a specified type.²¹⁷ The specified conditions, which are the same in each case, are that the body:
- (a) is one which regulates or is going to regulate the practice of a profession²¹⁸;
 - (b) has rules which it is going to maintain and enforce for securing that its insolvency specialist members are fit and proper persons to act as insolvency practitioners and meet acceptable requirements as to education, practical training and experience²¹⁹; and
 - (c) has rules and practices for authorising persons to act as insolvency practitioners and for regulating persons acting as such which are designed to ensure that the specified regulatory objectives are met.²²⁰
- 4-95** An application for recognition as a recognised professional body must be made to the Secretary of State in the required form and be accompanied by such information as they may require²²¹ and they may require supplementary infor-

²¹⁵ Insolvency Act 1986 s.390A(2). For this purpose, a reference to a member of a recognised professional body is to a person who is subject to its rules in the practice of the profession in question, whether or not they are actually a member of that body and a reference to insolvency specialist members of a professional body are to members who are permitted by or under its rules to act as insolvency practitioners: see Insolvency Act 1986 s.391(7).

²¹⁶ Insolvency Act 1986 s.390A(3). For the meaning of references to a member of a recognised professional body and insolvency specialist members, see Insolvency Act 1986 s.391(7).

²¹⁷ Insolvency Act 1986 s.391(1), (2).

²¹⁸ Insolvency Act 1986 s.391(4)(a).

²¹⁹ Insolvency Act 1986 s.391(4)(b).

²²⁰ Insolvency Act 1986 s.391(4)(c). The regulatory objectives are discussed further below.

²²¹ Insolvency Act 1986 s.391A(1)(a), (b). There is no prescribed form for the application as such. It is specifically provided that the requirements may differ as between different applications: Insolvency Act 1986 s.391A(2).

mation at any time between the making of the application and its determination.²²² Any such information must be in the form, and verified in such a manner, as the Secretary of State may specify.²²³ In particular, the application must be accompanied by a copy of the applicant's rules²²⁴; a copy of the applicant's policies and practices²²⁵; and a copy of any guidance issued by the applicant in writing.²²⁶ The Secretary of State may refuse an application for recognition *inter alia* where they consider that recognition of the body is unnecessary having regard to the existence of one or more other bodies which have been or are likely to be recognised²²⁷ or where the relevant fee has not been paid.²²⁸ The Secretary of State must notify the applicant of their decision in writing and, where the application is refused, the notice must set out the reasons for refusal.²²⁹

As noted above, there were originally seven recognised professional bodies, 4-96 namely the Association of Chartered Certified Accountants, the Insolvency Practitioners Association, the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants in Ireland, the Institute of Chartered Accountants of Scotland, the Law Society and the Law Society of Scotland,²³⁰ but the Law Society and the Law Society of Scotland have now ceased to be recognised professional bodies at their own request,²³¹ leaving only five recognised professional bodies. These continue to be recognised as bodies which are capable of providing their insolvency specialist members with full or partial authorisation under the new regime. At the time of writing, no other professional bodies have been recognised under the new regime.

The relationship between the Secretary of State as oversight regulator and the recognised professional bodies has traditionally been governed by a memorandum of understanding setting out agreed principles with a view to achieving consistency in the authorisation and regulation of insolvency practitioners.²³² These principles also applied to the Secretary of State when acting as a competent authority authorising persons to act as insolvency practitioners prior to the removal of that role as described above.²³³ The principles relate to the granting and maintenance of authorisations to act as an insolvency practitioner, ethics and professional standards, the handling of complaints, caution, disclosures and exchange of information, retention of records and reporting to the Secretary of

²²² Insolvency Act 1986 s.391A(1)(c).

²²³ Insolvency Act 1986 s.391A(3).

²²⁴ Insolvency Act 1986 s.391A(4)(a).

²²⁵ Insolvency Act 1986 s.391A(4)(b).

²²⁶ Insolvency Act 1986 s.391A(4)(c). For this purpose, guidance is defined as any relevant guidance or recommendations issued or made by the body which will apply to its insolvency specialist members or to persons seeking to become such and which is intended to have continuing effect, including guidance or recommendations relating to the admission or expulsion of members: Insolvency Act 1986 s.391A(5).

²²⁷ Insolvency Act 1986 s.391A(6).

²²⁸ Insolvency Act 1986 s.415A(1)(b). The fees payable for an application for recognition and for the maintenance of recognition once granted are set out in the Insolvency Practitioners and Insolvency Service Account (Fees) Order 2003 (SI 2003/3363).

²²⁹ Insolvency Act 1986 s.391A(8). This applies whatever the reason for refusal: see Insolvency Act 1986 s.391A(7).

²³⁰ Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986/1764).

²³¹ See para.4-81.

²³² The current version of the memorandum of understanding between the Secretary of State for Business, Innovation and Skills and the Recognised Professional Bodies was issued in April 2014 and is available on the Insolvency Service website.

²³³ *Memorandum of understanding*, Foreword.

State.²³⁴ In order to ensure compliance with the principles, regular visits—usually at least once every three years—have been made to the recognised professional bodies by monitors from the Insolvency Service Insolvency Practitioner Policy Section which, as noted above, carried out the Secretary of State's oversight regulatory role.²³⁵ As noted above, however, until the changes introduced by the Small Business, Enterprise and Employment Act 2015, the only sanction available to the Secretary of State for any regulatory failure identified was to revoke the recognition of the relevant professional body, a drastic step. In order to strengthen the regulatory regime, therefore, the Small Business, Enterprise and Employment Act 2015 introduced formal regulatory objectives and a much wider range of sanctions for the Secretary of State as oversight regulator.

4–98 So far as the regulatory objectives are concerned, there is now a statutory requirement for a recognised professional body, in discharging its regulatory functions, to act (so far as reasonably practicable) in a way which is compatible with the regulatory objectives and which it considers most appropriate for the purpose of meeting those objectives.²³⁶ Regulatory functions are defined as any functions which the body has: (i) under or in relation to its arrangements for or in connection with authorising persons to act as insolvency practitioners or regulating persons acting as insolvency practitioners; or (ii) in connection with the making or alteration of those arrangements.²³⁷ There is a corresponding obligation on the Secretary of State in discharging their functions to have regard to the regulatory objectives.²³⁸ The regulatory objectives are²³⁹:

- (a) having a system of regulating persons acting as insolvency practitioners that secures fair treatment for those affected by their acts and omissions, reflects the regulatory principles and ensures consistent outcomes.²⁴⁰ The regulatory principles are defined as the principles that regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed *and* any other principle appearing to the body concerned or the Secretary of State (as the case may be) to lead to best regulatory practice²⁴¹;
- (b) encouraging an independent and competitive insolvency practitioner profession whose members provide high quality services at a cost to the recipient which is fair and reasonable, act transparently and with integrity and consider the interests of all creditors in any particular case²⁴²;
- (c) promoting the maximisation of the value of returns to creditors and promptness in making those returns²⁴³; and
- (d) protecting and promoting the public interest.²⁴⁴

²³⁴ With regard to the principle relating to maintenance of authorisations, the memorandum of understanding is supplemented by *Principles for monitoring insolvency practitioners* which are published separately: the current version was published in April 2014 and can be found on the Insolvency Service website.

²³⁵ Reports of the Secretary of State's monitoring activities have latterly been published on the Insolvency Service website.

²³⁶ Insolvency Act 1986 s.391B(1).

²³⁷ Insolvency Act 1986 s.391C(2).

²³⁸ Insolvency Act 1986 s.391B(2).

²³⁹ Insolvency Act 1986 s.391C(3).

²⁴⁰ Insolvency Act 1986 s.391C(3)(a).

²⁴¹ Insolvency Act 1986 s.391C(4).

²⁴² Insolvency Act 1986 s.391C(3)(b).

²⁴³ Insolvency Act 1986 s.391C(3)(c).

²⁴⁴ Insolvency Act 1986 s.391C(3)(d).

Following the introduction of the regulatory objectives, the Insolvency Service began work with the recognised professional bodies to review whether the memorandum of understanding was still needed, on the basis that the future monitoring of the recognised professional bodies will largely focus on compliance with the new regulatory objectives.²⁴⁵ It has now indicated that memorandum of understanding will be withdrawn as soon as is reasonably feasible, subject to working through some final details.²⁴⁶

So far as the Secretary of State's powers as oversight regulator are concerned, the new powers include not only powers to take action against recognised professional bodies but, in some cases, powers to take action against individual insolvency practitioners directly. The Secretary of State's powers are now as follows:

- (a) Power to give directions. Where the Secretary of State is satisfied that an act or omission, or a series of acts or omissions, of a recognised professional body in discharging one or more of its regulatory functions has had, or is likely to have, an adverse impact on the achievement of one or more of the regulatory objectives, and they consider such a course of action to be appropriate in all the circumstances, they may direct the body to take such steps as they consider will counter the adverse impact, mitigate its effect or prevent its occurrence or recurrence.²⁴⁷ Such a direction may require the body to take steps to modify any part of its regulatory arrangements relating to the authorisation or regulation of insolvency practitioners, but may only require it to take steps which it has power to take under those arrangements.²⁴⁸ It may also require the body to take steps to institute or otherwise act in relation to specific regulatory proceedings or to take steps in respect of all, or a specified class, of such proceedings.²⁴⁹ For this purpose, a direction to take steps includes a direction to refrain from taking a particular course of action.²⁵⁰ There is a prescribed procedure which the Secretary of State must follow where they intend to give a direction under these provisions,²⁵¹ and there is provision for the publication of any direction which is given, except where the direction relates to specific regulatory proceedings against an individual.²⁵² The Secretary of State has the power to revoke any direction which they have given, and where this is done, they must give notice of their decision to the body and publish it, if possible in the same manner as the original notice giving the direction was published (where applicable).²⁵³ There is no provision for appeal against any of the Secretary of State's decisions under these provisions, but they would be subject to judicial review.
- (b) Power to impose a financial penalty. Where the Secretary of State is satisfied that a recognised professional body has failed to comply

²⁴⁵ See Insolvency Service, *Annual Review of Insolvency Practitioner Regulation 2015* (March 2016), para.5.3.

²⁴⁶ See Insolvency Service, *Annual Review of Insolvency Practitioner Regulation 2016* (March 2017), para.2.1.

²⁴⁷ Insolvency Act 1986 s.391D(1), (2).

²⁴⁸ Insolvency Act 1986 s.391D(3), (6).

²⁴⁹ Insolvency Act 1986 s.391D(4).

²⁵⁰ Insolvency Act 1986 s.391D(5).

²⁵¹ Insolvency Act 1986 s.391E.

²⁵² Insolvency Act 1986 s.391E(7).

²⁵³ Insolvency Act 1986 s.391E(8).

with a requirement imposed on it *either* by a direction given by the Secretary of State under the provisions discussed in the preceding paragraph *or* by a provision of the Insolvency Act 1986 or any subordinate legislation made under it, and they consider such a course of action to be appropriate in all the circumstances, they may impose on the body such financial penalty as they consider appropriate.²⁵⁴ In determining the amount of the penalty, the Secretary of State must have regard to the nature of the requirement which has not been complied with but must not take into account their costs in discharging their functions.²⁵⁵ The financial penalty is payable to the Secretary of State and falls to be paid into the consolidated fund.²⁵⁶ There is a prescribed procedure which the Secretary of State must follow where they intend to impose a financial penalty under these provisions,²⁵⁷ and there is provision for the publication of any financial penalty which is imposed.²⁵⁸ The Secretary of State has the power to rescind or reduce any financial penalty which they have imposed, and where this is done, they must give notice of their decision to the body and publish it, if possible in the same manner as the original notice imposing the penalty was published.²⁵⁹ A recognised professional body may appeal to the Court of Session against the imposition of a financial penalty within the period of three months beginning with the day on which the notice of the Secretary of State's decision to impose the penalty was given to the body.²⁶⁰ The grounds on which the body may appeal are: that the imposition of the penalty was not within the Secretary of State's power; that the requirement in respect of which the penalty was imposed had been complied with before the Secretary of State gave notice of their intention to impose the penalty; that the Secretary of State has not complied with the prescribed procedural requirements and the interests of the body have been substantially prejudiced as a result; that the amount of the penalty is unreasonable; that the time limit set by the Secretary of State for payment of the penalty was unreasonable.²⁶¹ On appeal, the court may quash the penalty; substitute a penalty of such lesser amount as the court considers appropriate; or, in the case of an appeal on the ground that the time limit set by the Secretary of State for payment of the penalty was unreasonable, set a different time limit for payment.²⁶² The court may also require the payment of interest on the penalty at such rate as it considers just and equitable where it substitutes a lesser penalty, sets a different time limit for payment or dismisses the appeal.²⁶³ Subject to these provisions, where the whole or part of any penalty is not paid timeously, the unpaid balance carries interest at a specified rate.²⁶⁴ The requirement to pay any penalty is, however, suspended pending the determination or withdrawal of any appeal.²⁶⁵

²⁵⁴ Insolvency Act 1986 s.391F(1), (2) and (3).

²⁵⁵ Insolvency Act 1986 s.391F(4).

²⁵⁶ Insolvency Act 1986 s.391F(5).

²⁵⁷ Insolvency Act 1986 s.391G.

²⁵⁸ Insolvency Act 1986 s.391G(7).

²⁵⁹ Insolvency Act 1986 s.391G(8).

²⁶⁰ Insolvency Act 1986 s.391H(1), (3) and (8).

²⁶¹ Insolvency Act 1986 s.391H(1), (2).

²⁶² Insolvency Act 1986 s.391H(4).

²⁶³ Insolvency Act 1986 s.391H(5), (6) and (7).

²⁶⁴ Insolvency Act 1986 s.391I(1).

²⁶⁵ Insolvency Act 1986 s.391I(2).

Any part of the penalty and interest which remains unpaid after the time for payment may be recovered from the recognised professional body as a debt due to the Secretary of State.²⁶⁶

- (c) Power to issue a reprimand. Where the Secretary of State is satisfied that an act or omission, or a series of acts or omissions, of a recognised professional body in discharging one or more of its regulatory functions has had, or is likely to have, an adverse impact on the achievement of one or more of the regulatory objectives, and that such a course of action is appropriate in all the circumstances, they may publish a statement reprimanding the body for the act or omission or series of acts or omissions.²⁶⁷ There is a prescribed procedure which the Secretary of State must follow where they intend to publish such a statement.²⁶⁸ The Secretary of State may vary a proposed statement before publishing it.²⁶⁹ There is no provision for appeal against any of the Secretary of State's decisions under these provisions, but they would be subject to judicial review.
- (d) Power to revoke recognition of professional body. The Secretary of State retains the power to revoke the recognition of a professional body which already existed prior to the changes brought about by the Small Business, Enterprise and Employment Act 2015, but the grounds for doing so have changed as a result of the changes brought about by that Act. Under the original provisions, it was open to the Secretary of State to revoke the recognition of a professional body where it appeared to them that it no longer met the required criteria for a recognised professional body.²⁷⁰ Under the new provisions introduced by the Small Business, Enterprise and Employment Act 2015, it is now provided that the Secretary of State may revoke the recognition of a professional body where they are satisfied that an act or omission, or a series of acts or omissions, of a recognised professional body in discharging one or more of its regulatory functions has had, or is likely to have, an adverse impact on the achievement of one or more of the regulatory objectives, and that such a course of action is appropriate in all the circumstances.²⁷¹ The Secretary of State may also revoke the recognition of a professional body which has been recognised as a body capable of providing its insolvency specialist members with full or partial authorisation but recognise it as one which is capable of providing its insolvency specialist members with partial authorisation only where they are satisfied that an act or omission, or a series of acts or omissions, of the body in discharging one or more of its regulatory functions has had, or is likely to have, an adverse impact on the achievement of one or more of the regulatory objectives, but it is appropriate for the body to be recognised as one which is capable of providing its insolvency specialist members with partial authorisation only.²⁷² A revocation under either of these provisions is by order of the Secretary of State,²⁷³ and there is a prescribed procedure which the Secretary of State must follow where they intend

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²⁶⁶ Insolvency Act 1986 s.391I(3).

²⁶⁷ Insolvency Act 1986 s.391J(1), (2).

²⁶⁸ Insolvency Act 1986 s.391K.

²⁶⁹ Insolvency Act 1986 s.391K(4).

²⁷⁰ Insolvency Act 1986 s.391(4) as originally enacted.

²⁷¹ Insolvency Act 1986 s.391L(1).

²⁷² Insolvency Act 1986 s.391L(2), (3).

²⁷³ Insolvency Act 1986 s.391L(1), (2).

to make an order.²⁷⁴ They must give notice of their intention to make an order to the recognised professional body and publish it on the same day,²⁷⁵ and where they subsequently decide to make the order, they must give notice of their decision to the body and publish it, if possible in the same manner as the original notice was published.²⁷⁶ An order takes effect from the date specified therein²⁷⁷ and it may make provision for members of the body in question to continue to be treated as fully or partially authorised to act as insolvency practitioners (as the case may be) for a specified period after the order takes effect.²⁷⁸ There is now also specific provision for the Secretary of State: (i) to revoke the recognition of a professional body where the body itself requests such a revocation and they are satisfied that such a course of action is appropriate in all the circumstances²⁷⁹; and (ii) to revoke the recognition of a professional body which has been recognised as a body capable of providing its insolvency specialist members with full or partial authorisation but recognise it as one which is capable of providing its insolvency specialist members with partial authorisation only where the body requests such a revocation and recognition and they are satisfied that it is appropriate in all the circumstances that the body should be recognised as one which is capable of providing its insolvency specialist members with partial authorisation only.²⁸⁰ A revocation under either of these provisions is by order of the Secretary of State,²⁸¹ and again there is a prescribed procedure which must be followed.²⁸² The order takes effect from the date specified therein²⁸³ and may make provision for members of the body in question to continue to be treated as fully or partially authorised to act as insolvency practitioners (as the case may be) for a specified period after the order takes effect.²⁸⁴ The revocation of the recognition of the Law Society and the Law Society of Scotland as recognised professional bodies referred to above was achieved under these new provisions.

- (e) Power to apply for a direct sanctions order. Where it appears to the Secretary of State to be in the public interest, they may apply to the Court of Session for a direct sanctions order against a person acting as an insolvency practitioner.²⁸⁵ They may not, however, apply for such an order against a person whose authorisation to act as an insolvency practitioner was granted by the Department of Enterprise, Trade and Investment in Northern Ireland.²⁸⁶ A direct sanctions order is an order which: (i) declares that the person is no longer authorised, fully or partially, to act as an insolvency practitioner; (ii) declares that the person is no longer fully authorised to act as an insolvency practitioner but remains partially authorised to act as an insolvency practitioner.

²⁷⁴ Insolvency Act 1986 s.391M.

²⁷⁵ Insolvency Act 1986 s.391M(1), (2).

²⁷⁶ Insolvency Act 1986 s.391M(5), (7). For the form of the notice, see s.391M(6).

²⁷⁷ Insolvency Act 1986 s.391L(5)(a).

²⁷⁸ Insolvency Act 1986 s.391L(5)(b).

²⁷⁹ Insolvency Act 1986 s.391N(1).

²⁸⁰ Insolvency Act 1986 s.391N(2).

²⁸¹ Insolvency Act 1986 s.391N(1), (2).

²⁸² Insolvency Act 1986 s.391N(3).

²⁸³ Insolvency Act 1986 s.391N(4)(a).

²⁸⁴ Insolvency Act 1986 s.391N(4)(b).

²⁸⁵ Insolvency Act 1986 ss.391O(1), (5) and 391P(1).

²⁸⁶ Insolvency Act 1986 ss.391O(3).

tioner as specified in the order; (iii) declares that the person's authorisation to act as an insolvency practitioner is suspended for a specified period or until such time as requirements specified in the order are complied with; (iv) requires the person to comply with requirements specified in the order while acting as an insolvency practitioner; (v) requires the person to make a specified contribution to one or more creditors of a debtor in relation to whom the person is acting or has acted as an insolvency practitioner, subject to the proviso that a direct sanctions order must not specify such a contribution which is more than the remuneration the insolvency practitioner has received or will receive in respect of acting as insolvency practitioner in the case.²⁸⁷ The Secretary of State must send a copy of any such application to the insolvency practitioner's recognised professional body.²⁸⁸ The court may make a direct sanctions order where it is satisfied that the person, in acting as an insolvency practitioner or in connection with any appointment as such, has failed to comply with a requirement imposed by the rules of their recognised professional body or any standards or code of ethics for the insolvency practitioner profession adopted from time to time by the recognised professional body *and* at least one of a number of other conditions are met.²⁸⁹ The other conditions are: (i) the person is not a fit and proper person to act as an insolvency practitioner *or* is fully authorised to act as an insolvency practitioner but is a fit and proper person to be partially authorised only²⁹⁰; (ii) it is appropriate for the person's authorisation to act as an insolvency practitioner to be suspended for a period or until one or more requirements are complied with²⁹¹; (iii) it is appropriate to impose other restrictions on the person acting as an insolvency practitioner²⁹²; and (iv) loss has been suffered as a result of the person's failure to comply with a requirement imposed by the rules of their recognised professional body or any standards or code of ethics for the insolvency practitioner profession by one or more creditors of a debtor in relation to whom the person is acting or has acted as an insolvency practitioner.²⁹³ It is therefore a condition precedent of any order that the person concerned has failed to comply with a requirement imposed by the rules of their recognised professional body or any standards or code of ethics for the insolvency practitioner profession. In deciding whether to make an order, the court must have regard to the extent to which the insolvency practitioner's recognised professional body has taken action against the person in respect of their failure to comply with a requirement imposed by the rules of the body or any standards or code of ethics for the insolvency practitioner profession and the extent to which any such action is sufficient to address the failure.²⁹⁴ Where the court does make a direct sanctions order, the insolvency practitioner's recognised professional body must take all necessary steps to give effect to it,²⁹⁵ and if it does

²⁸⁷ Insolvency Act 1986 s.391O(1), (4).

²⁸⁸ Insolvency Act 1986 ss.391P(2) and 391O(5).

²⁸⁹ Insolvency Act 1986 ss.391P(3) and (4) and 391Q(1) and (6). Standards and the code of ethics are discussed further at para.4–103.

²⁹⁰ Insolvency Act 1986 s.391Q(2).

²⁹¹ Insolvency Act 1986 s.391Q(3).

²⁹² Insolvency Act 1986 s.391Q(4).

²⁹³ Insolvency Act 1986 s.391Q(5).

²⁹⁴ Insolvency Act 1986 ss.391P(5) and 391O(5).

²⁹⁵ Insolvency Act 1986 s.391O(2), (5).

not do so, the Secretary of State may apply for a compliance order (discussed below).

- (f) Power to give a direct sanctions direction. Where the Secretary of State is satisfied that the conditions for making a direct sanctions order are met and it is in the public interest for a direct sanctions direction to be given, they may give a direct sanctions direction to an insolvency practitioner's recognised professional body instead of applying for or continuing with an application for a direct sanctions order against the insolvency practitioner.²⁹⁶ They may not, however, give such a direction in relation to a person whose authorisation to act as an insolvency practitioner was granted by the Department of Enterprise, Trade and Investment in Northern Ireland.²⁹⁷ The insolvency practitioner must consent to the giving of the direct sanctions direction.²⁹⁸ The direction may require the insolvency practitioner's recognised professional body to take all necessary steps to secure that: (i) the person is no longer authorised, fully or partially, to act as an insolvency practitioner; (ii) the person is no longer fully authorised to act as an insolvency practitioner but remains partially authorised to act as an insolvency practitioner as specified in the direction; (iii) the person's authorisation to act as an insolvency practitioner is suspended for a specified period or until such time as requirements specified in the direction are complied with; (iv) the person complies with requirements specified in the direction while acting as an insolvency practitioner; (v) the person makes a specified contribution to one or more creditors of a debtor in relation to whom the person is acting or has acted as an insolvency practitioner, subject to the proviso that a direct sanctions direction must not specify such a contribution which is more than the remuneration the insolvency practitioner has received or will receive in respect of acting as insolvency practitioner in the case.²⁹⁹
- (g) Power to obtain information. The Secretary of State may by notice in writing require specified persons to give them information for the exercise of their functions as oversight regulator.³⁰⁰ The specified persons are a recognised professional body, a person who is or has been an authorised insolvency practitioner and any person connected to a person who is or has been an authorised insolvency practitioner.³⁰¹ For this purpose, a person is connected to a person who is or has been an authorised insolvency practitioner if at any time during the authorisation that person was an employee of the insolvency practitioner or acted on behalf of the insolvency practitioner in any other way, was an employer of the insolvency practitioner, was a fellow employee of the insolvency practitioner's employer or, in the case of an insolvency practitioner employed by a firm, partnership or company, was a member of the firm or partnership or a director of the company.³⁰² The Secretary of State may specify in the notice a time limit for the provision of the information and the means by which it is to be verified,³⁰³ and if the information is not provided as requested,

²⁹⁶ Insolvency Act 1986 s.391R(1), (6).

²⁹⁷ Insolvency Act 1986 s.391R(4).

²⁹⁸ Insolvency Act 1986 s.391R(2).

²⁹⁹ Insolvency Act 1986 s.391R(3) and (5).

³⁰⁰ Insolvency Act 1986 s.391S(1).

³⁰¹ Insolvency Act 1986 s.391S(2).

³⁰² Insolvency Act 1986 s.391S(3).

³⁰³ Insolvency Act 1986 s.391S(4).

the Secretary of State may apply for a compliance order. Compliance orders are discussed further below.

- (h) Power to apply for a compliance order. Where it appears to the Secretary of State that a recognised professional body has failed to comply with any requirement imposed on it by or by virtue of the Insolvency Act 1986, or any other person has failed to comply with a requirement to provide information under the provisions discussed in the preceding paragraph, they may apply to the Court of Session for a compliance order.³⁰⁴ Where the court is satisfied that there has been a failure to comply, it may order the body or person concerned to take such steps as the court considers necessary to secure compliance.³⁰⁵ Failure to comply with an order of the court would constitute contempt of court.

Each recognised professional body has its own procedures, which currently must conform to the principles set out in the memorandum of understanding and supplementary principles for monitoring of insolvency practitioners referred to above, for applications for authorisation to act as an insolvency practitioner; for monitoring, dealing with complaints against, and disciplining, the insolvency practitioners authorised by it; and for withdrawing authorisation in appropriate cases. In this context, it may be noted that it has been held that a petition to the *nobile officium* of the Court of Session for a warrant to cite witnesses in order to compel their attendance at a disciplinary hearing of a recognised professional body is competent.³⁰⁶ The decision of a recognised professional body in disciplinary proceedings may be subject to judicial review.³⁰⁷ 4-101

Prior to the changes introduced by the Deregulation Act 2015, the corresponding procedures relating to authorisation to act as an insolvency practitioner by the Secretary of State as a competent authority were set out in legislation.³⁰⁸ As already noted, however, the Deregulation Act 2015 removed the Secretary of State's role in the direct authorisation of insolvency practitioners and although this was subject to transitional provisions for those insolvency practitioners then authorised by the Secretary of State, these procedures are not considered further here. 4-102

Insolvency practitioners are subject to various statutory requirements, including, in particular, in relation to the keeping of records and the making available of records for inspection.³⁰⁹ Such requirements are discussed in context throughout this book where relevant. Insolvency practitioners are also required to comply with non-statutory Statements of Insolvency Practice (SIPs). SIPs are principle-based and set out basic principles and essential procedures with which insolvency practitioners are required to comply to ensure a common approach in relation to particular aspects of insolvency. SIPs are commissioned, and kept under review, by the Joint Insolvency Committee, discussed further below. Once approved by the Joint Insolvency Committee, new and revised SIPs are adopted by each of the recognised professional bodies³¹⁰ and any departure 4-103

³⁰⁴ Insolvency Act 1986 s.391T(1), (3).

³⁰⁵ Insolvency Act 1986 s.391T(2).

³⁰⁶ *Institute of Chartered Accountants for Scotland, Petitioners* 14 June 2002 OH (available at <http://www.scotcourts.gov.uk/opinions/men1106.html>) [Accessed 16 September 2017].

³⁰⁷ *Harris, Petitioner* [2005] CSOH 57.

³⁰⁸ See Insolvency Act 1986 ss.392-398 together with Pt 2 of the Insolvency Practitioners Regulations 2005 (SI 2005/524) and the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986 (SI 1986/952).

³⁰⁹ See Pt 4 of the Insolvency Practitioners Regulations 2005 as amended.

³¹⁰ Prior to the changes introduced by the Deregulation Act 2015, they were also adopted by the

from the standards set out therein may be considered for the purposes of disciplinary or regulatory action. Insolvency practitioners must also have regard to the non-statutory Insolvency Code of Ethics (the Code). The Code was developed by the Joint Insolvency Committee and is intended to assist insolvency practitioners meet the obligations expected of them by providing professional and ethical guidance. It sets out five fundamental principles (integrity, objectivity, professional competence and due care, confidentiality and professional behaviour) and a framework which insolvency practitioners can use to identify actual or potential threats to these fundamental principles. It has been adopted by each of the recognised professional bodies,³¹¹ and while failure to observe the Code may not, of itself, constitute professional misconduct, it will be taken into account for the purposes of disciplinary or regulatory action. Insolvency practitioners may also have regard to non-statutory Insolvency Guidance Papers. Insolvency Guidance Papers, like SIPs, are commissioned and kept under review by the Joint Insolvency Committee, and they provide guidance on matters that may require consideration in the conduct of insolvency work or in an insolvency practitioner's practice. In contrast to SIPs, however, they do not represent required practice with the result that insolvency practitioners may develop different approaches based on the guidance.

4-104 The Joint Insolvency Committee, as noted above, was established as a result of recommendations in the report of the Insolvency Regulation Working Party, *Insolvency Practitioner Regulation Ten Years On* published in 1999.³¹² Established in 1999, it initially had eight members, one from each of the then recognised professional bodies and the Insolvency Service. Its membership has varied over time, however, and now consists of a representative from each of the recognised professional bodies (now five), the Insolvency Service, the Insolvency Service of Northern Ireland and a minimum of three lay members. Provision is also made for observers, who may include representatives of the Law Society Northern Ireland, AiB and R3 (the Association of Business Recovery Professionals). The role of the Joint Insolvency Committee is to consider, maintain, improve, develop and promote insolvency standards and guidance of a regulatory, ethical or best practice nature; discuss any such matters with other appropriate bodies; and facilitate discussion between authorising bodies in order to ensure that, as far as possible, insolvency practitioners are dealt with uniformly by authorising bodies. As referred to above, the Joint Insolvency Committee is responsible for commissioning and approving new SIPs and Insolvency Guidance Papers and keeping existing SIPs and Insolvency Guidance Papers under review and was responsible for developing the current Insolvency Code of Ethics.

4-105 Mention was also made above of the Insolvency Practices Council, which was also established as a result of recommendations in the report of the Insolvency Regulation Working Party, *Insolvency Practitioner Regulation Ten Years On*.³¹³ Established in 2000, it was intended to provide an external input into standards in the insolvency profession and had an independent chair, five lay

Secretary of State as competent authority in relation to the insolvency practitioners authorised directly by them.

³¹¹ Prior to the changes introduced by the Deregulation Act 2015, it was also adopted by the Secretary of State as competent authority in relation to the insolvency practitioners authorised directly by them.

³¹² Insolvency Regulation Working Party, *Insolvency Practitioner Regulation Ten Years On* (February 1999).

³¹³ Insolvency Regulation Working Party, *Insolvency Practitioner Regulation Ten Years On* (February 1999).

members, three insolvency practitioner members and a secretary. Its remit was to investigate and examine the ethical and professional standards of the insolvency profession, put proposals to the bodies representing the profession and make recommendations for their consideration, and consider whether standards were being adopted, observed and enforced. It worked closely with the Joint Insolvency Committee. However, as noted above, following the consultation on reforms to the regulation of insolvency practitioners in February 2011, it was concluded that there was no longer a need for a body of this sort and its functions would be better placed elsewhere within the regulatory and policy structure, with the result that it was disbanded in 2012.

Caution

A person is not qualified to act as an insolvency practitioner in relation to a debtor unless there is in force at that time caution for the proper performance of their functions which meets prescribed requirements (or they hold an authorisation granted by the Department of Enterprise, Trade and Investment for Northern Ireland under art.352 of the Insolvency (Northern Ireland) Order 1989).³¹⁴ The prescribed requirements are set out in the Insolvency Practitioners Regulations 2005.³¹⁵ **4-106**

As noted above, the Insolvency Service published a call for evidence on the bonding arrangements for insolvency practitioners in September 2016 seeking views on the current arrangements and possible improvements.³¹⁶ In September 2017, it published a summary of the responses,³¹⁷ which indicated that it would continue to liaise with stakeholders to develop changes to the system and that further consideration would be given to the costs and benefits of legislative change which, if taken forward, would be preceded by further consultation to commence by the end of 2017. **4-107**

Other regulation

The discussion above relates to the regulation of insolvency practitioners acting as such, in this context as interim trustees, trustees in sequestration and trustees under trust deeds for creditors. However, insolvency practitioners may in the course of their business carry out other related activities, particularly in relation to advising debtors on their financial circumstances and the various options available to them. It is possible that some of these activities may require authorisation under s.19 of the Financial Services and Markets Act 2000 as regulated activities in terms of that Act. The definition of regulated activities is found in s.22 of the Act and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 as amended³¹⁸ and includes inter alia certain activities in relation to debt, including debt advice.³¹⁹ If such authorisation is required, this would mean that the insolvency practitioner would effectively be subject to dual regulation by their authorising body and the Financial Conduct Authority in relation to these activities, which seems somewhat over- **4-108**

³¹⁴ Insolvency Act 1986 s.390(3).

³¹⁵ Insolvency Practitioners Regulations 2005 reg.12 and Sch.2.

³¹⁶ Insolvency Service, *Call for Evidence: Bonding arrangements for insolvency practitioners* (September 2016).

³¹⁷ Insolvency Service, *Summary of Responses: Bonding arrangements for insolvency practitioners* (September 2017).

³¹⁸ Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) as amended.

³¹⁹ See, in particular, Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 arts 39D-39G.

regulatory, particularly when the Government has been seeking to reduce regulatory burdens through initiatives such as the Red Tape Challenge referred to above. There are certain exclusions which allow a person acting as an insolvency practitioner or acting in reasonable contemplation of their appointment as an insolvency practitioner to carry out specified regulated activities without such authorisation,³²⁰ but there is some debate as to the scope of these exclusions, and it has been suggested that amendments should be made to the relevant provisions to make sure that an insolvency practitioner can carry out these activities without the need for separate additional authorisation under the Financial Services and Markets Act 2000.³²¹ There is also a potential tension between these provisions and the provisions for compulsory money advice for debtors wishing to apply for sequestration or a debt payment programme, which include insolvency practitioners among the persons permitted to give such advice.³²² On balance, therefore, it is suggested that an appropriate amendment of the current provisions would be appropriate.

³²⁰ See Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 art.72H.

³²¹ See, for example, Frampton, G, "One size does not fit all" *Recovery* (Winter 2015), p.8 and Turner, C, "Present company excepted" *Recovery* (Winter 2015), p.9.

³²² The provisions for compulsory money advice for debtors wishing to apply for sequestration or a debt payment programme are discussed in context later in this book.

CHAPTER 5

PRE-APPLICATION MORATORIUM

INTRODUCTION

The debt arrangement scheme introduced the concept of a pre-application moratorium designed to allow a debtor who intended to seek the consent of creditors to a debt payment programme to obtain protection from specified actions of creditors for a specified period pending the submission of the application.¹ **5-01**

The Scottish Government's *Consultation on Bankruptcy Law* reform issued in February 2012 contained a proposal to introduce similar provisions for sequestration.² This was supported by consultees³ and the Scottish Government's response to the consultation indicated an intention to make provision for such a moratorium in sequestration, protected trust deeds (although they had not been mentioned in the consultation) and the debt arrangement scheme.⁴ This was duly implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014, including the relocation of the existing provisions for the pre-application moratorium in the debt arrangement scheme from the Debt Arrangement Scheme (Scotland) Regulations 2011 to the Bankruptcy (Scotland) Act 1985.⁵ The provisions for the pre-application moratorium are now found in Pt 15 of the Bankruptcy (Scotland) Act 2016. **5-02**

This chapter considers the circumstances in which the pre-application moratorium applies, the nature and extent of the pre-application moratorium and the duration of the pre-application moratorium. **5-03**

CIRCUMSTANCES IN WHICH PRE-APPLICATION MORATORIUM APPLIES

The benefit of the pre-application moratorium is obtained by giving written notice to Accountant in Bankruptcy (AiB) in accordance with the provisions of Pt 15 of the Bankruptcy (Scotland) Act 2016. There are two separate provisions. **5-04**

Section 195(1) of the Bankruptcy (Scotland) Act 2016 makes provision for a person to give written notice to AiB of the person's intention: **5-05**

¹ See further Ch.21.

² Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 9.7–9.9.

³ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], Executive Summary.

⁴ *The Scottish Government's Response to: The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 16 September 2017]. As to protected trust deeds, see Ch.20.

⁵ See further Ch.21.

- (a) to make a debtor application for sequestration under s.2(1)(a) of that Act⁶;
- (b) to seek to fulfil the conditions for a trust deed granted by or on behalf of the person to become a protected trust deed⁷; or
- (c) to apply for the approval of a debt payment programme in accordance with s.2 of the Debt Arrangement and Attachment (Scotland) Act 2002.⁸

5-06 The notice must be in Form 33 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.⁹

5-07 Section 196(1) of the Bankruptcy (Scotland) Act 2016 makes provision for a person to give written notice to AiB of the person's intention to make a debtor application for sequestration under s.6 of that Act. The notice must be in Form 34 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.¹⁰

5-08 A debtor application for sequestration under s.2(1)(a) of the Bankruptcy (Scotland) Act 2016 is one made by a living debtor, while a debtor application for sequestration under s.6 of the Bankruptcy (Scotland) Act 2016 is one made by or on behalf of an entity to which that section applies. It may be noted, however, that s.4A(1) of the Bankruptcy (Scotland) Act 1985 as introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014, which s.195(1) is intended to consolidate, made provision for a person to give written notice to AiB of the person's intention to make a debtor application for sequestration under s.5 of the Bankruptcy (Scotland) Act 1985, and a debtor application under s.5 of the Bankruptcy (Scotland) Act 1985 as amended by the Bankruptcy and Debt Advice (Scotland) Act 2014 included one made by a living debtor and one made by an executor, or person entitled to be appointed executor, of a deceased debtor. Thus, there appears to be a discrepancy between the original provision introduced into the Bankruptcy (Scotland) Act 1985 by the Bankruptcy and Debt Advice (Scotland) Act 2014, which allowed for the possibility of a pre-application moratorium where there was to be a debtor application by an executor or person entitled to be appointed executor of a deceased debtor, and the consolidated provision in the Bankruptcy (Scotland) Act 2016, which apparently does not. In this respect, it may also be noted that the statutory form in which notice under s.195(1) is to be given, referred to above, includes sections to be completed where the notice is being given by an executor or person entitled to be appointed executor of a deceased debtor as well as sections to be completed where the notice is being given by an individual in their own right and by an entity. It may therefore be that there has simply been an error in omitting to include in s.195(1) a reference to a debtor application for sequestration under s.5(a) of the Bankruptcy (Scotland) Act 2016, which is the now separate provision which now provides for a debtor application by an executor or person entitled to be appointed executor of a deceased debtor.

⁶ Bankruptcy (Scotland) Act 2016 s.195(1)(a) and see further para.5-08.

⁷ Bankruptcy (Scotland) Act 2016 s.195(1)(b). Trust deeds, including protected trust deeds and the conditions for a trust deed becoming a protected trust deed, are discussed further in Ch.22.

⁸ Bankruptcy (Scotland) Act 2016 s.195(1)(c). Debt Payment programmes are discussed further in Ch.21.

⁹ Bankruptcy (Scotland) Regulations 2016 (SSI 2016/397) reg.29(1).

¹⁰ Bankruptcy (Scotland) Regulations 2016 reg.29(2).

The combined effect of the provisions is that the benefit of a pre-application moratorium may be obtained by any debtor contemplating making a debtor application for sequestration (subject to the point made above in relation to an executor or person entitled to be appointed executor of a deceased debtor), granting a trust deed which is intended to become protected or applying for a debt payment programme. The form of notice is, however, different in the case of a debtor seeking to make a debtor application for sequestration where the debtor is an entity. 5-09

In order to prevent abuse, a debtor may not give a notice under these provisions within 12 months of having previously given such a notice.¹¹ There is, however, an exception to this where a joint debt payment programme is revoked in specified circumstances and one of the joint debtors intends to apply for an individual debt payment programme.¹² 5-10

On receipt of the relevant notice, AiB is required, without delay, to enter specified information in the appropriate registers. In the case of a notice given under s.195(1), AiB is required to enter the name of the person giving the notice and such other information regarding that person as AiB considers appropriate in the register of insolvencies and the debt arrangement scheme register¹³; in the case of a notice given under s.196(1), AiB is required to enter the name of the person who is the subject of the notice and such other information regarding that person as AiB considers appropriate in the register of insolvencies.¹⁴ 5-11

NATURE AND EXTENT OF MORATORIUM

During the moratorium, it is not competent to:

5-12

- (a) serve a charge for payment in respect of any debt¹⁵;
- (b) commence or execute any diligence to enforce payment of any debt.¹⁶
This is, however, subject to the proviso that it remains competent to:
 - (i) auction an attached article where notice of the public auction has been given to the debtor or, in the case of an exceptional attachment, the attached article has been removed or notice of such removal has been given¹⁷;
 - (ii) implement a decree of furthcoming¹⁸;
 - (iii) implement a decree or order for sale of a ship (or a share of it) or cargo¹⁹;
 - or (iv) execute an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order which came into effect before the day on which the moratorium period commenced²⁰;
- (c) found on any debt in presenting, or concurring in the presentation of, a petition for the debtor's sequestration.²¹ It may be noted that there

¹¹ Bankruptcy (Scotland) Act 2016 ss.195(2) and 196(2).

¹² See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(3) and Ch.21.

¹³ Bankruptcy (Scotland) Act 2016 s.195(3) and (4).

¹⁴ Bankruptcy (Scotland) Act 2016 s.196(3). The register of insolvencies is discussed further in Ch.4; the Debt Arrangement Scheme Register is discussed in more detail in Ch.21.

¹⁵ Bankruptcy (Scotland) Act 2016 s.197(3)(a).

¹⁶ Bankruptcy (Scotland) Act 2016 s.197(3)(b).

¹⁷ Bankruptcy (Scotland) Act 2016 s.197(5)(a).

¹⁸ Bankruptcy (Scotland) Act 2016 s.197(5)(b).

¹⁹ Bankruptcy (Scotland) Act 2016 s.197(5)(c).

²⁰ Bankruptcy (Scotland) Act 2016 s.197(5)(d).

²¹ Bankruptcy (Scotland) Act 2016 s.197(3)(c).

was no corresponding provision in the original provisions for the pre-application moratorium in the debt arrangement scheme.²² The Debt Arrangement Scheme (Scotland) Regulations 2011 introduced a provision that it was not competent for a creditor to petition for sequestration inter alia during that pre-application moratorium,²³ but doubts arose as to the meaning of “petition for sequestration” in that context. In *Milne, Petitioner*,²⁴ it was held that it prevented the presentation of a petition for sequestration, but did not prevent an award of sequestration being made on a petition presented before the moratorium came into force. In contrast, in the later case of *Mackin, Petitioner*,²⁵ it was held that the same phrase in the context of the (separate) moratorium which comes into force when an application for a debt payment programme is made, did not prevent the presentation of a petition for sequestration but prevented an award of sequestration being made on an existing petition for sequestration. The current wording of the pre-application moratorium provision now makes it clear that it is the presentation of a petition for sequestration during the pre-application moratorium which is not competent.²⁶ It may also be noted that the reference to concurring in the presentation of a petition for the debtor’s sequestration appears both incorrect, in that concurrence by a creditor is now relevant only in certain cases where the debtor applies for sequestration by debtor application rather than where there is a petition for sequestration, and odd, in that a debtor application for sequestration would not be prevented by the pre-application moratorium; and

(d) release arrested funds in accordance with the provisions for automatic release of arrested funds.²⁷ The period of the moratorium is, however, disregarded in calculating the time when the arrested funds are to be released.²⁸

DURATION OF MORATORIUM

5–13 The moratorium commences on the day on which the entry referred to above is made in the register of insolvencies²⁹ and ends on the day six weeks after that day or such earlier or later day as is otherwise specified.³⁰

5–14 The moratorium will end on an earlier day if on such a day:

- (a) an entry is made in the register of insolvencies recording the award of sequestration of the estate³¹;
- (b) an entry is made in the register of insolvencies recording that a trust deed granted by the debtor has been granted or refused protection³²;

²² Debt Arrangement Scheme (Scotland) Regulations 2004 (SSI 2004/468) reg.31A as inserted by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007 (SSI 2007/187).

²³ Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141).

²⁴ *Milne, Petitioner*: 14 May 2012 Peterhead Sheriff Court, available on the Scottish Courts website.

²⁵ *Mackin, Petitioner*, 2015 S.C. GLA 73.

²⁶ The inter-relationship between sequestration and the debt arrangement scheme remains a matter of difficulty, however: see further discussion in Ch.8 and Ch.21.

²⁷ Bankruptcy (Scotland) Act 2016 s.197(3)(d).

²⁸ Bankruptcy (Scotland) Act 2016 s.197(4).

²⁹ Bankruptcy (Scotland) Act 2016 s.198(1)(a).

³⁰ Bankruptcy (Scotland) Act 2016 s.198(1)(b).

³¹ Bankruptcy (Scotland) Act 2016 s.198(2)(a).

³² Bankruptcy (Scotland) Act 2016 s.198(2)(b).

- (c) an entry is made in the debt arrangement scheme register recording the approval of a debt payment programme³³; or
- (d) written notice is given to AiB of the withdrawal of the notice.³⁴

The moratorium will end on a later day where:

5-15

- (a) a debtor application for sequestration has been made but not determined before the moratorium has otherwise expired.³⁵ In such a case, the moratorium will end either: (i) on the day on which an entry is made in the register of insolvencies recording the award of sequestration of the estate³⁶; or (ii) in the case of a refusal to award sequestration, on the day on which the period for review of that decision expires without an application for review having been made or the day on which a decision is made on any application for review³⁷; or (iii) on the day on which written notice is given to AiB of the withdrawal of the notice³⁸;
- (b) an application for a trust deed granted by the debtor to be granted protected status has been recorded in the register of insolvencies before the moratorium has otherwise expired.³⁹ In such a case, the moratorium will end either: (i) on the day on which an entry is made in the register of insolvencies recording that the trust deed has been granted protected status⁴⁰; or (ii) where there is no such entry, on the day which is 13 weeks after the day on which the moratorium commenced⁴¹; or (iii) on the day on which written notice is given to AiB of the withdrawal of the notice⁴²; and
- (c) an application for a debt payment programme in relation to the debtor has been made but not determined before the moratorium has otherwise expired.⁴³ In such a case, the moratorium will end either: (i) on the day on which an entry is made in the debt arrangement scheme register recording the approval of the debt payment programme⁴⁴; or (ii) in the case of a rejection of the debt payment programme, on the day on which an entry is made in the debt arrangement scheme register recording the rejection of the debt payment programme⁴⁵; or (iii) on the day on which written notice is given to AiB of the withdrawal of the notice.⁴⁶

³³ Bankruptcy (Scotland) Act 2016 s.198(2)(c).

³⁴ Bankruptcy (Scotland) Act 2016 s.198(2)(d).

³⁵ Bankruptcy (Scotland) Act 2016 s.198(3).

³⁶ Bankruptcy (Scotland) Act 2016 s.198(4)(a).

³⁷ Bankruptcy (Scotland) Act 2016 s.198(4)(b).

³⁸ Bankruptcy (Scotland) Act 2016 s.198(4)(c).

³⁹ Bankruptcy (Scotland) Act 2016 s.198(5).

⁴⁰ Bankruptcy (Scotland) Act 2016 s.198(6)(a).

⁴¹ Bankruptcy (Scotland) Act 2016 s.198(6)(b).

⁴² Bankruptcy (Scotland) Act 2016 s.198(6)(c).

⁴³ Bankruptcy (Scotland) Act 2016 s.198(7).

⁴⁴ Bankruptcy (Scotland) Act 2016 s.198(8)(a).

⁴⁵ Bankruptcy (Scotland) Act 2016 s.198(8)(b).

⁴⁶ Bankruptcy (Scotland) Act 2016 s.198(8)(c).

CHAPTER 6

NATURE AND SCOPE OF SEQUESTRATION

INTRODUCTION

This chapter considers the nature of sequestration under the bankruptcy legis- 6-01
lation and whose estate may be sequestrated.

NATURE OF SEQUESTRATION

Bell described sequestration as

6-02

“a judicial process for attaching and rendering litigious the whole estate, heritable and moveable, real and personal, of the bankrupt, wherever situated, in order that it may be vested in a trustee elected by the creditors, to be recovered, managed, sold and divided by him, according to certain rules of distribution”.¹

Notwithstanding the various reforms which have taken place to the process of 6-03
sequestration since then, that description continues to encapsulate the essence of sequestration. Although an award of sequestration is no longer made by the court in all cases, it remains in essence a judicial process. It still attaches the whole estate of the debtor (subject to defined exceptions), wherever that estate is situated (subject at present to the provisions of the EU insolvency proceedings regulation in certain cases). The estate still vests in the trustee in sequestration and the creditors may still chose the trustee if they wish. The essence of the sequestration process is still the recovery, management and sale of the debtor’s estate and its distribution among the creditors in accordance with the statutory scheme of distribution.

WHOSE ESTATE MAY BE SEQUESTERED?

General

Section 1(1) of the Bankruptcy (Scotland) Act 2016 provides that the estate of 6-04
a debtor may be sequestrated in accordance with the provisions of the Act. “Debtor” is defined widely in s.228(1) as including, without prejudice to the generality of that expression, an entity whose estate may be sequestrated by virtue of s.6, a deceased debtor, a deceased debtor’s executor and a person entitled to be appointed the executor of a deceased debtor. Sequestration therefore encompasses both natural persons, living or deceased, and certain entities. In the case of natural persons, as previously noted, this includes both trading and consumer debtors.²

¹ Bell, *Commentaries on the Law of Scotland*, 7th edn (1870) Vol.2, p.283.

² See Ch.2.

Entities

6-05 The entities whose estate may be sequestrated by virtue of s.6 of the Bankruptcy (Scotland) Act 2016 are:

- (i) a trust in respect of debts incurred by it³;
- (ii) a partnership, including a dissolved partnership⁴;
- (iii) a body corporate⁵;
- (iv) an unincorporated body⁶; and
- (iv) a limited partnership, including a dissolved limited partnership, within the meaning of the Limited Partnerships Act 1907.⁷

6-06 It is specifically provided that it is not competent to sequester the estate of a company registered under the Companies Act 2006,⁸ a limited liability partnership⁹ or an entity in respect of which an enactment provides, expressly or by implication, that sequestration is incompetent.¹⁰ With regard to limited liability partnerships, it may be noted that while it is now expressly provided that it is not competent to sequester the estate of a limited liability partnership, the Bankruptcy (Scotland) Act 1985 was not amended to make express provision to that effect when limited liability partnerships were first introduced. It seems likely that such an amendment was regarded as unnecessary on the basis that since the legislation governing limited liability partnerships provides for limited liability partnerships to be subject to modified forms of corporate insolvency procedures,¹¹ a limited liability partnership would have fallen to be regarded as an entity in respect of which an enactment provided by implication that sequestration was incompetent. However, the Scottish Law Commission in its *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland*,¹² while noting that a limited liability partnership seemed to come within that provision, observed that a company registered under the Companies Acts might also be regarded as doing so and yet was expressly referred to, and it therefore proposed that for the avoidance of any uncertainty, an express reference to limited liability partnerships should be introduced.¹³ It subsequently made a recommendation to that effect in its *Report on the Consolidation of Bankruptcy Legislation in Scotland*¹⁴ and the Bankruptcy (Scotland) Act 1985 was in due course amended accordingly by the Bankruptcy and Debt

³ Bankruptcy (Scotland) Act 2016 s.6(1)(a).

⁴ Bankruptcy (Scotland) Act 2016 s.6(1)(b).

⁵ Bankruptcy (Scotland) Act 2016 s.6(1)(c).

⁶ Bankruptcy (Scotland) Act 2016 s.6(1)(d).

⁷ Bankruptcy (Scotland) Act 2016 s.6(1)(e). The law in relation to limited partnerships is under review at the time of writing: see Department of Business, Energy and Industrial Strategy, *Review of Limited Partnership: a call for evidence* (January 2017).

⁸ Bankruptcy (Scotland) Act 2016 s.6(2)(a). The reference to a company registered under the Companies Act 2006 includes a company registered under previous companies legislation: see Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 para.3.

⁹ Bankruptcy (Scotland) Act 2016 s.6(2)(b).

¹⁰ Bankruptcy (Scotland) Act 2016 s.6(2)(c).

¹¹ See the Limited Liability Partnerships Act 2000 and the Limited Liability Partnerships (Scotland) Regulations 2001.

¹² Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland* (August 2011), available at <http://www.scotlawcom.gov.uk> [Accessed 16 September 2017].

¹³ Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland* (August 2011), para.2.11.

¹⁴ Scottish Law Commission, *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, May 2013), para.2.11.

Advice (Scotland) Act 2014 prior to the consolidation of the legislation in the Bankruptcy (Scotland) Act 2016.

Care must be taken to consider whether an entity in respect of which sequestration is sought is one whose estate may be sequestrated in terms of the provisions set out above. For example, sequestration of the estate of a royal burgh was held to be competent,¹⁵ and it is thought that the same would be true in the case of the councils established under the Local Government etc. (Scotland) Act 1994. Sequestration of the estate of a university may be competent depending on the legal form of the university: for example, in the case of the universities of Aberdeen, Edinburgh, Glasgow and St Andrews, the university court is a body corporate¹⁶ and thus its estate would seem to be liable to sequestration. A trade union is not, and except as specifically provided is not to be treated as if it were, a body corporate, and it may not be registered as a company under the Companies Act 2006 or under the Friendly Societies Act 1974 or the Co-operative and Community Benefit Societies Act 2014,¹⁷ but it may be regarded as an unincorporated body and as such its estate would be liable to be sequestrated. A club will also generally be an unincorporated body and as such its estate would be liable to be sequestrated. It is suggested that where provision is made for an entity to be subject to any of the corporate insolvency procedures provided for in the Insolvency Act 1986, whether in modified form or otherwise, this should be regarded as meaning that by implication sequestration would not be competent. It is not entirely clear whether the converse would also apply, so that where sequestration is competent, a debtor would not be regarded as subject to any of the corporate insolvency procedures under the Insolvency Act 1986. It has been held that partnerships and limited partnerships are liable to sequestration only and may not be wound up as unregistered companies under the Insolvency Act 1986,¹⁸ but it is not clear if this would also apply to any other entity which would be liable to sequestration but which would also potentially be liable, for example, to be wound up as an unregistered company. It is suggested that for the sake of consistency, it would be better if an entity was regarded as liable to either sequestration or corporate insolvency provisions but not both.

It should be noted that an entity must exist as such in order to be liable to sequestration and it has accordingly been held that the sequestration of what was in fact the trading name of a debtor rather than a real entity was a nullity which could not be cured by an action of declarator.¹⁹

The application of the Bankruptcy (Scotland) Act 2016 to the sequestration of the estate of a limited partnership is subject to such modifications as may be prescribed.²⁰ The relevant modifications are now prescribed in reg.31 of the Bankruptcy (Scotland) Regulations 2016 and are referred to throughout this book where applicable.

¹⁵ *Wotherspoon and Hope v Magistrates of Linlithgow* (1863) 2 M. 348.

¹⁶ Universities (Scotland) Act 1889 s.5(3).

¹⁷ Trade Union and Labour Relations Act 1974 s.2. The exceptions for which specific provision is made do not include insolvency.

¹⁸ *Smith v Smith* unreported 19 January 1998 Dumfries Sheriff Court.

¹⁹ *Accountant in Bankruptcy v Butler*, 2007 S.L.T. (Sh Ct) 200; and see further the discussion of the need for accuracy in the debtor's designation in Ch.7.

²⁰ Bankruptcy (Scotland) Act 2016 s.6(8).

ISSUES RELATING TO THE SCOPE OF SEQUESTRATION

6-10 As noted above, sequestration under the bankruptcy legislation encompasses both natural persons, living or deceased, whether trading or consumer debtors, and certain entities.²¹ It may be asked, however, whether this remains appropriate in modern times. It is accepted that different jurisdictions take different approaches to the scope of bankruptcy or insolvency law generally and there is no one size that fits all. In some jurisdictions, for example, a distinction is drawn between trading and other debtors irrespective of the form of the debtor, and consumer debtors may not fall within insolvency law as such at all, although there may be separate procedures for such debtors. In England and Wales, the same distinction is drawn between bankruptcy and corporate insolvency as in Scotland, but with the difference that bankruptcy law encompasses natural persons only, while partnerships and other entities are subject to (a suitably modified version of) corporate insolvency law. This is so despite the fact that partnerships, which have separate legal personality in Scotland and so might be regarded as more akin to company debtors than natural person debtors, do not do so in England and Wales. It is arguable that this represents a more logical approach, particularly in the modern world where most natural person debtors are now consumer debtors rather than the trading debtors for whom sequestration was originally devised and where most recent reform of bankruptcy law has been focused on such debtors. It appears to make more sense to have one insolvency regime focused on natural person debtors who, whether consumers or otherwise, raise different issues from other types of debtors in many respects, and another insolvency regime focused on legal person debtors and other entities who, whether trading or not, might be regarded as having more in common with each other than with natural person debtors, even if it can also be argued that at least some of the underlying principles of the different regimes might justifiably be the same.²² It is suggested that such an approach is worthy of consideration for future reform.

²¹ The same is true for trust deeds for creditors and, now, the debt arrangement scheme: see further Chs 21 and 22 regarding the scope of these processes and comment thereon.

²² This is touched on in Ch.3.

CHAPTER 7

APPLICATIONS FOR SEQUESTRATION

INTRODUCTION

The bankruptcy legislation makes separate provision for sequestration of the estate of a living or deceased debtor and sequestration of other estates. 7-01

An award of sequestration may be applied for by a debtor, a qualified creditor or creditors, or certain other parties. Prior to the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, all applications for sequestration were made by petition to the court. In 2003, however, views were sought on whether applications for sequestration made by a debtor should be determined by Accountant in Bankruptcy (AiB) rather than the court on the basis that such applications were generally straightforward and this would save costs and court time.¹ The majority of consultees were in favour of such a change² and the Bankruptcy and Diligence etc. (Scotland) Act 2007 accordingly made provision for an application for sequestration by a debtor to be made by debtor application to AiB rather than by petition to the court. The Scottish Government's *Consultation on Bankruptcy Law* reform issued in February 2012 subsequently sought views on proposals to allow an application for sequestration to be made by application to AiB rather than by petition to the court in certain other cases also, namely non-contentious applications by a creditor or trustee under a trust deed and applications by the executor of a deceased debtor.³ The proposal in so far as it related to applications by a creditor or trustee under a trust deed was strongly opposed by consultees,⁴ and although the Scottish Government's response indicated an intention to proceed with it notwithstanding,⁵ it was not ultimately implemented. The proposal in so far as it related to applications by the executor of a deceased debtor was, however, supported by consultees,⁶ and was duly implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014. As a result, all applications for sequestration by debtors and by executors or persons entitled to be appointed executors of deceased debtors are now made by debtor application to AiB 7-02

¹ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 6.21–6.23.

² See Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), paras 5.56–5.61.

³ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), available at <http://www.gov.scot/Resource/0038/00388465.pdf> [Accessed 16 September 2017], Pt 12.

⁴ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 7.1–7.4 and 7.6.

⁵ The Scottish Government, *Response to: The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 16 September 2017], para.5.

⁶ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), paras 7.5 and 7.6.

while applications for sequestration made by creditors and other parties are still made by petition to the court.

- 7-03** This chapter deals with the application for sequestration and related matters. The procedure for determining an application, the award of sequestration and related matters are dealt with in Ch.8, while the review of an award of sequestration is dealt with in Ch.9.

APPLICATIONS FOR SEQUESTRATION OF THE ESTATE OF A LIVING DEBTOR

- 7-04** Sequestration of the estate of a living debtor may be applied for by the debtor in specified circumstances; by a qualified creditor or creditors where the debtor is apparently insolvent; by a temporary administrator appointed under the EU insolvency proceedings regulation; by a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation; or by a trustee under a trust deed in specified circumstances. These are considered in turn.

Application by the debtor

Requirement for money advice

- 7-05** The Bankruptcy and Debt Advice (Scotland) Act 2014 introduced a statutory requirement for a living debtor to take money advice before applying for sequestration. The debt arrangement scheme first introduced a statutory requirement for a debtor to take money advice before making an application for a debt payment programme.⁷ Subsequently, a requirement for the prospective trustee to give advice to the debtor on certain matters prior to the granting of a trust deed which was intended to become protected was incorporated into the statutory provisions relating to protected trust deeds.⁸ Building on this, the Scottish Government's *Consultation on Bankruptcy Law* reform issued in February 2012 contained a proposal to introduce a statutory requirement for money advice before a debtor application for sequestration.⁹ It also sought views on an advice-giving function for AiB.¹⁰ The former proposal was supported by consultees but the latter was not,¹¹ and the Scottish Government's response to the consultation accordingly indicated an intention to make provision for a requirement for money advice prior to an application for any form of statutory debt relief.¹² The relevant provisions were duly included in the Bankruptcy and Debt Advice (Scotland) Act 2014 which amended the Bankruptcy (Scotland) Act 1985 accordingly. The provisions on money advice prior to a debtor application for sequestration by a living debtor are now found in s.4 of the Bankruptcy (Scotland) Act 2016.
- 7-06** In accordance with these provisions, a living debtor may not apply for sequestration unless they have obtained advice from a money adviser on their financial

⁷ See further Ch.21.

⁸ See further Ch.22.

⁹ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.6.

¹⁰ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 6.2–6.3 and see further Ch.4.

¹¹ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 1.3–1.7.

¹² The Scottish Government, *Response to: The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 16 September 2017].

circumstances, the effect of the proposed sequestration, the preparation of the application and such other matters as may be prescribed.¹³ The prescribed matters, which are to some extent duplicative, are: the income and expenditure of the debtor in accordance with the common financial tool; the evidence required to confirm the debtor's debts when making the application; the debt advice and information package referred to in s.10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002; the alternative options of a voluntary repayment plan, debt payment programme or trust deed for creditors; the consequences of sequestration; and the fact that an award of sequestration is recorded in a public register and may have one or more specified effects, namely the debtor being refused credit or being offered credit at a higher rate (whether before or after their discharge), the debtor not being able to remain in their current place of residence, the debtor being required to relinquish property which they own, the debtor being required to make contributions from income for the benefit of creditors, damage to the debtor's business interests and employment prospects, the debtor still being liable for some debts, the debtor's past financial transactions being investigated and the restrictions and requirements imposed on the debtor.¹⁴

A money adviser is defined as a person who is not an associate of the debtor¹⁵ and who is of a prescribed description or falls within a prescribed class.¹⁶ Subject to certain exceptions, the prescribed classes are: 7-07

- (i) a qualified insolvency practitioner who is either fully authorised as such or partially authorised to act as such in relation to individuals¹⁷;
- (ii) a person who works for such a qualified insolvency practitioner and has been authorised by them to give advice for these purposes¹⁸;
- (iii) a person who works as a money adviser for an organisation which has been awarded accreditation at Type 2 level or above against the Scottish National Standards for Information and Advice Provision¹⁹;
- (iv) a person who is approved as a money adviser for the purposes of the debt arrangement scheme²⁰;
- (v) a person who works as a money adviser for a citizens advice bureau which is a full member of the Scottish Association of Citizens Advice Bureaux—Citizens Advice Scotland²¹; and
- (vi) a person who works as a money adviser for a local authority.²²

The exceptions, who may not be a money adviser for this purpose, are: 7-08

- (i) a sheriff officer or messenger-at-arms or an employee of such a person²³;

¹³ Bankruptcy (Scotland) Act 2016 s.4(1).

¹⁴ Bankruptcy (Scotland) Regulations 2016 (SSI 2016/397) reg.6.

¹⁵ Bankruptcy (Scotland) Act 2016 s.4(2)(a). "Associate" is defined in s.229 of the Bankruptcy (Scotland) Act 2016: the definition is discussed in detail in Ch.14 in the context of challenge of prior transactions.

¹⁶ Bankruptcy (Scotland) Act 2016 s.4(2)(b).

¹⁷ Bankruptcy (Scotland) Regulations 2016 reg.4(a)(i). Insolvency practitioners are discussed in detail in Ch.4.

¹⁸ Bankruptcy (Scotland) Regulations 2016 reg.4(a)(ii).

¹⁹ Bankruptcy (Scotland) Regulations 2016 reg.4(b)(i).

²⁰ Bankruptcy (Scotland) Regulations 2016 reg.4(b)(ii) and see further Ch.21.

²¹ Bankruptcy (Scotland) Regulations 2016 reg.4(b)(iii).

²² Bankruptcy (Scotland) Regulations 2016 reg.4(b)(iv).

²³ Bankruptcy (Scotland) Regulations 2016 reg.5(1)(a).

- (ii) a person or body providing financial services, or financial advice other than money advice, in the course of a business or otherwise for profit, or an employee of such a person, unless the person is a solicitor, a chartered or certified accountant or a registered credit union²⁴;
- (iii) a person providing debt collection services or an employee of such a person²⁵;
- (iv) a person who has been convicted of an offence involving theft, fraud or other dishonesty²⁶;
- (v) a person who is subject to a bankruptcy restrictions order (including an interim order) under the Bankruptcy (Scotland) Act 2016 or a bankruptcy restrictions order or undertaking under the Insolvency Act 1986²⁷;
- (vi) a person who is subject to a disqualification order or undertaking under the Company Directors Disqualification Act 1986²⁸;
- (vii) a person without a licence from the Money Advice Trust to use the common financial statement²⁹; and
- (viii) a person whose approval as a money adviser has been revoked or suspended by AiB.³⁰ AiB may revoke or suspend a person's approval as a money adviser if the money adviser fails, without good cause, to apply the common financial tool in accordance with the Bankruptcy (Scotland) Regulations 2016 *or* to comply with certain other requirements imposed on money advisers by these regulations.³¹ In such a case, AiB must give written notice of the revocation or suspension, including the reasons for the decision to revoke or suspend, to the money adviser³² and written notice of the revocation or suspension to any debtor for whom AiB is aware the money adviser is acting.³³ There is no provision for appeal against AiB's decision, but such decision would be subject to judicial review.

7-09 It is notable that these exceptions do not include a person who is an undischarged bankrupt, who has granted a trust deed for creditors under which they remain undischarged or who has entered into a debt payment programme which is not yet completed. It may be questioned, however, whether it is appropriate for such persons to be included among those who may give money advice in these circumstances.

7-10 It may be noted that while the provisions discussed here prescribe those who may give pre-application money advice, they are silent as to whether such a person is also required to comply where relevant with any separate requirement for a person to have authorisation to give money advice, for example under the Financial Services and Markets Act 2000. There is therefore a potential tension between these provisions and such other requirements. This was

²⁴ Bankruptcy (Scotland) Regulations 2016 reg.5(1)(b).

²⁵ Bankruptcy (Scotland) Regulations 2016 reg.5(1)(c).

²⁶ Bankruptcy (Scotland) Regulations 2016 reg.5(1)(d).

²⁷ Bankruptcy (Scotland) Regulations 2016 reg.5(1)(e). Bankruptcy restrictions are discussed further in Ch.17.

²⁸ Bankruptcy (Scotland) Regulations 2016 reg.5(1)(f).

²⁹ Bankruptcy (Scotland) Regulations 2016 reg.5(1)(g).

³⁰ Bankruptcy (Scotland) Regulations 2016 reg.5(1)(h).

³¹ Bankruptcy (Scotland) Regulations 2016 reg.5(2). As to the other requirements imposed on money advisers, see further para.7-11.

³² Bankruptcy (Scotland) Regulations 2016 reg.5(3).

³³ Bankruptcy (Scotland) Regulations 2016 reg.5(4).

explored further in Ch.4 in the context of the regulation of insolvency practitioners in particular.

A money adviser is required in the course of advising the debtor to obtain evidence of the debtor's income and expenditure.³⁴ They are also required to retain records relating to the advice given, including the aforesaid evidence of income and expenditure, for a period of two years from the date on which the advice was given³⁵ and to provide information about the debtor's application, including the aforesaid evidence of income and expenditure and the debtor's consent to the application, to AiB as required.³⁶ As noted above, any failure without good cause to comply with these requirements may lead to the revocation or suspension of the money adviser's approval as such.³⁷

Criteria for debtor application

The debtor may apply by debtor application for the sequestration of their estate if they satisfy either of two sets of criteria³⁸ which are referred to here as the minimal asset criteria and the standard criteria respectively.

It may be noted that the criteria enabling a debtor to apply for sequestration have changed considerably over time. Originally, the Bankruptcy (Scotland) Act 1985 allowed a living debtor to apply for sequestration only with the concurrence of a qualified creditor.³⁹ There were no other criteria for such an application. However, the Bankruptcy (Scotland) Act 1993 introduced provisions which allowed the debtor as an alternative to apply for sequestration where certain specified criteria were satisfied, namely a minimum debt level of £1,500, no award of sequestration in the preceding five years and a requirement for the debtor to be either apparently insolvent or to have granted a trust deed which had failed to become protected.⁴⁰ The minimum debt level for the purposes of those criteria was touched on in 1998 in the context of a proposed reduction in the qualifying level of debt for a creditor application for sequestration,⁴¹ and further views on the possibility of change were sought in 2003.⁴² The majority of respondents to the latter consultation felt that there should be no change and the Scottish Executive indicated initially that it agreed and there would be no change.⁴³ However, the ensuing Bankruptcy and Diligence etc. (Scotland) Act 2007 did raise the minimum debt level to £3,000, although this provision was never brought into force. It also introduced another alternative to the requirement for the debtor to be either apparently insolvent or to have granted a trust deed which had failed to become protected, namely for the debtor to be unable to pay their debts *and* be a "low income, low asset"

³⁴ Bankruptcy (Scotland) Regulations 2016 reg.7(1).

³⁵ Bankruptcy (Scotland) Regulations 2016 reg.7(2).

³⁶ Bankruptcy (Scotland) Regulations 2016 reg.7(3).

³⁷ Bankruptcy (Scotland) Regulations 2016 reg.5(2), see further para.7–08.

³⁸ See Bankruptcy (Scotland) Act 2016 s.2(1)(a).

³⁹ Bankruptcy (Scotland) Act 1985 s.5(2)(a) as enacted.

⁴⁰ Bankruptcy (Scotland) Act 1993 s.3(1), (2), substituting inter alia a new s.5(2)(a) and 5(2A) and 5(2B) for Bankruptcy (Scotland) Act 1985 s.5(2)(a) as enacted.

⁴¹ See Scottish Office, *The Bankruptcy (Scotland) Act 1985 A Consultation Follow-Up: Protected Trust Deeds and Other Issues* (July 1998), para.36. As to the qualifying level of debt for a creditor application for sequestration, see further para.7–30.

⁴² Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), para.5.13.

⁴³ See Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), para.5.67.

(LILA) debtor as defined.⁴⁴ These provisions were introduced specifically in order to enable debtors with little or no income and/or assets who were unable to apply for sequestration under the existing criteria to do so.⁴⁵ Further changes were made by the Home Owner and Debtor Protection (Scotland) Act 2010, which added yet another alternative to the requirement for the debtor to be apparently insolvent, to have granted a trust deed which had failed to become protected or to be unable to pay their debts and be a LILA debtor, namely for the debtor to have been granted a certificate for sequestration.⁴⁶ These provisions were introduced specifically in order to enable debtors who were still unable to apply for sequestration even under the previously amended criteria to do so.⁴⁷ The Home Owner and Debtor Protection (Scotland) Act 2010 also repealed the original provision for a debtor to apply for sequestration with the concurrence of a qualified creditor or creditors.

- 7–14 The Scottish Government's *Consultation on Bankruptcy Law* reform issued in February 2012 put forward proposals to introduce new criteria for applications for sequestration and to define a range of what it referred to as “products” within sequestration, a defining feature of which would be whether an individual would be able to pay a contribution from income on sequestration.⁴⁸ It therefore sought views on a number of different aspects of the existing criteria, including whether apparent insolvency should be retained as part of the criteria, whether the minimum debt level should now be increased and the LILA provisions. With regard to the last of these, it noted that they had been very successful⁴⁹ but were perhaps too broad,⁵⁰ and it therefore proposed to replace the LILA provisions with what it described as a “no income” “product” and a “low income” “product” and set out proposed criteria for each.⁵¹ It also proposed to introduce a “bankruptcy of last resort” for individuals who were assessed as being unable to pay a contribution but could not access any other “product”,⁵² and two “products” for those who were assessed as being able to pay a contribution in the form of a “payment” “product” and a “high value” “product” with different proposed criteria for each.⁵³ The consultation responses to these proposals were mixed. The responses on whether apparent insolvency should be retained as part of the criteria were fairly evenly split,⁵⁴

⁴⁴ Bankruptcy (Scotland) Act 1985 s.5(2)(c)(ia) and s.5A as added by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

⁴⁵ For a history of, inter alia, the LILA provisions, see McKenzie Skene, DW, “Credit where Credit is Due: The Effect of Devolution on Insolvency Law in Scotland” (2013) 1 NIBLeJ 5. See also Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.10.5.20.

⁴⁶ Bankruptcy (Scotland) Act 1985 s.5(2)(c)(ib) and s.5B as added by the Home Owner and Debtor Protection (Scotland) Act 2010. The certificate for sequestration is discussed at para.7–15.

⁴⁷ For a history of, inter alia, these provisions, see McKenzie Skene, DW, “Credit where Credit is Due: The Effect of Devolution on Insolvency Law in Scotland” (2013) 1 NIBLeJ 5.

⁴⁸ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.10.5.14.

⁴⁹ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.10.5.22.

⁵⁰ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.10.6.1.1.
⁵¹ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 10.6.1–10.6.9 and 10.7.1–10.7.7.

⁵² Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 10.8.1–10.8.4.

⁵³ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 10.9.1–10.9.8 and 10.10.1–10.10.6.

⁵⁴ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 5.34–5.36, 5.39.

while a clear majority were in favour of increasing the minimum debt level.⁵⁵ There was some confusion over the proposed “no income” “product”, but it was considered that notwithstanding this, the majority of consultees were in favour of either it or the retention of a “product” for LILA debtors,⁵⁶ with areas of both agreement and disagreement being identified in relation to the proposed criteria.⁵⁷ In contrast, the majority of consultees considered that neither the “low income” “product” nor the “payment” “product” was required⁵⁸ and, in general, they were not in favour of the development of a variety of different “products” for sequestration.⁵⁹ The Scottish Government’s response accordingly indicated an intention to retain but consider simplifying the apparent insolvency criteria, to raise the minimum debt level in most cases and to introduce a new “no income” “product” with specified criteria to replace the LILA provisions.⁶⁰ The relevant provisions were duly included in the Bankruptcy and Debt Advice (Scotland) Act 2014 which amended the Bankruptcy (Scotland) Act 1985 accordingly. The result of these changes is that, as noted above, there are now two alternative sets of criteria for debtor applications for sequestration which are referred to here as the minimal asset criteria and the standard criteria.

Minimal asset criteria These criteria effectively replaced the LILA provisions and now form a stand-alone set of criteria for debtor applications for sequestration. They are referred to here for the sake of convenience as the “minimal asset criteria”. The minimal asset criteria are as follows:

- (i) The debtor has been assessed by the common financial tool as requiring to make no debtor contribution in the sequestration *or* has been in receipt of a prescribed payment for a period of at least six months ending with the day on which the debtor application is made.⁶¹ Debtor contributions and the common financial tool are discussed further in Ch.11. The prescribed payments, where the debtor has no other income apart from any of these payments, are: universal credit under Pt 1 of the Welfare Reform Act 2012; any other income-related benefit as defined in s.191 of the Social Security Administration Act 1992; an income-based jobseeker’s allowance as defined in s.1(4) of the Jobseekers Act 1995; state pension credit under the State Pension Credit Act 2002; child tax

⁵⁵ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 5.37–5.39.

⁵⁶ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 5.41–5.42.

⁵⁷ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 5.42–5.50.

⁵⁸ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 5.51–5.55 and 5.59–5.64.

⁵⁹ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], para.5.69.

⁶⁰ The Scottish Government, *Response to The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 16 September 2017].

⁶¹ Bankruptcy (Scotland) Act 2016 s.2(2)(a). A debtor application is made when the application is received by the Accountant in Bankruptcy: Bankruptcy (Scotland) Act 2016 s.228(12).

credit under the Tax Credits Act 2002; and an income-related allowance under Pt 1 of the Welfare Reform Act 2007 (employment and support).⁶²

- (ii) The total amount of the debtor's debts, including interest, at the date the debtor application is made is not less than £1,500 or such other sum as may be prescribed and not more than £17,000 or such other sum as may be prescribed.⁶³
- (iii) The total gross value of the debtor's assets at the date the debtor application is made does not exceed £2,000 or such other amount as may be prescribed.⁶⁴ For this purpose, any property which would not vest in the trustee in sequestration, any vehicle reasonably required by the debtor the value of which does not exceed £3,000 or such other amount as may be prescribed and any other type of property which is prescribed is not to be regarded as an asset.⁶⁵ At the time of writing, however, no other type of property has been so prescribed. Provision as to how the value of the debtor's assets is to be determined may be made in regulations,⁶⁶ but at the time of writing, no such regulations have been made.
- (iv) The value of a single asset does not exceed £1,000 or such other amount as may be prescribed.⁶⁷ As in relation to the previous criterion, any property which would not vest in the trustee in sequestration, any vehicle reasonably required by the debtor the value of which does not exceed £3,000 or such other amount as may be prescribed and any other type of property which is prescribed is not to be regarded as an asset for this purpose.⁶⁸ At the time of writing, however, no other type of property has been so prescribed. Again as in relation to the previous criterion, provision as to how the value of the debtor's assets is to be determined may be made in regulations,⁶⁹ but at the time of writing, no such regulations have been made.
- (v) The debtor does not own land.⁷⁰
- (vi) The debtor has been granted a certificate for sequestration within the prescribed period.⁷¹ As already noted, the certificate for sequestration was originally introduced by the Home Owner and Debtor Protection (Scotland) Act 2010. It is a certificate granted by a money adviser certifying that the debtor is unable to pay their debts as they fall due.⁷² Such a certificate may be granted only on the application of the debtor,⁷³ and the money adviser must grant the certificate if, but only if, the debtor is able to demonstrate that they are unable to pay their debts as they fall due.⁷⁴ The certificate must be in the prescribed form.⁷⁵ There is currently no fee for the granting

⁶² Bankruptcy (Scotland) Regulations 2016 reg.13.

⁶³ Bankruptcy (Scotland) Act 2016 s.2(2)(b).

⁶⁴ Bankruptcy (Scotland) Act 2016 s.2(2)(c).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.2(3).

⁶⁶ Bankruptcy (Scotland) Act 2016 s.2(4).

⁶⁷ Bankruptcy (Scotland) Act 2016 s.2(2)(d).

⁶⁸ Bankruptcy (Scotland) Act 2016 s.2(3).

⁶⁹ Bankruptcy (Scotland) Act 2016 s.2(4).

⁷⁰ Bankruptcy (Scotland) Act 2016 s.2(2)(e).

⁷¹ Bankruptcy (Scotland) Act 2016 s.2(2)(f).

⁷² Bankruptcy (Scotland) Act 2016 s.9(1). Money advisers are discussed at para.7–07.

⁷³ Bankruptcy (Scotland) Act 2016 s.9(2).

⁷⁴ Bankruptcy (Scotland) Act 2016 s.9(3).

⁷⁵ See Bankruptcy (Scotland) Act 2016 s.9(4)(a)(i) and Bankruptcy (Scotland) Regulations 2016 reg.8, which provides that a certificate for sequestration must be in Form 2 in Sch.1 to those

- of such a certificate.⁷⁶ The prescribed period within which the certificate for sequestration must have been granted is 30 days.⁷⁷
- (vii) No previous award of sequestration under the minimal asset criteria has been made in relation to the debtor in the period of 10 years ending on the day before the debtor application is made or such other period as may be prescribed.⁷⁸
 - (viii) No other award of sequestration has been made in relation to the debtor in the period of five years ending on the day before the debtor application is made.⁷⁹

The minimal asset criteria may be modified by regulations.⁸⁰ Where they apply, a number of aspects of the sequestration process are modified⁸¹; the relevant modifications are discussed in Ch.19. 7-16

Standard criteria The alternative set of criteria for a debtor application for sequestration, which are referred to here for the sake of convenience as the standard criteria, are: 7-17

- (i) The total amount of the debtor's debts (including interest) at the date the debtor application is made is not less than £3,000 or such other sum as may be prescribed.⁸²
- (ii) No award of sequestration has been made in relation to the debtor in the period of five years ending on the day before the debtor application is made.⁸³
- (iii) The debtor has obtained the advice of a money adviser in accordance with the provisions discussed above.⁸⁴
- (iv) The debtor has given a statement of undertakings (including an undertaking to pay any debtor contribution determined using the common financial tool after the award of sequestration).⁸⁵ This requirement was introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014. The Scottish Government's *Consultation on Bankruptcy Law* reform issued in February 2012 highlighted concerns about debtor co-operation in some cases and proposed that in future, co-operation should be more closely linked to discharge.⁸⁶ As part of its proposals in this respect, it proposed that an individual debtor should be required at an early stage to sign a document which set out their duties and obligations during the sequestration process thereby

regulations, be signed and dated by the money adviser and the debtor in the manner provided for in that form and be printed on the headed notepaper of the organisation to which the money adviser belongs or, if there is no such organisation, the headed notepaper of the money adviser.

⁷⁶ See Bankruptcy (Scotland) Act 2016 s.9(4)(a)(ii) and Bankruptcy (Scotland) Regulations 2016 reg.9.

⁷⁷ See Bankruptcy (Scotland) Act 2016 s.9(4)(b) and Bankruptcy (Scotland) Regulations 2016 reg.10.

⁷⁸ Bankruptcy (Scotland) Act 2016 s.2(2)(g).

⁷⁹ Bankruptcy (Scotland) Act 2016 s.2(2)(h).

⁸⁰ Bankruptcy (Scotland) Act 2016 s.2(5).

⁸¹ Bankruptcy (Scotland) Act 2016 s.2(6).

⁸² Bankruptcy (Scotland) Act 2016 s.2(8)(a).

⁸³ Bankruptcy (Scotland) Act 2016 s.2(8)(b).

⁸⁴ Bankruptcy (Scotland) Act 2016 s.2(8)(c).

⁸⁵ Bankruptcy (Scotland) Act 2016 s.2(8)(d).

⁸⁶ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 13,

agreeing thereto.⁸⁷ No specific question was asked about this particular proposal, but the wider proposals to link co-operation more closely with discharge were generally supported by consultees⁸⁸ and provision for a statement of undertakings was duly made by the Bankruptcy and Debt Advice (Scotland) Act 2014. In the case of a debtor application, as noted, the statement of undertakings must be given at the time of the application; there are separate provisions requiring the debtor to sign a statement of undertakings after the award of sequestration where sequestration is initiated other than by debtor application.⁸⁹

- (v) The debtor is apparently insolvent,⁹⁰ has been granted a certificate for sequestration within the prescribed period⁹¹ or has granted a trust deed which has failed to become protected as a result of the creditors objecting, or not agreeing, to the trust deed.⁹² Apparent insolvency was discussed in detail in Ch.1. It should be noted, however, that for this purpose, it is provided that the debtor is not to be regarded as apparently insolvent by reason only of having granted a trust deed or given notice to their creditors that they have ceased to pay their debts in the ordinary course of business.⁹³ This provision was originally designed to prevent the debtor from creating their own apparent insolvency in order to enable them to apply for sequestration, although this may now be regarded as less important since the introduction of the certificate for sequestration. The certificate for sequestration is discussed above. The prescribed period within which a certificate for sequestration must have been granted for the purposes of this provision is the period of 30 days ending immediately before the debtor application is made.⁹⁴ Trust deeds generally, including the conditions for a trust deed to become protected, are discussed in Ch.22.

Form of application and accompanying documents

- 7–18 An application under either set of criteria must be in Form 1 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.⁹⁵ The preceding version of these regulations, the Bankruptcy (Scotland) Regulations 2014, specifically provided that a form might differ from the form set out in Sch.1 if it was of substantially the same effect or contained such variation as the circumstances may require,⁹⁶ but this provision has not been carried over into the Bankruptcy (Scotland) Regulations 2016.
- 7–19 The application must include a declaration by the money adviser who provided the pre-application money advice that such advice was given and must specify

⁸⁷ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.13.1.

⁸⁸ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], para.8.4.

⁸⁹ See further Ch.8.

⁹⁰ Bankruptcy (Scotland) Act 2016 s.2(8)(e)(i).

⁹¹ Bankruptcy (Scotland) Act 2016 s.2(8)(e)(ii).

⁹² Bankruptcy (Scotland) Act 2016 s.2(8)(e)(iii).

⁹³ Bankruptcy (Scotland) Act 2016 s.2(9).

⁹⁴ See Bankruptcy (Scotland) Act 2016 s.9(4)(b) and Bankruptcy (Scotland) Regulations 2016 reg.10.

⁹⁵ Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(a).

⁹⁶ Bankruptcy (Scotland) Regulations 2014 reg.3(2).

the name and address of the money adviser.⁹⁷ An appropriate form of declaration is incorporated in Form 1.

The debtor is required to state in the application whether or not their centre of main interests is situated in the UK or in another EU Member State⁹⁸ and whether or not they possess an establishment in the UK or in another EU Member State.⁹⁹ This information is currently required to allow jurisdiction to be established.¹⁰⁰ There is no specific provision relating to these matters in Form 1, however, and although there are questions in the form relating to the debtor's details, home, etc. the answers to these questions may not be sufficient in themselves to allow these matters to be established. 7-20

The debtor is required to send with the application a statement of assets and liabilities,¹⁰¹ but in fact this information is incorporated in Form 1. It is provided that the debtor commits an offence if they fail to disclose any material fact or make a material misstatement in such a statement of assets and liabilities.¹⁰² It is, however, a defence for the debtor to show that they had a reasonable excuse for the failure to disclose or material misstatement.¹⁰³ Prior to the changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014, the debtor was also guilty of an offence if he failed to send a statement of assets and liabilities to AiB,¹⁰⁴ but this provision was repealed by the Bankruptcy and Debt Advice (Scotland) Act 2014. 7-21

The debtor is also required to send with the application a statement of undertakings,¹⁰⁵ but again this statement is in fact incorporated in Form 1. 7-22

The application must be accompanied by such evidence as is necessary to establish that the relevant criteria for a debtor application are satisfied, for example, in the case of the standard criteria, evidence of the debtor's apparent insolvency, the certificate for sequestration or evidence of the trust deed which has failed to become protected.¹⁰⁶ 7-23

The application may nominate an insolvency practitioner to be appointed as the trustee in sequestration.¹⁰⁷ Where such a nomination is made, the application must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration¹⁰⁸ and a copy of the undertaking in Form 12 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016 must be annexed to the application.¹⁰⁹ It should be noted, however, that 7-24

⁹⁷ Bankruptcy (Scotland) Act 2016 s.8(2).

⁹⁸ Bankruptcy (Scotland) Act 2016 s.11(1)(a).

⁹⁹ Bankruptcy (Scotland) Act 2016 s.11(1)(b).

¹⁰⁰ Jurisdiction is discussed further at para.7-206.

¹⁰¹ Bankruptcy (Scotland) Act 2016 s.8(3)(a).

¹⁰² Bankruptcy (Scotland) Act 2016 s.8(4).

¹⁰³ Bankruptcy (Scotland) Act 2016 s.8(6).

¹⁰⁴ Bankruptcy (Scotland) Act 1985 s.5(9)(a) as inserted by the Bankruptcy (Scotland) Act 1993.

¹⁰⁵ Bankruptcy (Scotland) Act 2016 s.8(3)(b).

¹⁰⁶ Form 1 contains a reminder to include the relevant documentation.

¹⁰⁷ Bankruptcy (Scotland) Act 2016 s.51(8)(a).

¹⁰⁸ Bankruptcy (Scotland) Act 2016 s.51(8)(b).

¹⁰⁹ Bankruptcy (Scotland) Act 2016 s.51(8)(c) and Bankruptcy (Scotland) Regulations 2016 regs 3, 12(2). Form 1 contains a section to be completed with the relevant information where an insolvency practitioner is nominated as trustee. Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

an insolvency practitioner may not be appointed as trustee where the application is made under the minimal asset criteria.¹¹⁰

- 7-25** In the case of *Toni, Petitioner*,¹¹¹ it was held that an application for sequestration could not be made by a debtor's attorney, at least where the relevant power of attorney did not contain a specific power to do so and such a power could not be inferred. The sheriff left open the question of whether such an application could be made where there was a specific power to do so, but expressed doubts as to whether this would be the case. Form 1 specifically provides for its completion by a person who has a power of attorney with authority to apply for sequestration or who is the legal guardian of the debtor with authority to apply for sequestration, but it is suggested that the validity of such an application remains an open question.
- 7-26** Where the debtor is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the debtor must send a copy of the debtor application to that Member State insolvency practitioner as soon as reasonably practicable.¹¹²
- 7-27** There are specific provisions for dealing with an application which is incomplete, in respect of which further information or evidence is required or in respect of which any fee or charge is outstanding¹¹³; these are discussed further in Ch.8.
- 7-28** It should be noted that where the debtor dies after the application is made but before sequestration is awarded, the applications falls.¹¹⁴

Application by a qualified creditor or creditors

Criteria for application

- 7-29** A qualified creditor or creditors may petition for sequestration of the debtor's estate where the debtor is apparently insolvent.¹¹⁵
- 7-30** A qualified creditor is defined as a creditor who, at the date of presentation of the sequestration petition is a creditor in respect of debts which amount, or one of which amounts, to not less than £3,000 or such other sum as may be prescribed.¹¹⁶ For this purpose, debts mean liquid or illiquid debts (other than contingent or future debts or amounts payable under a confiscation order under Pts 2, 3 or 4 of the Proceeds of Crime Act 2002), whether secured or unsecured.¹¹⁷ Qualified creditors are defined as creditors in respect of such debts which amount in aggregate to £3,000 or such other sum as may be prescribed.¹¹⁸

¹¹⁰ Bankruptcy (Scotland) Act 2016 s.51(9), (10) and (11). The appointment of the trustee in sequestration is discussed further in Ch.9.

¹¹¹ *Toni, Petitioner* unreported 5 December 2001 Dumfries Sheriff Court. The case was decided before the introduction of debtor applications and accordingly involved a petition for sequestration, but the principles are the same.

¹¹² Bankruptcy (Scotland) Act 2016 s.11(3).

¹¹³ Bankruptcy (Scotland) Act 2016 s.20.

¹¹⁴ Bankruptcy (Scotland) Act 2016 s.10(2).

¹¹⁵ Bankruptcy (Scotland) Act 2016 s.2(1)(b)(i). Apparent insolvency is discussed in Ch.1.

¹¹⁶ Bankruptcy (Scotland) Act 2016 s.7(1). Cf the level of debt required to serve a statutory demand for payment of debt: see para.1-13. A petition for sequestration is presented when it is received by the sheriff clerk: Bankruptcy (Scotland) Act 2016 s.228(11).

¹¹⁷ Bankruptcy (Scotland) Act 2016 s.7(2) and (3).

¹¹⁸ Bankruptcy (Scotland) Act 2016 s.7(1).

It may be noted that the qualifying level of debt has increased over time. The Bankruptcy (Scotland) Act 1985 as originally enacted set it at £750,¹¹⁹ and it was subsequently raised to £1,500 by the Bankruptcy (Scotland) Act 1993.¹²⁰ In 1998, views were sought on a possible reduction back to £750¹²¹ and in 2003 views were sought on the possibility of increase or reduction.¹²² The majority of respondents to the latter consultation felt that there should be no change and the Scottish Executive indicated initially that it agreed and there would be no change.¹²³ However, the ensuing Bankruptcy and Diligence etc. (Scotland) Act 2007 did in fact raise the qualifying level of debt to £3,000.¹²⁴ The issue was not revisited in the Scottish Government's *Consultation on Bankruptcy Law* reform issued in February 2012 and the qualifying level of debt remained unchanged.

The amount of a debt or debts for this purpose is calculated in broadly the same way as the amount which a creditor is entitled to claim in the sequestration with the substitution of the date of presentation of the sequestration petition for the date of sequestration.¹²⁵ In carrying out the calculation, the amount of an award of expenses and the expenses of diligence may be included.¹²⁶ In contrast to the calculation of the amount of a debt for the purpose of a claim in the sequestration, however, the value of any security which the creditor holds for the debt does not fall to be deducted.¹²⁷ The question of whether a creditor is a qualified creditor is a question of fact.¹²⁸ 7-31

Prior to the presentation of the petition, the qualified creditor or qualified creditors must have provided the debtor with the debt advice and information package referred to in s.10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002 within the prescribed period.¹²⁹ The prescribed period is currently not less than 14 days and not more than 12 weeks before the presentation of the petition.¹³⁰ This requirement does not apply, however, where it is averred that the address of the debtor is not known.¹³¹ 7-32

The petition must be presented within four months of the constitution of the debtor's apparent insolvency.¹³² 7-33

¹¹⁹ Bankruptcy (Scotland) Act 1985 s.5(4) as originally enacted.

¹²⁰ Bankruptcy (Scotland) Act 1993 s.3(3) amending the Bankruptcy (Scotland) Act 1985 s.5(4).

¹²¹ See Scottish Office, *The Bankruptcy (Scotland) Act 1985 A Consultation Follow-Up: Protected Trust Deeds and Other Issues* (July 1998), para.36.

¹²² Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 5.8–5.12.

¹²³ See Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), para.5.67.

¹²⁴ Bankruptcy and Diligence etc. (Scotland) Act 2007 s.25(b) amending the Bankruptcy (Scotland) Act 1985 s.5(4).

¹²⁵ Bankruptcy (Scotland) Act 2016 s.7(4) which applies paras 1(1) and (3), 2(1)(a) and (2) and 5 of Sch.2 of that Act. The provisions relating to the calculation of creditors' claims are discussed further in Ch.16.

¹²⁶ *Arthur v The SMT Sales and Service Company Ltd* unreported IH 14 October 1998.

¹²⁷ Paragraph 4 of Sch.2, which makes provision for the amount which may be claimed in the sequestration where the debt is secured, is not applied for the purpose of calculating the amount of the creditor's debt for the purposes of a petition for sequestration.

¹²⁸ *Arthur v The SMT Sales and Service Company Ltd* unreported IH 14 October 1998. For a case in which it was held on the facts that the petitioner was not a qualified creditor, see *Mowbray v Valentine*, 1998 S.L.T. 1440.

¹²⁹ Bankruptcy (Scotland) Act 2016 s.3.

¹³⁰ Bankruptcy (Scotland) Regulations 2016 reg.11(1).

¹³¹ Bankruptcy (Scotland) Regulations 2016 reg.11(2).

¹³² Bankruptcy (Scotland) Act 2016 s.13(2)(a).

7–34 It is not competent for a creditor to present a petition for sequestration: (i) where the debtor has the benefit of the pre-application moratorium¹³³; or (ii) where a debt payment programme has been approved in relation to the debtor if the debt which would be founded on in the petition is *either* included in the debt payment programme *or* is another debt owed to the creditor and the creditor has been given notice in the prescribed form of the approval of the debt payment programme.¹³⁴ In order to establish that the presentation of a petition is not incompetent on either of these grounds, a petitioning creditor is required to lodge a statement in court confirming that as at the date of lodging of the petition, the petitioner has checked the register of insolvencies and the debt arrangement scheme register and is satisfied: (i) that the debtor has not given a notice triggering the pre-application moratorium or the pre-application moratorium has ended; and (ii) that the debtor is not subject to an approved debt payment programme or the creditor is entitled to present the petition notwithstanding an approved debt payment programme because the debt founded on is not one of the debts referred to.¹³⁵

7–35 It is also provided that it is not competent for a creditor “to petition for sequestration” during a specified period immediately following an application by a debtor for a debt payment programme being entered in the debt arrangement scheme register,¹³⁶ but there is some doubt as to the precise meaning of this provision. In the case of *Mackin, Petitioner*,¹³⁷ it was held that it did not prevent the presentation of a petition for sequestration, but rather prevented an award of sequestration being made. In the earlier case of *Milne, Petitioner*,¹³⁸ however, which was not referred to in that decision, it was held that the same phrase in the context of the then existing provisions for a pre-application moratorium in the debt arrangement scheme prevented the presentation of a petition for sequestration during that moratorium but did not prevent an award of sequestration being made on a petition presented before that moratorium came into force.¹³⁹ There is, therefore, some doubt as to the meaning of the provision which has yet to be resolved.¹⁴⁰

Form of petition and accompanying documents

7–36 The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.¹⁴¹ It is specifically provided that the petitioner must, in so far as it is within the petitioner’s knowledge, state in the petition whether or not the debtor’s centre of main interests is situated in the UK or in another EU Member

¹³³ Bankruptcy (Scotland) Act 2016 ss.195, 197 and 198. The pre-application moratorium is discussed in detail in Ch.5.

¹³⁴ Debt Arrangement and Attachment (Scotland) Act 2002 s.4(3), (5).

¹³⁵ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 (SSI 2016/313) r.6.2. The statement must be in Form 6.2 in Sch.1 to that Act of Sederunt, which may be varied if circumstances require: see r.6.2(2) read with r.1.4(1) and (3). This provision is discussed further at para.7–38.

¹³⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(1)(ba).

¹³⁷ *Mackin, Petitioner*, 2015 S.C. GLA 73.

¹³⁸ *Milne, Petitioner* 14 May 2012 Peterhead Sheriff Court, available on the Scottish Courts website.

¹³⁹ The current provisions for the pre-application moratorium now make it clear that it is the presentation of a petition for sequestration which is prevented by that moratorium as has already been set out above. The pre-application moratorium is discussed in detail in Ch.5.

¹⁴⁰ See further discussion of the inter-relationship of sequestration and the debt arrangement scheme in Chs 8 and 21.

¹⁴¹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3). As to the extent to which the petition may vary from the statutory form, see *Donald, Petitioner* 21 October 2011 Lerwick Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/SQ4_11.html [Accessed 16 September 2017].

State¹⁴² and whether or not the debtor possesses an establishment in the UK or in another EU Member State.¹⁴³ This information is currently required to allow jurisdiction to be established¹⁴⁴ and appropriate provision for such a statement is duly made in Form 6.1-A.

The petitioning creditor is required to produce an oath in the prescribed form.¹⁴⁵ 7-37 Provision is made for the making of the oath both within and outwith the UK.¹⁴⁶ The identity of the creditor and of the person administering the oath, and their authority to make and administer the oath respectively, are presumed to be correct unless the contrary is established,¹⁴⁷ and any seal or signature on the oath is presumed to be authentic unless the contrary is established.¹⁴⁸ If there is any error or omission in the oath, the sheriff to whom the petition was presented may allow another oath to be produced rectifying the original oath at any time before sequestration is awarded.¹⁴⁹ The oath is to be read as a whole but must be sufficiently specific to be intelligible to those with an interest in reading it and provide sufficient information about the origin, nature and validity of the creditor's debt to enable all those with an interest, including the debtor, to understand it and reach a view about it.¹⁵⁰ The oath does not require to be lodged at the same time as the petition, although if it is not, a first order in the petition may be refused; it is sufficient if the oath is lodged in time for the sheriff to consider it when deciding whether or not to award sequestration.¹⁵¹ Where the oath has not been lodged before the award of sequestration is made and this has been overlooked, it has been held that it is possible to rectify the position on an application under the statutory provisions for the remedy of defects in procedure.¹⁵² The petitioning creditor must produce along with the oath an account or voucher constituting *prima facie* evidence of the debt and such evidence as is available to the creditor to show the debtor's apparent insolvency.¹⁵³ The requirement to produce evidence of the debt is a separate requirement from the requirement to produce evidence of apparent insolvency, and while it may be the case that one document will satisfy both requirements, the evidence of apparent insolvency will not necessarily also constitute evidence of the debt.¹⁵⁴ The court must be satisfied of the debtor's apparent insolvency before making an award of sequestration.¹⁵⁵

As noted above, the petitioning creditor is also required to lodge in court a 7-38 statement confirming that as at the date of lodging of the petition, the petitioner has checked the register of insolvencies and the debt arrangement scheme register and is satisfied: (i) that the debtor has not given a notice triggering the

¹⁴² Bankruptcy (Scotland) Act 2016 s.12(1)(a).

¹⁴³ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

¹⁴⁴ See further para.7-206 onwards.

¹⁴⁵ Bankruptcy (Scotland) Act 2016 s.19(1). The prescribed form is Form 6 in Sch.1 of the Bankruptcy (Scotland) Regulations 2016: see reg.3 thereof.

¹⁴⁶ Bankruptcy (Scotland) Act 2016 s.19(2).

¹⁴⁷ Bankruptcy (Scotland) Act 2016 s.19(3).

¹⁴⁸ Bankruptcy (Scotland) Act 2016 s.19(4).

¹⁴⁹ Bankruptcy (Scotland) Act 2016 s.19(5).

¹⁵⁰ *Punch Taverns Properties Ltd v Rowe* 17 December 2003, Sheriff Principal of Lothian and Borders, available at <http://www.scotcourts.gov.uk/opinions/S69.html> [Accessed 16 September 2017]. It was held in that case that the oath was not valid.

¹⁵¹ *Clydesdale Bank Plc v Grantly Developments*, 2000 S.L.T. 1369.

¹⁵² *Bell v McMillan*, 1999 S.L.T. 947. The then statutory provision was s.63 of the Bankruptcy (Scotland) Act 1985. The current statutory provisions are discussed in Ch.12.

¹⁵³ Bankruptcy (Scotland) Act 2016 s.19(7).

¹⁵⁴ See *Lord Advocate v Thomson*, 1994 S.C.L.R. 96; *Bell v McMillan*, 1999 S.L.T. 947.

¹⁵⁵ Bankruptcy (Scotland) Act 2016 s.22(5)(e).

pre-application moratorium or the pre-application moratorium has ended; and (ii) that the debtor is not subject to an approved debt payment programme or the creditor is entitled to present the petition notwithstanding an approved debt payment programme because the debt founded on is not one of the debts referred to in the relevant provisions of the Debt Arrangement and Attachment (Scotland) Act 2002.¹⁵⁶ The preceding Act of Sederunt, the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008, specifically provided that the sheriff might not award sequestration unless such a statement had been lodged or they were otherwise satisfied that, as of the date of the award of sequestration, there was no approved debt payment programme in force or the creditor was nonetheless entitled to present the petition because the debt founded on was not one covered by the relevant provisions of the Debt Arrangement and Attachment (Scotland) Act 2002,¹⁵⁷ but there is no corresponding provision in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.¹⁵⁸

7–39 The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.¹⁵⁹ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration¹⁶⁰ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.¹⁶¹

7–40 The petitioner must send a copy of the petition to AiB on the day the petition is presented.¹⁶² The requirements of this provision were held not to be satisfied where a copy of an earlier version of a petition for sequestration, in which the petitioner was designed in a different capacity, had been sent to AiB.¹⁶³ They were, however, held to be satisfied where a copy of the petition had been sent to AiB by document exchange on the day before presentation of the petition so that it arrived at AiB's office on the day the petition was presented.¹⁶⁴ That decision has, however, been criticised.¹⁶⁵ In the same case, it was observed that it was good practice for the petition to aver that a copy of the petition would be sent to AiB and for a copy of the intimation to be lodged in court thereafter¹⁶⁶ and Form 6.1-A now incorporates an averment that a copy of the petition has been sent to AiB. It has been said, however, that a strict application of the precise terms of the provision is not appropriate: Parliament's intention in making such provision was that AiB should have proper notice prior to a petition for sequestration coming before the sheriff that AiB's services as trustee might be required if the

¹⁵⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.2. The statement must be in Form 6.2 in Sch.1 to that Act of Sederunt, which may be varied if circumstances require: see r.6.2(2) read with r.1.4(1) and (3).

¹⁵⁷ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 (SSI 2008/119) Sch.r.12(2).

¹⁵⁸ As to the award of sequestration, see further Ch.8.

¹⁵⁹ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

¹⁶⁰ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

¹⁶¹ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

¹⁶² Bankruptcy (Scotland) Act 2016 s.13(1).

¹⁶³ *Mowbray v Valentine*, 1998 S.L.T. 1440.

¹⁶⁴ *Scottish and Newcastle Breweries Plc v Harvey-Rutherford*, 1993 S.C.L.R. 131.

¹⁶⁵ See the commentary to the report.

¹⁶⁶ That observation was approved in the commentary to the report.

petition was granted, and it was therefore sufficient if there was substantial compliance with the provision with the result that AiB had such notice.¹⁶⁷

Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.¹⁶⁸ 7-41

Where the debtor dies after the petition has been presented but before sequestration has been awarded, the proceedings continue so far as circumstances will permit.¹⁶⁹ 7-42

Where the petitioner withdraws or dies after the petition has been presented but before sequestration has been awarded, another creditor who was a qualified creditor at the date of presentation of the petition and who remains so at the date of the sist may be sisted in their place.¹⁷⁰ The creditor who is so sisted is required to produce an oath in the prescribed form and what is said above in relation to the oath applies equally here.¹⁷¹ 7-43

Where it becomes apparent before sequestration is awarded that the petitioner was in fact ineligible to petition, they must withdraw or, as the case may be, withdraw from the petition, but another creditor may be sisted in their place.¹⁷² 7-44

Application by a temporary administrator

Criteria for application

Currently, a temporary administrator appointed under the EU insolvency proceedings regulation may petition for sequestration of the debtor's estate.¹⁷³ There are no additional criteria for such a petition, which may be presented at any time.¹⁷⁴ 7-45

Form of petition and accompanying documents

The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.¹⁷⁵ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State¹⁷⁶ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.¹⁷⁷ This information is currently required to allow jurisdiction to be established¹⁷⁸ and appropriate provision for such a statement is duly made in Form 6.1-A. 7-46

¹⁶⁷ *Dumfries & Galloway Council v Duff*, 2013 G.W.D. 12-258; also available on the Scottish Courts website.

¹⁶⁸ Bankruptcy (Scotland) Act 2016 s.12(2).

¹⁶⁹ Bankruptcy (Scotland) Act 2016 s.10(1).

¹⁷⁰ Bankruptcy (Scotland) Act 2016 s.10(3).

¹⁷¹ Bankruptcy (Scotland) Act 2016 s.19(1).

¹⁷² Bankruptcy (Scotland) Act 2016 s.13(6).

¹⁷³ See Bankruptcy (Scotland) Act 2016 s.2(1)(b)(ii) and EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further in Ch.25.

¹⁷⁴ Bankruptcy (Scotland) Act 2016 s.13(2)(b)(ii).

¹⁷⁵ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

¹⁷⁶ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

¹⁷⁷ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

¹⁷⁸ See further para.7-206 onwards.

- 7-47** The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.¹⁷⁹
- 7-48** The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.¹⁸⁰ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration¹⁸¹ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.¹⁸²
- 7-49** The petitioner must send a copy of the petition to AiB on the day the petition is presented.¹⁸³ Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.¹⁸⁴

Application by a Member State insolvency practitioner

Criteria for application

- 7-50** Currently, a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation may petition for sequestration of the debtor's estate.¹⁸⁵ There are no additional criteria for such a petition, which may be presented at any time.¹⁸⁶

Form of petition and accompanying documents

- 7-51** The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.¹⁸⁷ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State¹⁸⁸ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.¹⁸⁹ This information is currently required to allow jurisdiction to be established¹⁹⁰ and appropriate provision for such a statement is duly made in Form 6.1-A.

¹⁷⁹ See notes in Form 6.1-A.

¹⁸⁰ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

¹⁸¹ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

¹⁸² Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

¹⁸³ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

¹⁸⁴ Bankruptcy (Scotland) Act 2016 s.12(2).

¹⁸⁵ See Bankruptcy (Scotland) Act 2016 s.2(1)(b)(iii), which mirrors on the face of the Bankruptcy (Scotland) Act 2016 the right which is conferred directly by the EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further in Ch.25.

¹⁸⁶ Bankruptcy (Scotland) Act 2016 s.13(2)(b)(iii).

¹⁸⁷ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

¹⁸⁸ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

¹⁸⁹ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

¹⁹⁰ See further para.7-206 onwards.

The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.¹⁹¹ 7-52

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.¹⁹² Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration¹⁹³ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.¹⁹⁴ 7-53

The petitioner must send a copy of the petition to AiB on the day the petition is presented.¹⁹⁵ 7-54

Application by a trustee under a trust deed

Criteria for application

A trustee acting under a trust deed may petition for sequestration of the debtor's estate where any of a number of specified conditions is satisfied.¹⁹⁶ The specified conditions are: 7-55

- (a) the debtor has failed to comply with an obligation imposed on them by the trust deed with which they could reasonably have complied¹⁹⁷;
- (b) the debtor has failed to comply with any reasonable instruction or requirement of the trustee for the purposes of the trust deed¹⁹⁸; or
- (c) the trustee avers that it is in the best interests of the creditors that an award of sequestration be made.¹⁹⁹

Only one of the conditions has to be satisfied.²⁰⁰ In the case of the first two conditions, the court must be satisfied that the relevant condition applies; in the case of the third condition, the court must be satisfied only that the petition includes the relevant averment.²⁰¹ Prior to an amendment made by the Bankruptcy and Debt Advice (Scotland) Act 2014, it was provided that the court had to be satisfied that the trustee's averments in relation to any of the conditions were true,²⁰² and in the case of the third condition, it was a moot point whether this meant that the court had to be satisfied that it was in the best interests of the creditors that an award of sequestration be made or only that the trustee had made an averment to that effect.²⁰³ The amendment made it clear 7-56

¹⁹¹ See notes in Form 6.1-A.

¹⁹² See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

¹⁹³ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

¹⁹⁴ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3).

¹⁹⁵ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

¹⁹⁶ Bankruptcy (Scotland) Act 2016 s.2(1)(b)(iv).

¹⁹⁷ Bankruptcy (Scotland) Act 2016 s.2(7)(a)(i).

¹⁹⁸ Bankruptcy (Scotland) Act 2016 s.2(7)(a)(ii).

¹⁹⁹ Bankruptcy (Scotland) Act 2016 s.2(7)(b).

²⁰⁰ Bankruptcy (Scotland) Act 2016 s.2(1)(b)(iv) and see *Young, Petitioner* [2007] CSOH 194. In that case, it was held that all three conditions were in fact satisfied.

²⁰¹ Bankruptcy (Scotland) Act 2016 s.22(5)(d).

²⁰² Bankruptcy (Scotland) Act 1985 s.12(3)(e) prior to amendment by the Bankruptcy and Debt Advice (Scotland) Act 2014.

²⁰³ See *Young, Petitioner* [2007] CSOH 194, where Lady Paton reserved her opinion on the point although she was satisfied on the facts that the trustee's averment that sequestration was in the best interests of the creditors was true.

that all that is required is an averment by the trustee to the appropriate effect; the matter is therefore one for the judgment of the trustee and not the court.

7-57 The petition may be presented at any time.²⁰⁴

Form of petition and accompanying documents

7-58 The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²⁰⁵ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State²⁰⁶ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.²⁰⁷ This information is currently required to allow jurisdiction to be established²⁰⁸ and appropriate provision for such a statement is duly made in Form 6.1-A.

7-59 The petition should be accompanied by a copy of the trust deed.²⁰⁹

7-60 The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.²¹⁰ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration²¹¹ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²¹²

7-61 The petitioner must send a copy of the petition to the AiB on the day the petition is presented.²¹³ Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.²¹⁴

APPLICATIONS FOR SEQUESTRATION OF THE ESTATE OF A DECEASED DEBTOR

7-62 Sequestration of the estate of a deceased debtor may be applied for by the executor, or person entitled to be appointed as executor, on the estate; by a qualified creditor or creditors; by a temporary administrator appointed under the EU insolvency proceedings regulation; by a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation; or by a trustee under a trust deed. These are considered in turn.

²⁰⁴ Bankruptcy (Scotland) Act 2016 s.13(2)(b)(i).

²⁰⁵ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

²⁰⁶ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

²⁰⁷ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

²⁰⁸ See further at para.7-206 onwards.

²⁰⁹ See notes in Form 6.1-A.

²¹⁰ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

²¹¹ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

²¹² Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

²¹³ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

²¹⁴ Bankruptcy (Scotland) Act 2016 s.12(2).

Application by executor or person entitled to be appointed executor

Criteria for application

An executor or person entitled to be appointed executor on a deceased debtor's estate may apply by debtor application for sequestration of the deceased debtor's estate.²¹⁵ Although there is no express statutory provision to that effect, it has been held that as a general rule, the deceased's estate must be insolvent before such an application can be made.²¹⁶ 7-63

The application may be presented at any time.²¹⁷ It should be noted, however, that after the period of 12 months following the day on which an executor knew or ought to have known that the estate was absolutely insolvent and likely to remain so, any intromission with the estate by that executor is deemed to be an intromission without title unless the executor has made a debtor application for sequestration of the estate or petitioned for the appointment of a judicial factor on the estate within the 12 month period.²¹⁸ 7-64

Form of application and accompanying documents

The application must be in Form 1 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.²¹⁹ As noted above in relation to debtor applications by a living debtor, the preceding version of these regulations, the Bankruptcy (Scotland) Regulations 2014, specifically provided that a form might differ from the form set out in Sch.1 if it was of substantially the same effect or contained such variation as the circumstances may require,²²⁰ but this provision has not been carried over into the Bankruptcy (Scotland) Regulations 2016. Form 1 refers only to its completion by "the recognised executor" of a deceased debtor's estate, but it is clear that it is also to be used by a person entitled to be appointed as executor.²²¹ It may be observed, however, that the form does not seem to be particularly well-adapted to completion by an executor or person entitled to be appointed executor. 7-65

It is specifically provided that an executor must state in the application whether or not the debtor's centre of main interests was situated in the UK or in another EU Member State²²² and whether or not the debtor possessed an establishment in the UK or in another EU Member State.²²³ This information is currently required to allow jurisdiction to be established.²²⁴ There is no specific 7-66

²¹⁵ Bankruptcy (Scotland) Act 2016 s.5(a).

²¹⁶ *Pollock, Petitioner*, 2016 S.C. LIV 48. The case concerned a petition for sequestration which was presented prior to the changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014 as a result of which an application for sequestration by an executor or person entitled to be appointed executor is to be made by debtor application rather than petition, but the principles will apply equally to a debtor application for sequestration in such a case as it is only the form of application which has changed.

²¹⁷ Bankruptcy (Scotland) Act 2016 s.13(4)(b)(i). It may be noted that this provision continues to refer to a petition for the sequestration of the estate of a deceased debtor by a person entitled to be appointed as executor of the estate rather than a debtor application, but as noted, an application for sequestration by such a person is now made by debtor application rather than petition; the failure to amend this provision accordingly was presumably an oversight which should be remedied.

²¹⁸ Bankruptcy (Scotland) Act 2016 s.14(3) and (4).

²¹⁹ Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(a).

²²⁰ Bankruptcy (Scotland) Regulations 2014 reg.3(2).

²²¹ Bankruptcy (Scotland) Regulations 2016 reg.12(1)(a).

²²² Bankruptcy (Scotland) Act 2016 s.11(2)(a).

²²³ Bankruptcy (Scotland) Act 2016 s.11(2)(b).

²²⁴ See further para.7-206 onwards.

provision relating to these matters in Form 1, however, and although there are questions in the form relating to the debtor's details, home, etc. the answers to these questions may not be sufficient in themselves to allow these matters to be established. It may be noted that the provision refers only to an executor, not a person entitled to be appointed as executor, although presumably it is also intended to apply to the latter.

- 7-67** The general provisions relating to debtor applications provide that the debtor must send a statement of assets and liabilities to AiB with the application,²²⁵ but it is not clear if this requirement applies to an executor or person entitled to be appointed executor, since although an application by such a person is a debtor application, that person is not the debtor. The relevant information is, however, incorporated in Form 1, and is therefore likely to be supplied in any event.
- 7-68** Similarly, the general provisions relating to debtor applications provide that the debtor must send a statement of undertakings to AiB with the application,²²⁶ but it is not clear if this requirement applies to an executor or person entitled to be appointed executor, since although an application by such a person is a debtor application, that person is not the debtor. As previously noted in relation to debtor applications by living debtors, however, the required statement of undertakings is incorporated in Form 1, and this is clearly drawn on the basis that the requirement does apply since it states that if the statement is being signed by a person completing the form as executor or person entitled to be appointed as executor, certain of the undertakings do not apply and the remaining undertakings are given in relation to the deceased debtor or the deceased debtor's estate.
- 7-69** The application should be accompanied by appropriate supporting documentation such as evidence of the debtor's death and the executor's appointment or entitlement to be appointed.
- 7-70** The application may nominate an insolvency practitioner to be appointed as the trustee in sequestration.²²⁷ Where such a nomination is made, the application must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration²²⁸ and the application must be accompanied by a copy of the undertaking to act as trustee in Form 12 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.²²⁹
- 7-71** It is not clear if there is any requirement for an executor or person entitled to be appointed executor who is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor to send a copy of the application to that Member State insolvency practitioner as soon as reasonably practicable, since the relevant requirement is expressed to apply only to the debtor,²³⁰ and

²²⁵ Bankruptcy (Scotland) Act 2016 s.8(3)(a). This provision is discussed further at para.7-21 in relation to debtor applications by living debtors.

²²⁶ Bankruptcy (Scotland) Act 2016 s.8(3)(b). This provision is discussed further at para.7-22 in relation to debtor applications by living debtors.

²²⁷ See Bankruptcy (Scotland) Act 2016 s.51(8)(a).

²²⁸ Bankruptcy (Scotland) Act 2016 s.51(8)(b).

²²⁹ Bankruptcy (Scotland) Act 2016 s.51(8)(c) and Bankruptcy (Scotland) Regulations 2016 regs 3, 12(2). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

²³⁰ Bankruptcy (Scotland) Act 2016 s.11(3), discussed at para.7-26 in relation to debtor applications by a living debtor.

although an application by an executor or person entitled to be appointed executor is a debtor application, that person is not the debtor.

There are specific provisions for dealing with an application which is incomplete, in respect of which further information or evidence is required or in respect of which any fee or charge is outstanding²³¹: these are discussed further in the following chapter. 7-72

Application by a qualified creditor or creditors

Criteria for application

A qualified creditor or creditors may petition for sequestration of a deceased debtor's estate.²³² The same definition of qualified creditor and qualified creditors applies as in the case of a petition for sequestration of the estate of a living debtor.²³³ 7-73

Where the apparent insolvency of the debtor founded on in the petition was constituted within four months before the date of death, the petition may be presented at any time.²³⁴ In any other case, whether or not apparent insolvency has been constituted, the petition may not be presented earlier than six months after the debtor's death.²³⁵ 7-74

Form of petition and accompanying documents

The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²³⁶ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State²³⁷ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.²³⁸ This information is currently required to allow jurisdiction to be established²³⁹ and appropriate provision for such a statement is duly made in Form 6.1-A. 7-75

The petitioner is required to produce an oath in the prescribed form²⁴⁰ and what is said above in relation to the oath to be produced by the petitioning creditor in the case of a petition for sequestration of the estate of a living debtor applies equally here. 7-76

The petition should also be accompanied by appropriate evidence of the debtor's death. 7-77

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.²⁴¹ Where such a nomination is made, the petition must 7-78

²³¹ Bankruptcy (Scotland) Act 2016 s.20.

²³² Bankruptcy (Scotland) Act 2016 s.5(b).

²³³ See para.7-30.

²³⁴ Bankruptcy (Scotland) Act 2016 s.13(4)(a)(i).

²³⁵ Bankruptcy (Scotland) Act 2016 s.13(4)(a)(ii).

²³⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

²³⁷ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

²³⁸ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

²³⁹ See further at para.7-206 onwards.

²⁴⁰ Bankruptcy (Scotland) Act 2016 s.19(1).

²⁴¹ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration²⁴² and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²⁴³

7-79 The petitioner must send a copy of the petition to AiB on the day the petition is presented.²⁴⁴ Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.²⁴⁵

7-80 Where the petitioner withdraws or dies after the petition has been presented but before sequestration has been awarded, another creditor who was a qualified creditor at the date of presentation of the petition and who remains so at the date of the sist may be sisted in their place.²⁴⁶ The creditor who is so sisted is required to produce an oath in the prescribed form,²⁴⁷ and what is said above in relation to the oath applies equally here.

7-81 Where it becomes apparent before sequestration is awarded that the petitioner was in fact ineligible to petition, they must withdraw or, as the case may be, withdraw from, the petition, but another creditor may be sisted in their place.²⁴⁸

Application by a temporary administrator

Criteria for application

7-82 Currently, a temporary administrator appointed under the EU insolvency proceedings regulation may petition for sequestration of a deceased debtor's estate.²⁴⁹ There are no additional criteria for such a petition, which may be presented at any time.²⁵⁰

Form of petition and accompanying documents

7-83 The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²⁵¹ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State²⁵² and whether or not the debtor possesses an establishment in the UK or

²⁴² Bankruptcy (Scotland) Act 2016 s.51(1)(b).

²⁴³ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

²⁴⁴ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40 above.

²⁴⁵ Bankruptcy (Scotland) Act 2016 s.12(2).

²⁴⁶ Bankruptcy (Scotland) Act 2016 s.10(3).

²⁴⁷ Bankruptcy (Scotland) Act 2016 s.19(1).

²⁴⁸ Bankruptcy (Scotland) Act 2016 s.13(6).

²⁴⁹ See Bankruptcy (Scotland) Act 2016 s.5(c) and EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further at Ch.25.

²⁵⁰ Bankruptcy (Scotland) Act 2016 s.13(4)(b)(iii).

²⁵¹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

²⁵² Bankruptcy (Scotland) Act 2016 s.12(1)(a).

in another EU Member State.²⁵³ This information is currently required to allow jurisdiction to be established²⁵⁴ and appropriate provision for such a statement is duly made in Form 6.1-A.

The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title and evidence of the debtor's death.²⁵⁵ **7-84**

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.²⁵⁶ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration²⁵⁷ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²⁵⁸ **7-85**

The petitioner must send a copy of the petition to AiB on the day the petition is presented.²⁵⁹ Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.²⁶⁰ **7-86**

Application by a Member State insolvency practitioner

Criteria for application

Currently, a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation may petition for sequestration of a deceased debtor's estate.²⁶¹ There are no additional criteria for such a petition, which may be presented at any time.²⁶² **7-87**

Form of petition and accompanying documents

The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²⁶³ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State²⁶⁴ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.²⁶⁵ This information is currently required to allow **7-88**

²⁵³ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

²⁵⁴ See further below.

²⁵⁵ See notes in Form 6.1-A.

²⁵⁶ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

²⁵⁷ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

²⁵⁸ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3).

²⁵⁹ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion of this provision above.

²⁶⁰ Bankruptcy (Scotland) Act 2016 s.12(2).

²⁶¹ See Bankruptcy (Scotland) Act 2016 s.5(d) which mirrors on the face of the Bankruptcy (Scotland) Act 2016 the right which is conferred directly by the EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further in Ch.25.

²⁶² Bankruptcy (Scotland) Act 2016 s.13(4)(b)(iv).

²⁶³ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

²⁶⁴ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

²⁶⁵ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

jurisdiction to be established²⁶⁶ and appropriate provision for such a statement is duly made in Form 6.1-A.

- 7-89** The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title and evidence of the debtor's death.²⁶⁷
- 7-90** The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.²⁶⁸ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration²⁶⁹ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²⁷⁰
- 7-91** The petitioner must send a copy of the petition to AiB on the day the petition is presented.²⁷¹

Application by a trustee under a trust deed

Criteria for application

- 7-92** A trustee acting under a trust deed may petition for sequestration of a deceased debtor's estate.²⁷² There are no additional criteria for such a petition, which may be presented at any time.²⁷³

Form of petition and accompanying documents

- 7-93** The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²⁷⁴ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State²⁷⁵ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.²⁷⁶ This information is currently required to allow jurisdiction to be established²⁷⁷ and appropriate provision for such a statement is duly made in Form 6.1-A.
- 7-94** The petition should be accompanied by a copy of the trust deed and evidence of the debtor's death.²⁷⁸

²⁶⁶ See further at para.7-206 onwards.

²⁶⁷ See notes in Form 6.1-A.

²⁶⁸ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

²⁶⁹ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

²⁷⁰ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

²⁷¹ Bankruptcy (Scotland) Act 2016 s.13(1) and see para.7-40.

²⁷² Bankruptcy (Scotland) Act 2016 s.5(e).

²⁷³ Bankruptcy (Scotland) Act 2016 s.13(4)(b)(ii).

²⁷⁴ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

²⁷⁵ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

²⁷⁶ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

²⁷⁷ See further at para.7-206 onwards.

²⁷⁸ See notes in Form 6.1-A.

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.²⁷⁹ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration²⁸⁰ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.²⁸¹ **7-95**

The petitioner must send a copy of the petition to AiB on the day the petition is presented.²⁸² Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.²⁸³ **7-96**

APPLICATIONS FOR SEQUESTRATION OF THE ESTATE OF A TRUST

Sequestration of the estate of a trust may be applied for by a majority of the trustees with the concurrence of a qualified creditor or creditors; by a qualified creditor or creditors where the trustees as such are apparently insolvent; by a temporary administrator appointed under the EU insolvency proceedings regulation; or by a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation. There is, however, no provision for a trustee under a trust deed to apply for sequestration of the estate of a trust notwithstanding that a trust may grant a trust deed for creditors, that such a trust deed may become protected and that there is now provision for a trustee under a trust deed to petition for sequestration of the estate of a partnership.²⁸⁴ The various applications are considered in turn. **7-97**

Application by majority of trustees with concurrence of a qualified creditor or creditors

Criteria for application

The majority of the trustees may apply by debtor application for sequestration of the estate of the trust with the concurrence of a qualified creditor or creditors.²⁸⁵ The same definition of qualified creditor and qualified creditors applies as in the case of a petition for sequestration of the estate of a living debtor.²⁸⁶ There is no requirement for apparent insolvency and no additional criteria for such an application, which may be made at any time.²⁸⁷ **7-98**

²⁷⁹ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

²⁸⁰ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

²⁸¹ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

²⁸² Bankruptcy (Scotland) Act 2016 s.13(1) and see para.7-40.

²⁸³ Bankruptcy (Scotland) Act 2016 s.12(2).

²⁸⁴ For trust deeds generally, see further Ch.22; for a petition for sequestration of a partnership by a trustee under a trust deed, see further below.

²⁸⁵ Bankruptcy (Scotland) Act 2016 s.6(3)(a).

²⁸⁶ See para.7-30.

²⁸⁷ Bankruptcy (Scotland) Act 2016 s.14(1).

Form of application and accompanying documents

- 7–99** The application must be in Form 3 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.²⁸⁸ As noted above in relation to other debtor applications, the preceding version of these regulations, the Bankruptcy (Scotland) Regulations 2014, specifically provided that a form might differ from the form set out in Sch.1 if it was of substantially the same effect or contained such variation as the circumstances may require,²⁸⁹ but this provision has not been carried over into the Bankruptcy (Scotland) Regulations 2016. It is specifically provided that the debtor must state in the application whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State²⁹⁰ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.²⁹¹ This information is currently required to allow jurisdiction to be established.²⁹² There is no specific provision relating to these matters in Form 3, however, and although there are questions in the form relating to the debtor's details, address, etc. the answers to these questions may not be sufficient in themselves to allow these matters to be established.
- 7–100** The application must be accompanied by a statement of assets and liabilities²⁹³ which must be in Form 4 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.²⁹⁴
- 7–101** The concurring creditor is required to produce an oath in the prescribed form,²⁹⁵ and what is said above in relation to the oath to be produced by the petitioning creditor in the case of a petition for sequestration of the estates of a living debtor applies equally here, except that in this case there will be no requirement for the concurring creditor to produce evidence of the debtor's apparent insolvency.
- 7–102** The application may nominate an insolvency practitioner to be appointed as the trustee in sequestration.²⁹⁶ Where such a nomination is made, the application must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration²⁹⁷ and the application must be accompanied by a copy of the undertaking to act as trustee in Form 12 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.²⁹⁸
- 7–103** Where the debtor is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the debtor must send a copy of the application to that Member State insolvency practitioner as soon as reasonably practicable.²⁹⁹

²⁸⁸ Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(b).

²⁸⁹ Bankruptcy (Scotland) Regulations 2014 reg.3(2).

²⁹⁰ Bankruptcy (Scotland) Act 2016 s.11(1)(a).

²⁹¹ Bankruptcy (Scotland) Act 2016 s.11(1)(b).

²⁹² See further at para.7–206 onwards.

²⁹³ Bankruptcy (Scotland) Act 2016 s.8(3)(a) as applied by s.6(9).

²⁹⁴ Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(b).

²⁹⁵ Bankruptcy (Scotland) Act 2016 s.19(1).

²⁹⁶ See Bankruptcy (Scotland) Act 2016 s.51(8)(a).

²⁹⁷ Bankruptcy (Scotland) Act 2016 s.51(8)(b).

²⁹⁸ Bankruptcy (Scotland) Act 2016 s.51(8)(c) and Bankruptcy (Scotland) Regulations 2016 regs 3, 12(2). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

²⁹⁹ Bankruptcy (Scotland) Act 2016 s.11(3).

There are specific provisions for dealing with an application which is incomplete, in respect of which further information or evidence is required or in respect of which any fee or charge is outstanding³⁰⁰; these are discussed further in Ch.8. **7-104**

Where it becomes apparent before sequestration is awarded that a concurring creditor was in fact ineligible so to concur, AiB must withdraw them from the application, but another creditor may concur in their place and notify AiB to that effect.³⁰¹ Such a creditor will be required to produce an oath in the prescribed form.³⁰² **7-105**

Where a concurring creditor withdraws or dies after the debtor application has been made but before sequestration has been awarded, another creditor who was a qualified creditor at the date of the debtor application and who remains so may notify AiB that they concur in the application in place of the creditor who has withdrawn or died.³⁰³ Such a creditor will be required to produce an oath in the prescribed form.³⁰⁴ **7-106**

Application by a qualified creditor or creditors

Criteria for application

A qualified creditor or creditors may petition for sequestration of the estate of a trust where the trustees as such are apparently insolvent.³⁰⁵ The same definition of qualified creditor and qualified creditors applies as in the case of a petition for sequestration of the estate of a living debtor.³⁰⁶ **7-107**

The petition must be presented within four months of the constitution of the trustees' apparent insolvency.³⁰⁷ **7-108**

It is not competent for a creditor to present a petition for sequestration: **7-109**
 (i) where the debtor has the benefit of the pre-application moratorium³⁰⁸; or
 (ii) where a debt payment programme has been approved in relation to the debtor if the debt which would be founded on in the petition is *either* included in the debt payment programme *or* is another debt owed to the creditor and the creditor has been given notice in the prescribed form of the approval of the debt payment programme.³⁰⁹ In order to establish that the presentation of a petition is not incompetent on either of these grounds, a petitioning creditor is required to lodge a statement in court confirming that as at the date of lodging of the petition, the petitioner has checked the register of insolvencies and the debt arrangement scheme register and is satisfied: (i) that the debtor has not given a notice triggering the pre-application moratorium or the pre-application moratorium has ended; and (ii) that the debtor is not subject to an approved debt payment programme or the creditor is entitled to present the

³⁰⁰ Bankruptcy (Scotland) Act 2016 s.20.

³⁰¹ Bankruptcy (Scotland) Act 2016 s.14(6) and (7).

³⁰² Bankruptcy (Scotland) Act 2016 s.19(1).

³⁰³ Bankruptcy (Scotland) Act 2016 s.10(5) and (6) as applied by s.6(9).

³⁰⁴ Bankruptcy (Scotland) Act 2016 s.19(1).

³⁰⁵ Bankruptcy (Scotland) Act 2016 s.6(3)(b)(iii).

³⁰⁶ See para.7-30.

³⁰⁷ Bankruptcy (Scotland) Act 2016 s.13(2)(a).

³⁰⁸ Bankruptcy (Scotland) Act 2016 ss.195, 197 and 198. The pre-application moratorium is discussed in detail in Ch.5.

³⁰⁹ Debt Arrangement and Attachment (Scotland) Act 2002 s.4(3), (5).

petition notwithstanding an approved debt payment programme because the debt founded on is not one of the debts referred to.³¹⁰

- 7–110** It is also provided that it is not competent for a creditor “to petition for sequestration” during a specified period immediately following an application by a debtor for a debt payment programme being entered in the debt arrangement scheme register³¹¹ but, as discussed above, there is some doubt as to the precise meaning of this provision.³¹²

Form of petition and accompanying documents

- 7–111** The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.³¹³ It is specifically provided that the petitioner must, in so far as it is within the petitioner’s knowledge, state in the petition whether or not the debtor’s centre of main interests is situated in the UK or in another EU Member State³¹⁴ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.³¹⁵ This information is currently required to allow jurisdiction to be established³¹⁶ and appropriate provision for such a statement is duly made in Form 6.1-A.
- 7–112** The petitioner is required to produce an oath in the prescribed form³¹⁷ and what is said above in relation to the oath to be produced by the petitioning creditor in the case of a petition for sequestration of the estate of a living debtor applies equally here.
- 7–113** As noted above, the petitioning creditor is also required to lodge in court a statement confirming that as at the date of lodging of the petition, the petitioner has checked the register of insolvencies and the debt arrangement scheme register and is satisfied: (i) that the debtor has not given a notice triggering the pre-application moratorium or the pre-application moratorium has ended; and (ii) that the debtor is not subject to an approved debt payment programme or the creditor is entitled to present the petition notwithstanding an approved debt payment programme because the debt founded on is not one of the debts referred to in the relevant provisions of the Debt Arrangement and Attachment (Scotland) Act 2002.³¹⁸ The preceding Act of Sederunt—the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008—specifically provided that the sheriff might not award sequestration unless such a statement had been lodged or they were otherwise satisfied that, as of the date of the award of sequestration, there was no approved debt payment programme in force or the creditor was nonetheless entitled to present the petition because the debt founded on was not one covered by the relevant provisions of the Debt Arrangement and Attachment

³¹⁰ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.2. The statement must be in Form 6.2 in Sch.1 to that Act of Sederunt, which may be varied if circumstances require: see r.6.2(2) read with r.1.4(1) and (3). This provision is discussed further at para.7–113.

³¹¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(1)(ba).

³¹² See further discussion at para.7–35 in relation to petitions for the sequestration of the estate of a living debtor.

³¹³ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

³¹⁴ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

³¹⁵ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

³¹⁶ See further para.7–206 onwards.

³¹⁷ Bankruptcy (Scotland) Act 2016 s.19(1).

³¹⁸ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.2. The statement must be in Form 6.2 in Sch.1 to that Act of Sederunt, which may be varied if circumstances require: see r.6.2(2) read with r.1.4(1) and (3).

(Scotland) Act 2002,³¹⁹ but there is no corresponding provision in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.³²⁰

The petitioner may nominate an insolvency practitioner to be appointed as the trustee in sequestration.³²¹ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration³²² and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.³²³ **7-114**

The petitioner must send a copy of the petition to AiB on the day the petition is presented.³²⁴ **7-115**

Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.³²⁵ **7-116**

Where the petitioner withdraws or dies after the petition has been presented but before sequestration has been awarded, another creditor who was a qualified creditor at the date of presentation of the petition and who remains so at the date of the sist may be sisted in their place.³²⁶ The creditor who is so sisted is required to produce an oath in the prescribed form and what is said above in relation to the oath applies equally here.³²⁷ **7-117**

Where it becomes apparent before sequestration is awarded that the petitioner was in fact ineligible to petition, they must withdraw or, as the case may be, withdraw from, the petition, but another creditor may be sisted in their place.³²⁸ **7-118**

Application by a temporary administrator

Criteria for application

Currently, a temporary administrator under the EU insolvency proceedings regulation may petition for sequestration of the estate of a trust.³²⁹ There are no additional criteria for such a petition, which may be presented at any time.³³⁰ **7-119**

³¹⁹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 Sch., r.12(2).

³²⁰ As to the award of sequestration, see further Ch.8.

³²¹ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

³²² Bankruptcy (Scotland) Act 2016 s.51(1)(b).

³²³ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

³²⁴ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

³²⁵ Bankruptcy (Scotland) Act 2016 s.12(2).

³²⁶ Bankruptcy (Scotland) Act 2016 s.10(3).

³²⁷ Bankruptcy (Scotland) Act 2016 s.19(1).

³²⁸ Bankruptcy (Scotland) Act 2016 s.13(6).

³²⁹ See Bankruptcy (Scotland) Act 2016 s.6(3)(b)(i) and EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further in Ch.25.

³³⁰ Bankruptcy (Scotland) Act 2016 s.13(2)(b)(ii).

Form of petition and accompanying documents

- 7–120** The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.³³¹ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State³³² and whether or not the debtor possesses an establishment in the UK or in another EU Member State.³³³ This information is currently required to allow jurisdiction to be established³³⁴ and appropriate provision for such a statement is duly made in Form 6.1-A.
- 7–121** The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.³³⁵
- 7–122** The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.³³⁶ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration³³⁷ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.³³⁸
- 7–123** The petitioner must send a copy of the petition to AiB on the day the petition is presented.³³⁹ Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.³⁴⁰

Application by a Member State insolvency practitioner*Criteria for application*

- 7–124** Currently, a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation may petition for sequestration of the estate of a trust.³⁴¹ There are no additional criteria for such a petition, which may be presented at any time.³⁴²

³³¹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

³³² Bankruptcy (Scotland) Act 2016 s.12(1)(a).

³³³ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

³³⁴ See further at para.7–206 onwards.

³³⁵ See notes in Form 6.1-A.

³³⁶ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

³³⁷ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

³³⁸ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

³³⁹ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7–40.

³⁴⁰ Bankruptcy (Scotland) Act 2016 s.12(2).

³⁴¹ See Bankruptcy (Scotland) Act 2016 s.6(3)(b)(ii), which mirrors on the face of the Bankruptcy (Scotland) Act 2016 the right which is conferred directly by the EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further in Ch.25.

³⁴² Bankruptcy (Scotland) Act 2016 s.13(2)(b)(iii).

Form of petition and accompanying documents

The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.³⁴³ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State³⁴⁴ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.³⁴⁵ This information is currently required to allow jurisdiction to be established³⁴⁶ and appropriate provision for such a statement is duly made in Form 6.1-A. **7-125**

The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.³⁴⁷ **7-126**

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.³⁴⁸ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration³⁴⁹ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.³⁵⁰ **7-127**

The petitioner must send a copy of the petition to AiB on the day the petition is presented.³⁵¹ **7-128**

APPLICATIONS FOR SEQUESTRATION OF THE ESTATE OF A PARTNERSHIP

Sequestration of the estate of a partnership may be applied for by the partnership where the partnership is apparently insolvent; by the partnership with the concurrence of a qualified creditor or creditors; by a qualified creditor or creditors where the partnership is apparently insolvent; by a temporary administrator appointed under the EU insolvency proceedings regulation; by a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation; or by a trustee under a trust deed. **7-129**

In the case of an application other than by the partnership itself, the petition for sequestration may be combined with a petition for sequestration of the estate of any of the partners as an individual where that individual is apparently insolvent.³⁵² Where sequestration of the partnership only is sought, it is not necessary to name the partners in the application.³⁵³ **7-130**

³⁴³ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

³⁴⁴ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

³⁴⁵ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

³⁴⁶ See further at para.7-206 onwards.

³⁴⁷ See notes in Form 6.1-A.

³⁴⁸ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

³⁴⁹ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

³⁵⁰ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

³⁵¹ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

³⁵² Bankruptcy (Scotland) Act 2016 s.6(6). In relation to combined applications, see further para.7-205.

³⁵³ *Clydesdale Bank Plc v Grantly Developments*, 2000 S.L.T. 1369.

7-131 The various applications are considered in turn.

Application by the partnership where the partnership is apparently insolvent or with the concurrence of a qualified creditor or creditors

Criteria for application

7-132 A partnership may apply by debtor application for sequestration of its estate *either* where the partnership is apparently insolvent³⁵⁴ *or* with the concurrence of a qualified creditor or creditors.³⁵⁵ The Scottish Executive in its *Personal Bankruptcy Reform in Scotland: A Modern Approach* issued in November 2003 noted that the law as it then stood did not allow a partnership to apply for sequestration of its own estates in the same way as a sole trader, and sought views on allowing a partnership to petition for sequestration of its estates without the concurrence of a qualified creditor.³⁵⁶ The majority of consultees were in favour³⁵⁷ and the Bankruptcy and Diligence etc. (Scotland) Act 2007 duly introduced the possibility of an application for sequestration of its estates by a partnership without the concurrence of a qualified creditor or creditors where the partnership is apparently insolvent. A modified definition of apparent insolvency applies for this purpose.³⁵⁸ In the case of an application with the concurrence of a qualified creditor or creditors, the same definition of qualified creditor and qualified creditors applies as in the case of a petition for sequestration of the estate of a living debtor,³⁵⁹ apparent insolvency is not required and there are no other criteria for such an application.

7-133 The effect of s.24(8) of the Partnership Act 1890, which provides that, subject to any express or implied agreement between the partners, no change may be made in the nature of the partnership business without the consent of all of the existing partners, is generally accepted as meaning that an application for sequestration by a partnership requires to be made by all the partners unless there is an agreement to the contrary either in the partnership agreement (if there is one) or otherwise.

7-134 The application may be made at any time, subject to the proviso that in the case of a limited partnership, a time limit for making an application may be prescribed.³⁶⁰ No such time limit has been prescribed at the time of writing.

Form of application and accompanying documents

7-135 The application must be in Form 3 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.³⁶¹ As noted above in relation to other debtor applications, the preceding version of these regulations, the Bankruptcy (Scotland) Regulations 2014, specifically provided that a form might differ from the form set out in Sch.1 if it was of substantially the same effect or contained such variation as the circumstances may require,³⁶² but this provision has not been carried over into the

³⁵⁴ Bankruptcy (Scotland) Act 2016 s.6(4)(a).

³⁵⁵ Bankruptcy (Scotland) Act 2016 s.6(4)(b).

³⁵⁶ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), para.5.19.

³⁵⁷ Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), para.5.55.

³⁵⁸ Bankruptcy (Scotland) Act 2016 s.6(5).

³⁵⁹ See para.7-30.

³⁶⁰ Bankruptcy (Scotland) Act 2016 s.14(1) and (2).

³⁶¹ Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(b).

³⁶² Bankruptcy (Scotland) Regulations 2014 reg.3(2).

Bankruptcy (Scotland) Regulations 2016. It is specifically provided that the debtor must state in the application whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State³⁶³ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.³⁶⁴ This information is currently required to allow jurisdiction to be established.³⁶⁵ There is no specific provision relating to these matters in Form 3, however, and although there are questions in the form relating to the debtor's details, address, business address, previous business addresses or trading outside Scotland, bankruptcy proceedings outside Scotland, etc. the answers to these questions may not be sufficient in themselves to allow these matters to be established.

The application must be accompanied by a statement of assets and liabilities³⁶⁶ 7-136 which must be in Form 4 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.³⁶⁷

Where the application is being made without the concurrence of a qualified 7-137 creditor on the basis that the partnership is apparently insolvent, appropriate evidence of apparent insolvency will require to be produced along with the application. Where the application is being made with the concurrence of a qualified creditor or creditors, any such creditor is required to produce an oath in the prescribed form,³⁶⁸ and what is said above in relation to the oath to be produced by the petitioning creditor in the case of a petition for sequestration of the estates of a living debtor applies equally here, except that in this case there will be no requirement for the concurring creditor to produce evidence of the debtor's apparent insolvency.

The application may nominate an insolvency practitioner to be appointed as 7-138 the trustee in sequestration.³⁶⁹ Where such a nomination is made, the application must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration³⁷⁰ and the application must be accompanied by a copy of the undertaking to act as trustee in Form 12 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.³⁷¹

Where the debtor is aware that there is a Member State insolvency practi- 7-139 tioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the debtor must send a copy of the application to that Member State insolvency practitioner as soon as reasonably practicable.³⁷²

There are specific provisions for dealing with an application which is incom- 7-140 plete, in respect of which further information or evidence is required or in respect of which any fee or charge is outstanding³⁷³; these are discussed further in Ch.8.

³⁶³ Bankruptcy (Scotland) Act 2016 s.11(1)(a).

³⁶⁴ Bankruptcy (Scotland) Act 2016 s.11(1)(b).

³⁶⁵ See further at para.7-206 onwards.

³⁶⁶ Bankruptcy (Scotland) Act 2016 s.8(3)(a) as applied by s.6(9).

³⁶⁷ Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(b).

³⁶⁸ Bankruptcy (Scotland) Act 2016 s.19(1).

³⁶⁹ See Bankruptcy (Scotland) Act 2016 s.51(8)(a).

³⁷⁰ Bankruptcy (Scotland) Act 2016 s.51(8)(b).

³⁷¹ Bankruptcy (Scotland) Act 2016 s.51(8)(c) and Bankruptcy (Scotland) Regulations 2016 regs 3, 12(2). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

³⁷² Bankruptcy (Scotland) Act 2016 s.11(3).

³⁷³ Bankruptcy (Scotland) Act 2016 s.20.

- 7-141** Where the application is made with the concurrence of a qualified creditor or creditors and it becomes apparent before sequestration is awarded that a concurring creditor was in fact ineligible so to concur, AiB must withdraw them from the application, but another creditor may concur in their place and notify AiB to that effect.³⁷⁴ Such a creditor will be required to produce an oath in the prescribed form.³⁷⁵
- 7-142** Where a concurring creditor withdraws or dies after the debtor application has been made but before sequestration has been awarded, another creditor who was a qualified creditor at the date of the debtor application and who remains so may notify AiB that they concur in the application in place of the creditor who has withdrawn or died.³⁷⁶ Such a creditor will be required to produce an oath in the prescribed form.³⁷⁷

Application by a qualified creditor or creditors

Criteria for application

- 7-143** A qualified creditor or creditors may petition for sequestration of the estate of a partnership where the partnership is apparently insolvent.³⁷⁸ The same definition of qualified creditor and qualified creditors applies as in the case of a petition for sequestration of the estate of a living debtor.³⁷⁹
- 7-144** The petition must be presented within four months of the constitution of the partnership's apparent insolvency, subject to the proviso that in the case of a limited partnership, another period may be prescribed.³⁸⁰ No other period has been prescribed at the time of writing.
- 7-145** It is not competent for a creditor to present a petition for sequestration: (i) where the debtor has the benefit of the pre-application moratorium³⁸¹; or (ii) where a debt payment programme has been approved in relation to the debtor if the debt which would be founded on in the petition is *either* included in the debt payment programme *or* is another debt owed to the creditor and the creditor has been given notice in the prescribed form of the approval of the debt payment programme.³⁸² In order to establish that the presentation of a petition is not incompetent on either of these grounds, a petitioning creditor is required to lodge a statement in court confirming that as at the date of lodging of the petition, the petitioner has checked the register of insolvencies and the debt arrangement scheme register and is satisfied: (i) that the debtor has not given a notice triggering the pre-application moratorium or the pre-application moratorium has ended; and (ii) that the debtor is not subject to an approved debt payment programme or the creditor is entitled to present the petition notwithstanding an approved debt payment programme because the debt founded on is not one of the debts referred to.³⁸³

³⁷⁴ Bankruptcy (Scotland) Act 2016 s.14(6) and (7).

³⁷⁵ Bankruptcy (Scotland) Act 2016 s.19(1).

³⁷⁶ Bankruptcy (Scotland) Act 2016 s.10(5) and (6) as applied by s.6(9).

³⁷⁷ Bankruptcy (Scotland) Act 2016 s.19(1).

³⁷⁸ Bankruptcy (Scotland) Act 2016 s.6(4)(c)(iv).

³⁷⁹ See para.7-30.

³⁸⁰ Bankruptcy (Scotland) Act 2016 s.13(3)(a).

³⁸¹ Bankruptcy (Scotland) Act 2016 ss.195, 197 and 198. The pre-application moratorium is discussed in detail in Ch.5.

³⁸² Debt Arrangement and Attachment (Scotland) Act 2002 s.4(3), (5).

³⁸³ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.2. The statement must be in Form 6.2 in Sch.1 to that Act of Sederunt, which may be varied if circumstances require: see r.6.2(2) read with r.1.4(1) and (3). This provision is discussed further at para.7-149.

It is also provided that it is not competent for a creditor “to petition for sequestration” during a specified period immediately following an application by a debtor for a debt payment programme being entered in the debt arrangement scheme register³⁸⁴ but, as discussed above, there is some doubt as to the precise meaning of this provision.³⁸⁵ 7-146

Form of petition and accompanying documents

The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.³⁸⁶ It is specifically provided that the petitioner must, in so far as it is within the petitioner’s knowledge, state in the petition whether or not the debtor’s centre of main interests is situated in the UK or in another EU Member State³⁸⁷ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.³⁸⁸ This information is currently required to allow jurisdiction to be established³⁸⁹ and appropriate provision for such a statement is duly made in Form 6.1-A. 7-147

The petitioner is required to produce an oath in the prescribed form³⁹⁰ and what is said above in relation to the oath to be produced by the petitioning creditor in the case of a petition for sequestration of the estate of a living debtor applies equally here. 7-148

As noted above, the petitioning creditor is also required to lodge in court a statement confirming that as at the date of lodging of the petition, the petitioner has checked the register of insolvencies and the debt arrangement scheme register and is satisfied: (i) that the debtor has not given a notice triggering the pre-application moratorium or the pre-application moratorium has ended; and (ii) that the debtor is not subject to an approved debt payment programme or the creditor is entitled to present the petition notwithstanding an approved debt payment programme because the debt founded on is not one of the debts referred to in the relevant provisions of the Debt Arrangement and Attachment (Scotland) Act 2002.³⁹¹ The preceding Act of Sederunt, the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008, specifically provided that the sheriff might not award sequestration unless such a statement had been lodged or they were otherwise satisfied that, as of the date of the award of sequestration, there was no approved debt payment programme in force or the creditor was nonetheless entitled to present the petition because the debt founded on was not one covered by the relevant provisions of the Debt Arrangement and Attachment (Scotland) Act 2002,³⁹² but there is no corresponding provision in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.³⁹³ 7-149

³⁸⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(1)(ba).

³⁸⁵ See further at para.7-35 in relation to petitions for the sequestration of the estate of a living debtor.

³⁸⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

³⁸⁷ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

³⁸⁸ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

³⁸⁹ See further at para.7-206 onwards.

³⁹⁰ Bankruptcy (Scotland) Act 2016 s.19(1).

³⁹¹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.2. The statement must be in Form 6.2 in Sch.1 to that Act of Sederunt, which may be varied if circumstances require: see r.6.2(2) read with r.1.4(1) and (3).

³⁹² Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 Sch., r.12(2).

³⁹³ As to the award of sequestration, see further Ch.8.

- 7-150** The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.³⁹⁴ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration³⁹⁵ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.³⁹⁶
- 7-151** The petitioner must send a copy of the petition to AiB on the day the petition is presented.³⁹⁷
- 7-152** Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.³⁹⁸
- 7-153** Where the petitioner withdraws or dies after the petition has been presented but before sequestration has been awarded, another creditor who was a qualified creditor at the date of presentation of the petition and who remains so at the date of the sist may be sisted in their place.³⁹⁹ The creditor who is so sisted is required to produce an oath in the prescribed form and what is said above in relation to the oath applies equally here.⁴⁰⁰
- 7-154** Where it becomes apparent before sequestration is awarded that the petitioner was in fact ineligible to petition, they must withdraw or, as the case may be, withdraw from, the petition, but another creditor may be sisted in their place.⁴⁰¹

Application by a temporary administrator

Criteria for application

- 7-155** Currently, a temporary administrator appointed under the EU insolvency proceedings regulation may petition for sequestration of the estate of a partnership.⁴⁰² There are no additional criteria for such a petition, which may be presented at any time.⁴⁰³

Form of petition and accompanying documents

- 7-156** The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴⁰⁴ It is specifically provided that the petitioner must, in so far as

³⁹⁴ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

³⁹⁵ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

³⁹⁶ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

³⁹⁷ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

³⁹⁸ Bankruptcy (Scotland) Act 2016 s.12(2).

³⁹⁹ Bankruptcy (Scotland) Act 2016 s.10(3).

⁴⁰⁰ Bankruptcy (Scotland) Act 2016 s.19(1).

⁴⁰¹ Bankruptcy (Scotland) Act 2016 s.13(6).

⁴⁰² See Bankruptcy (Scotland) Act 2016 s.6(4)(c)(i) and EU insolvency proceedings regulation art.37.

⁴⁰³ Bankruptcy (Scotland) Act 2016 s.13(2)(b)(ii) (in the case of a partnership other than a limited partnership) and 13(3)(b)(ii) (in the case of a limited partnership).

⁴⁰⁴ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State⁴⁰⁵ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.⁴⁰⁶ This information is currently required to allow jurisdiction to be established⁴⁰⁷ and appropriate provision for such a statement is duly made in Form 6.1-A.

The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.⁴⁰⁸ **7-157**

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.⁴⁰⁹ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration⁴¹⁰ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴¹¹ **7-158**

The petitioner must send a copy of the petition to AiB on the day the petition is presented.⁴¹² Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.⁴¹³ **7-159**

Application by a Member State insolvency practitioner

Criteria for application

Currently, a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation may petition for sequestration of the estate of a partnership.⁴¹⁴ There are no additional criteria for such a petition, which may be presented at any time.⁴¹⁵ **7-160**

Form of petition and accompanying documents

The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴¹⁶ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the

⁴⁰⁵ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

⁴⁰⁶ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

⁴⁰⁷ See further at para.7-206 onwards.

⁴⁰⁸ See notes in Form 6.1-A.

⁴⁰⁹ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

⁴¹⁰ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

⁴¹¹ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

⁴¹² Bankruptcy (Scotland) Act 2016 s.13(1) and see para.7-40.

⁴¹³ Bankruptcy (Scotland) Act 2016 s.12(2).

⁴¹⁴ See Bankruptcy (Scotland) Act 2016 s.6(4)(c)(ii), which mirrors on the face of the Bankruptcy (Scotland) Act 2016 the right which is conferred directly by the EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further in Ch.25.

⁴¹⁵ Bankruptcy (Scotland) Act 2016 ss.13(2)(b)(iii) (in the case of a partnership other than a limited partnership) and 13(3)(b)(iii) (in the case of a limited partnership).

⁴¹⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

debtor's centre of main interests is situated in the UK or in another EU Member State⁴¹⁷ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.⁴¹⁸ This information is currently required to allow jurisdiction to be established⁴¹⁹ and appropriate provision for such a statement is duly made in Form 6.1-A.

7-162 The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.⁴²⁰

7-163 The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.⁴²¹ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration⁴²² and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴²³

7-164 The petitioner must send a copy of the petition to AiB on the day the petition is presented.⁴²⁴

Application by a trustee under a trust deed

Criteria for application

7-165 A trustee acting under a trust deed may petition for sequestration of the estate of a partnership.⁴²⁵ This possibility was introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 but, in contrast to the position where a trustee under a trust deed applies for sequestration of the estate of a living debtor, there are no additional criteria for such a petition. The petition may be presented at any time.⁴²⁶

Form of petition and accompanying documents

7-166 The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴²⁷ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State⁴²⁸ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.⁴²⁹ This information is currently required to allow jurisdiction to be established⁴³⁰ and appropriate provision for such a statement is duly made in Form 6.1-A.

⁴¹⁷ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

⁴¹⁸ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

⁴¹⁹ See further at para.7-206 onwards.

⁴²⁰ See notes in Form 6.1-A.

⁴²¹ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

⁴²² Bankruptcy (Scotland) Act 2016 s.51(1)(b).

⁴²³ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3).

⁴²⁴ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

⁴²⁵ Bankruptcy (Scotland) Act 2016 s.6(4)(c)(iii).

⁴²⁶ Bankruptcy (Scotland) Act 2016 s.13(2)(b)(i) (in the case of a partnership other than a limited partnership) and 13(3)(b)(i) (in the case of a limited partnership).

⁴²⁷ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

⁴²⁸ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

⁴²⁹ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

⁴³⁰ See further at para.7-206 onwards.

The petition should be accompanied by a copy of the trust deed.⁴³¹

7-167

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.⁴³² Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration⁴³³ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴³⁴

7-168

The petitioner must send a copy of the petition to AiB on the day the petition is presented.⁴³⁵ Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.⁴³⁶

7-169

APPLICATIONS FOR SEQUESTRATION OF THE ESTATE OF A BODY CORPORATE OR UNINCORPORATED BODY

Sequestration of the estate of a body corporate or unincorporated body may be applied for by a person authorised to act on behalf of the body with the concurrence of a qualified creditor or creditors; by a qualified creditor or creditors where the body is apparently insolvent; by a temporary administrator appointed under the EU insolvency proceedings regulation; or by a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation. As in the case of a trust, there is no provision for a trustee under a trust deed to apply for sequestration of the estate of a body corporate or unincorporated body notwithstanding that such a body may grant a trust deed for creditors, that such a trust deed may become protected and that there is now provision for a trustee under a trust deed to petition for sequestration of the estate in the case of a partnership.⁴³⁷

7-170

The various applications are considered in turn.

7-171

Application by authorised person with concurrence of a qualified creditor or creditors

Criteria for application

A person authorised to act on behalf of a body corporate or unincorporated body may apply by debtor application for sequestration of the estate of the body with the concurrence of a qualified creditor or creditors.⁴³⁸ The same

7-172

⁴³¹ See notes in Form 6.1-A.

⁴³² See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

⁴³³ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

⁴³⁴ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

⁴³⁵ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

⁴³⁶ Bankruptcy (Scotland) Act 2016 s.12(2).

⁴³⁷ For trust deeds generally, see further Ch.22; for a petition for sequestration of a partnership by a trustee under a trust deed, see further at para.7-165.

⁴³⁸ Bankruptcy (Scotland) Act 2016 s.6(7)(a).

definition of qualified creditor and qualified creditors applies as in the case of a petition for sequestration of the estate of a living debtor.⁴³⁹

- 7-173** There is no requirement for apparent insolvency and no additional criteria for such an application, which may be made at any time.⁴⁴⁰

Form of application and accompanying documents

- 7-174** The application must be in Form 3 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.⁴⁴¹ As noted above in relation to other debtor applications, the preceding version of these regulations, the Bankruptcy (Scotland) Regulations 2014, specifically provided that a form might differ from the form set out in Sch.1 if it was of substantially the same effect or contained such variation as the circumstances may require,⁴⁴² but this provision has not been carried over into the Bankruptcy (Scotland) Regulations 2016. It is specifically provided that the debtor must state in the application whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State⁴⁴³ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.⁴⁴⁴ This information is currently required to allow jurisdiction to be established.⁴⁴⁵ There is no specific provision relating to these matters in Form 3, however, and although there are questions in the form relating to the debtor's details, address, etc. the answers to these questions may not be sufficient in themselves to allow these matters to be established.

- 7-175** The application must be accompanied by a statement of assets and liabilities⁴⁴⁶ which must be in Form 4 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.⁴⁴⁷

- 7-176** The concurring creditor is required to produce an oath in the prescribed form,⁴⁴⁸ and what is said above in relation to the oath to be produced by the petitioning creditor in the case of a petition for sequestration of the estates of a living debtor applies equally here, except that in this case there will be no requirement for the concurring creditor to produce evidence of the debtor's apparent insolvency.

- 7-177** The application may nominate an insolvency practitioner to be appointed as the trustee in sequestration.⁴⁴⁹ Where such a nomination is made, the application must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration⁴⁵⁰ and the application must be accompanied by a copy of the undertaking to act as trustee in Form 12 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.⁴⁵¹

⁴³⁹ See para.7-30.

⁴⁴⁰ Bankruptcy (Scotland) Act 2016 s.14(1).

⁴⁴¹ Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(b).

⁴⁴² Bankruptcy (Scotland) Regulations 2014 reg.3(2).

⁴⁴³ Bankruptcy (Scotland) Act 2016 s.11(1)(a).

⁴⁴⁴ Bankruptcy (Scotland) Act 2016 s.11(1)(b).

⁴⁴⁵ See further at para.7-206 onwards.

⁴⁴⁶ Bankruptcy (Scotland) Act 2016 s.8(3)(a) as applied by s.6(9).

⁴⁴⁷ Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(b).

⁴⁴⁸ Bankruptcy (Scotland) Act 2016 s.19(1).

⁴⁴⁹ See Bankruptcy (Scotland) Act 2016 s.51(8)(a).

⁴⁵⁰ Bankruptcy (Scotland) Act 2016 s.51(8)(b).

⁴⁵¹ Bankruptcy (Scotland) Act 2016 s.51(8)(c) and Bankruptcy (Scotland) Regulations 2016 regs 3, 12(2). Although it is not a statutory requirement, there will normally also be produced

Where the debtor is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the debtor must send a copy of the application to that Member State insolvency practitioner as soon as reasonably practicable.⁴⁵² 7-178

There are specific provisions for dealing with an application which is incomplete, in respect of which further information or evidence is required or in respect of which any fee or charge is outstanding:⁴⁵³ these are discussed further in Ch.8. 7-179

Where it becomes apparent before sequestration is awarded that a concurring creditor was in fact ineligible so to concur, AiB must withdraw them from the application, but another creditor may concur in their place and notify AiB to that effect.⁴⁵⁴ Such a creditor will be required to produce an oath in the prescribed form.⁴⁵⁵ 7-180

Where a concurring creditor withdraws or dies after the debtor application has been made but before sequestration has been awarded, another creditor who was a qualified creditor at the date of the debtor application and who remains so may notify AiB that they concur in the application in place of the creditor who has withdrawn or died.⁴⁵⁶ Such a creditor will be required to produce an oath in the prescribed form.⁴⁵⁷ 7-181

Application by a qualified creditor or creditors

Criteria for application

A qualified creditor or creditors may petition for sequestration of the estate of a body corporate or unincorporated body where the body is apparently insolvent.⁴⁵⁸ The same definition of qualified creditor and qualified creditors applies as in the case of a petition for sequestration of the estate of a living debtor.⁴⁵⁹ 7-182

The petition must be presented within four months of the constitution of the body's apparent insolvency.⁴⁶⁰ 7-183

It is not competent for a creditor to present a petition for sequestration: 7-184
(i) where the debtor has the benefit of the pre-application moratorium⁴⁶¹; or
(ii) where a debt payment programme has been approved in relation to the debtor if the debt which would be founded on in the petition is *either* included in the debt payment programme *or* is another debt owed to the creditor and the creditor has been given notice in the prescribed form of the approval of the

copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

⁴⁵² Bankruptcy (Scotland) Act 2016 s.11(3).

⁴⁵³ Bankruptcy (Scotland) Act 2016 s.20.

⁴⁵⁴ Bankruptcy (Scotland) Act 2016 s.14(6) and (7).

⁴⁵⁵ Bankruptcy (Scotland) Act 2016 s.19(1).

⁴⁵⁶ Bankruptcy (Scotland) Act 2016 s.10(5) and (6) as applied by s.6(9).

⁴⁵⁷ Bankruptcy (Scotland) Act 2016 s.19(1).

⁴⁵⁸ Bankruptcy (Scotland) Act 2016 s.6(7)(b)(iii).

⁴⁵⁹ See para.7-30.

⁴⁶⁰ Bankruptcy (Scotland) Act 2016 s.13(2)(a).

⁴⁶¹ Bankruptcy (Scotland) Act 2016 ss.195, 197 and 198. The pre-application moratorium is discussed in detail in Ch.5.

debt payment programme.⁴⁶² In order to establish that the presentation of a petition is not incompetent on either of these grounds, a petitioning creditor is required to lodge a statement in court confirming that as at the date of lodging of the petition, the petitioner has checked the register of insolvencies and the debt arrangement scheme register and is satisfied: (i) that the debtor has not given a notice triggering the pre-application moratorium or the pre-application moratorium has ended; and (ii) that the debtor is not subject to an approved debt payment programme or the creditor is entitled to present the petition notwithstanding an approved debt payment programme because the debt founded on is not one of the debts referred to.⁴⁶³

- 7-185** It is also provided that it is not competent for a creditor “to petition for sequestration” during a specified period immediately following an application by a debtor for a debt payment programme being entered in the debt arrangement scheme register⁴⁶⁴ but, as discussed above, there is some doubt as to the precise meaning of this provision.⁴⁶⁵

Form of petition and accompanying documents

- 7-186** The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴⁶⁶ It is specifically provided that the petitioner must, in so far as it is within the petitioner’s knowledge, state in the petition whether or not the debtor’s centre of main interests is situated in the UK or in another EU Member State⁴⁶⁷ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.⁴⁶⁸ This information is currently required to allow jurisdiction to be established⁴⁶⁹ and appropriate provision for such a statement is duly made in Form 6.1-A.

- 7-187** The petitioner is required to produce an oath in the prescribed form⁴⁷⁰ and what is said above in relation to the oath to be produced by the petitioning creditor in the case of a petition for sequestration of the estate of a living debtor applies equally here.

- 7-188** As noted above, the petitioning creditor is also required to lodge in court a statement confirming that as at the date of lodging of the petition, the petitioner has checked the register of insolvencies and the debt arrangement scheme register and is satisfied: (i) that the debtor has not given a notice triggering the pre-application moratorium or the pre-application moratorium has ended; and (ii) that the debtor is not subject to an approved debt payment programme or the creditor is entitled to present the petition notwithstanding an approved debt payment programme because the debt founded on is not one of the debts referred to in the relevant provisions of the Debt Arrangement and Attachment

⁴⁶² Debt Arrangement and Attachment (Scotland) Act 2002 s.4(3), (5).

⁴⁶³ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.2. The statement must be in Form 6.2 in Sch.1 to that Act of Sederunt, which may be varied if circumstances require: see r.6.2(2) read with r.1.4(1) and (3). This provision is discussed further at para.7-188.

⁴⁶⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(1)(ba).

⁴⁶⁵ See further at para.7-35 in relation to petitions for the sequestration of the estate of a living debtor.

⁴⁶⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

⁴⁶⁷ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

⁴⁶⁸ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

⁴⁶⁹ See further para.7-206 onwards.

⁴⁷⁰ Bankruptcy (Scotland) Act 2016 s.19(1).

(Scotland) Act 2002.⁴⁷¹ The preceding Act of Sederunt, the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008, specifically provided that the sheriff might not award sequestration unless such a statement had been lodged or they were otherwise satisfied that, as of the date of the award of sequestration, there was no approved debt payment programme in force or the creditor was nonetheless entitled to present the petition because the debt founded on was not one covered by the relevant provisions of the Debt Arrangement and Attachment (Scotland) Act 2002,⁴⁷² but there is no corresponding provision in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.⁴⁷³

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.⁴⁷⁴ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration⁴⁷⁵ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴⁷⁶ **7-189**

The petitioner must send a copy of the petition to AiB on the day the petition is presented.⁴⁷⁷ **7-190**

Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.⁴⁷⁸ **7-191**

Where the petitioner withdraws or dies after the petition has been presented but before sequestration has been awarded, another creditor who was a qualified creditor at the date of presentation of the petition and who remains so at the date of the sist may be sisted in their place.⁴⁷⁹ The creditor who is so sisted is required to produce an oath in the prescribed form and what is said above in relation to the oath applies equally here.⁴⁸⁰ **7-192**

Where it becomes apparent before sequestration is awarded that the petitioner was in fact ineligible to petition, they must withdraw or, as the case may be, withdraw from, the petition, but another creditor may be sisted in their place.⁴⁸¹ **7-193**

⁴⁷¹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.2. The statement must be in Form 6.2 in Sch.1 to that Act of Sederunt, which may be varied if circumstances require: see r.6.2(2) read with r.1.4(1) and (3).

⁴⁷² Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 Sch., r.12(2).

⁴⁷³ As to the award of sequestration, see further Ch.8.

⁴⁷⁴ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

⁴⁷⁵ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

⁴⁷⁶ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

⁴⁷⁷ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

⁴⁷⁸ Bankruptcy (Scotland) Act 2016 s.12(2).

⁴⁷⁹ Bankruptcy (Scotland) Act 2016 s.10(3).

⁴⁸⁰ Bankruptcy (Scotland) Act 2016 s.19(1).

⁴⁸¹ Bankruptcy (Scotland) Act 2016 s.13(6).

Application by a temporary administrator

Criteria for application

- 7-194** Currently, a temporary administrator appointed under the EU insolvency proceedings regulation may petition for sequestration of the estate of a body corporate or unincorporated body.⁴⁸² There are no additional criteria for such a petition, which may be presented at any time.⁴⁸³

Form of petition and accompanying documents

- 7-195** The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴⁸⁴ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State⁴⁸⁵ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.⁴⁸⁶ This information is currently required to allow jurisdiction to be established⁴⁸⁷ and appropriate provision for such a statement is duly made in Form 6.1-A.
- 7-196** The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.⁴⁸⁸
- 7-197** The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.⁴⁸⁹ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration⁴⁹⁰ and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴⁹¹
- 7-198** The petitioner must send a copy of the petition to AiB on the day the petition is presented.⁴⁹² Where the petitioner is aware that there is a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation in relation to the debtor, the petitioner must also send a copy of the petition to that Member State insolvency practitioner as soon as reasonably practicable.⁴⁹³

⁴⁸² See Bankruptcy (Scotland) Act 2016 s.6(7)(b)(i) and EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further in Ch.25.

⁴⁸³ Bankruptcy (Scotland) Act 2016 s.13(2)(b)(ii).

⁴⁸⁴ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

⁴⁸⁵ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

⁴⁸⁶ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

⁴⁸⁷ See further para.7-206 onwards.

⁴⁸⁸ See notes in Form 6.1-A.

⁴⁸⁹ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

⁴⁹⁰ Bankruptcy (Scotland) Act 2016 s.51(1)(b).

⁴⁹¹ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

⁴⁹² Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7-40.

⁴⁹³ Bankruptcy (Scotland) Act 2016 s.12(2).

Application by a Member State insolvency practitioner

Criteria for application

Currently, a Member State insolvency practitioner appointed in main proceedings under the EU insolvency proceedings regulation may petition for sequestration of the estate of a body corporate or unincorporated body.⁴⁹⁴ There are no additional criteria for such a petition, which may be presented at any time.⁴⁹⁵ **7–199**

Form of petition and accompanying documents

The petition must be in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁴⁹⁶ It is specifically provided that the petitioner must, in so far as it is within the petitioner's knowledge, state in the petition whether or not the debtor's centre of main interests is situated in the UK or in another EU Member State⁴⁹⁷ and whether or not the debtor possesses an establishment in the UK or in another EU Member State.⁴⁹⁸ This information is currently required to allow jurisdiction to be established⁴⁹⁹ and appropriate provision for such a statement is duly made in Form 6.1-A. **7–200**

The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.⁵⁰⁰ **7–201**

The petition may nominate an insolvency practitioner to be appointed as the trustee in sequestration.⁵⁰¹ Where such a nomination is made, the petition must state that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee in the sequestration⁵⁰² and the petition must be accompanied by a copy of the undertaking to act as trustee in Form 6.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁵⁰³ **7–202**

The petitioner must send a copy of the petition to AiB on the day the petition is presented.⁵⁰⁴ **7–203**

⁴⁹⁴ See Bankruptcy (Scotland) Act 2016 s.6(7)(b)(ii) which mirrors on the face of the Bankruptcy (Scotland) Act 2016 the right which is conferred directly by the EU insolvency proceedings regulation art.37. The EU insolvency proceedings regulation is discussed further in Ch.25.

⁴⁹⁵ Bankruptcy (Scotland) Act 2016 s.13(2)(b)(iii).

⁴⁹⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

⁴⁹⁷ Bankruptcy (Scotland) Act 2016 s.12(1)(a).

⁴⁹⁸ Bankruptcy (Scotland) Act 2016 s.12(1)(b).

⁴⁹⁹ See further at para.7–206 onwards.

⁵⁰⁰ See notes in Form 6.1-A.

⁵⁰¹ See Bankruptcy (Scotland) Act 2016 s.51(1)(a).

⁵⁰² Bankruptcy (Scotland) Act 2016 s.51(1)(b).

⁵⁰³ Bankruptcy (Scotland) Act 2016 s.51(1)(c) and Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(2) read with r.1.4(3). Although it is not a statutory requirement, there will normally also be produced copies of the relevant documentation vouching the prospective trustee's qualification as an insolvency practitioner.

⁵⁰⁴ Bankruptcy (Scotland) Act 2016 s.13(1) and see discussion at para.7–40.

APPLICATION FOR SEQUESTRATION BY A FOREIGN REPRESENTATIVE UNDER
THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

- 7-204** The Cross-Border Insolvency Regulations 2006⁵⁰⁵ enact a modified version of the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain.⁵⁰⁶ The Model Law as so enacted allows a foreign representative in foreign main proceedings or foreign non-main proceedings to apply for sequestration of the estate of a debtor if the conditions for doing so are otherwise met.⁵⁰⁷ Any such application must be in the form of a petition in Form 6.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, subject to any variation which circumstances may require.⁵⁰⁸ The petition should be accompanied by appropriate supporting documentation vouching the petitioner's title.⁵⁰⁹

COMBINED APPLICATIONS

- 7-205** As noted above, where sequestration of the estate of a partnership is applied for other than by the partnership itself, it is competent to combine the petition for sequestration of the partnership with a petition for sequestration of the estate of any of the partners as an individual where they are apparently insolvent. The awards of sequestration remain distinct, however, and the different estates must be administered separately: the court cannot make a joint award of sequestration.⁵¹⁰ This is the only situation in which it is competent to combine applications for sequestration: it is not competent, for example, to have a combined application for sequestration of the estates of a husband and wife, unless they are actually in partnership.⁵¹¹ It was proposed at one time to allow one application for sequestration to be presented jointly by two or more persons resident at the same address⁵¹² but, it is suggested rightly, the proposal was never implemented.

JURISDICTION

- 7-206** Under the Bankruptcy (Scotland) Act 1985 as enacted, both the Court of Session and the sheriff court had jurisdiction in sequestration proceedings.⁵¹³ However, in practice the majority of petitions were presented in the sheriff court⁵¹⁴ and it was provided that where an award of sequestration was made in the Court of Session, it was to be remitted to the appropriate sheriff court.⁵¹⁵
- 7-207** In 2003, the Scottish Executive, as part of wider proposals for streamlining bankruptcy procedures, proposed that, subject to its proposals for debtor applications

⁵⁰⁵ Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

⁵⁰⁶ See further Ch.25.

⁵⁰⁷ UNCITRAL Model Law on Cross-Border Insolvency as enacted by the Cross-Border Insolvency Regulations 2006 art.11.

⁵⁰⁸ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.1(1) read with r.1.4(3).

⁵⁰⁹ See notes in Form 6.1-A.

⁵¹⁰ *The Royal Bank of Scotland Plc v J & J Messenger*, 1991 S.L.T. 482.

⁵¹¹ *Campbell v Dunbar*, 1989 S.L.T. (Sh Ct) 29.

⁵¹² See Scottish Office, *The Bankruptcy (Scotland) Act 1985 A Consultation Follow-Up: Protected Trust Deeds and Other Issues* (July 1998), Annex A, para.1.

⁵¹³ Bankruptcy (Scotland) Act 1985 s.9 as enacted.

⁵¹⁴ See, for example, statistics referred to in Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), para.5.62.

⁵¹⁵ Bankruptcy (Scotland) Act 1985 s.15(1) as enacted.

for sequestration to be dealt with by AiB,⁵¹⁶ all bankruptcy proceedings should be consolidated in the sheriff court.⁵¹⁷ The majority of consultees were in favour of this proposal,⁵¹⁸ which was duly implemented by the Bankruptcy and Diligence etc. (Scotland) Act 2007, although it should be noted that the Court of Session does retain jurisdiction in relation to certain limited matters.⁵¹⁹ All petitions for sequestration, however, are now presented in the sheriff court and the Bankruptcy (Scotland) Act 2016 contains separate provisions relating to jurisdiction in the case of petitions and debtor applications.

Petitions for sequestration

In the case of a petition for sequestration of the estate of a living or deceased debtor, jurisdiction is established if the debtor had *either* an established place of business *or* was habitually resident within the sheriffdom in which the petition is presented at any time in the year immediately preceding the date of presentation of the petition or date of death as the case may be.⁵²⁰ In the case of a partner of a firm, whether alive or deceased, jurisdiction is established even if the partner does not meet these criteria where a petition for sequestration of the estate of the firm of which they are a partner (or were a partner at any time in the year immediately preceding the date of their death) has been presented and the process of that sequestration is still current.⁵²¹ **7-208**

With one exception, in the case of a petition for sequestration of the estate of an entity the estate of which may be sequestrated by virtue of s.6 of the Bankruptcy (Scotland) Act 2016, jurisdiction is established if the entity *either* had an established place of business within the sheriffdom in which the petition is presented at any time in the year immediately preceding the date of presentation of the petition *or* was constituted or formed under Scots law and at any time carried on business in Scotland.⁵²² The exception is that in the case of a petition for sequestration of the estate of a limited partnership, jurisdiction is established if the limited partnership is registered in Scotland and has a place of business in the sheriffdom.⁵²³ **7-209**

Debtor applications

In the case of a debtor application for sequestration of the estate of a living or deceased debtor, jurisdiction is established if the debtor had *either* an established place of business *or* was habitually resident in Scotland at any time in the year immediately preceding the date the debtor application is made or date of death as the case may be.⁵²⁴ **7-210**

With one exception, in the case of a debtor application for sequestration of the estate of an entity the estate of which may be sequestrated by virtue of s.6 of the Bankruptcy (Scotland) Act 2016, jurisdiction is established if the entity *either* had an established place of business in Scotland at any time in the **7-211**

⁵¹⁶ See above.

⁵¹⁷ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 10.2–10.6.

⁵¹⁸ See Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), paras 5.62–5.64.

⁵¹⁹ These are discussed where relevant in the following chapters.

⁵²⁰ Bankruptcy (Scotland) Act 2016 s.15(1), (8).

⁵²¹ Bankruptcy (Scotland) Act 2016 s.15(5) and (8).

⁵²² Bankruptcy (Scotland) Act 2016 s.15(3) and (8).

⁵²³ See Bankruptcy (Scotland) Regulations 2016 reg.31(1), (3)(b).

⁵²⁴ Bankruptcy (Scotland) Act 2016 s.15(2) and (8).

year immediately preceding the date of presentation of the petition *or* was constituted or formed under Scots law and at any time carried on business in Scotland.⁵²⁵ The exception is that in the case of a debtor application for sequestration of the estate of a limited partnership, jurisdiction is established if the limited partnership is registered in Scotland and has a place of business there.⁵²⁶

Established place of business

- 7-212** This concept is not defined, but it does require there to be a place where business is carried on. The requirement for the place of business to be established is intended to ensure that the place of business is of a settled nature.⁵²⁷ Business is defined widely as the carrying on of any activity, whether for profit or not.⁵²⁸

Habitual residence

- 7-213** Again, this concept is not defined, although it has been subject to interpretation in other contexts.⁵²⁹ The Scottish Government in its *Consultation on Bankruptcy Law Reform* in 2012 proposed to introduce a statutory definition of the concept⁵³⁰ and there was support for the proposal among consultees,⁵³¹ but it was not identified as one of the proposals to be taken forward in the Scottish Government's response⁵³² and was not ultimately implemented. The concept therefore remains undefined. It may be noted that the Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* in 1982 observed that

“the term ‘habitual’ suggests that something more than ordinary residence is required, perhaps, as Lane J has accepted, something ‘similar to the residence required as part of domicile, although in habitual residence there is no need for the element of animus which is necessary in domicile’”.⁵³³

Carrying on business

- 7-214** Carrying on business is different from having a place of business, whether established or not, and this test may therefore be satisfied where the other would not.

⁵²⁵ Bankruptcy (Scotland) Act 2016 s.15(4) and (8).

⁵²⁶ See Bankruptcy (Scotland) Regulations 2016 reg.31(1), (3)(a).

⁵²⁷ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.6.19.

⁵²⁸ Bankruptcy (Scotland) Act 2016 s.228(1).

⁵²⁹ See Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), available at <http://www.gov.scot/Resource/0038/00388465.pdf> [Accessed 16 September 2017], para.14.4.3.

⁵³⁰ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.14.4.4.

⁵³¹ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 9.7–9.10.

⁵³² The Scottish Government, *Response to: The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 16 September 2017].

⁵³³ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.6.21; the reference to Lane J has the citation *Cruse v Chittum* [1974] 2 All E.R. 940 at 943.

EU insolvency proceedings regulation

It is specifically provided that the provisions on jurisdiction discussed above are subject to art.3 of the EU insolvency proceedings regulation.⁵³⁴ Although this provision is unnecessary, since the regulation has direct effect, it provides a useful reminder of the position on the face of the Bankruptcy (Scotland) Act 2016. Article 3 of the EU insolvency proceedings regulation provides mandatory rules of international jurisdiction for those cases where the regulation applies. These rules establish the Member State in which insolvency proceedings may be opened, while jurisdiction within the Member State is determined according to the law of that Member State, in this case s.15 of the Bankruptcy (Scotland) Act 2016. AIB or the court, as the case may be, is required to determine the issue of international jurisdiction *ex proprio motu*, hence the requirements, discussed above, to include in a debtor application or petition information relating to the debtor's centre of main interests and/or any establishments.⁵³⁵ The EU insolvency proceedings regulation is discussed further in Ch.25. 7-215

Proceedings relating to debtor applications

Any proceedings under the Bankruptcy (Scotland) Act 2016 which relate to a debtor application or to a sequestration awarded as a result of a debtor application and which may be brought before a sheriff must be brought before the sheriff who would have had jurisdiction in a petition for sequestration of the debtor's estate.⁵³⁶ 7-216

EFFECT OF DEBTOR APPLICATION OR PETITION FOR SEQUESTRATION

The making of, or concurrence in, a debtor application for sequestration and the presentation of a petition for sequestration bar the effect of any enactment or rule of law relating to the limitation of actions in all parts of the UK.⁵³⁷ In this context, the reference to the concurrence in a debtor application or the presentation of a petition for sequestration barring the effect of any enactment or rule of law relating to the limitation of actions is to be construed as a reference to the relevant act having the same effect, for the purposes of any such enactment or rule of law, as an effective acknowledgement of the creditor's claim⁵³⁸ and the reference to an enactment does not include a reference to an enactment which implements or gives effect to any international agreement or obligation.⁵³⁹ 7-217

In addition, it is provided that the presentation of, or concurring in, a petition for sequestration is a relevant claim which interrupts the running of negative prescription in specified cases.⁵⁴⁰ It is a moot point whether a relevant claim is 7-218

⁵³⁴ Bankruptcy (Scotland) Act 2016 s.15(9).

⁵³⁵ While this was implicit in the original regulation, it has now been made explicit in the recast: see EU insolvency proceedings regulation, recital 27 and art.4.

⁵³⁶ Bankruptcy (Scotland) Act 2016 s.15(6) and (7).

⁵³⁷ Bankruptcy (Scotland) Act 2016 ss.13(5) and 14(5) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 reg.6(1)(a),(b) and (4).

⁵³⁸ Bankruptcy (Scotland) Act 2016 s.228(8) and (9) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 reg.6(2), (4). The effect of this provision in relation to the provisions relating to the limitation of actions in the Prescription and Limitation (Scotland) Act 1973 is uncertain, because the concept of an effective acknowledgement of a creditor's claim is not referred to in these provisions.

⁵³⁹ Bankruptcy (Scotland) Act 2016 s.228(10) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 reg.6(3), (4).

⁵⁴⁰ Prescription and Limitation (Scotland) Act 1973 s.9(1)(b). The reference to concurring in a

continuous in nature and subsists until it is disposed of or is an instantaneous event which happens on the day it takes place. The point is, perhaps, more pertinent where the relevant claim is the submission of a claim in the sequestration.⁵⁴¹ It is, however, specifically provided that the interruption of prescription caused by the presentation of a petition for sequestration or the making of a debtor application is not affected by any subsequent recall of the sequestration,⁵⁴² which would tend to suggest that it is continuous in nature.⁵⁴³ It may be noted that the Scottish Law Commission has recommended that the law should be clarified to make it clear that a relevant claim is continuous in nature and subsists until it is disposed of.⁵⁴⁴

petition for sequestration would now require to be understood as a reference to concurrence in a debtor application for sequestration.

⁵⁴¹ This is discussed further in Ch.16.

⁵⁴² Bankruptcy (Scotland) Act 2016 s.38(3)(a)(i) and (ii). It may be noted that the acts mentioned do not quite match those mentioned in the Prescription and Limitation (Scotland) Act 1973 s.9(1)(b). Recall of sequestration is discussed in Ch.9.

⁵⁴³ See also *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13 which involved effect of the submission of a claim to a trustee under a trust deed, discussed further in Ch.16.

⁵⁴⁴ Scottish Law Commission, *Report on Prescription* (Scot. Law Com. No.247, 2017), paras 7.27–7.30 and recommendation 22.

CHAPTER 8

THE AWARD OF SEQUESTRATION

INTRODUCTION

This chapter deals with the procedure for determining a debtor application or petition for sequestration; the date of sequestration where sequestration is awarded; the registration of orders relating to the sequestration; the procedure for review and appeal where an award of sequestration is refused; and the procedure following an award of sequestration. The procedures for bringing an award of sequestration under review are dealt with in Ch.9. **8-01**

PROCEDURE FOR DETERMINING A DEBTOR APPLICATION OR PETITION FOR SEQUESTRATION

The procedure for determining an application for sequestration differs depending on whether it is a debtor application or a petition to the court. **8-02**

Debtor applications

A debtor application is made when the application is received by Accountant in Bankruptcy (AiB).¹ **8-03**

Incomplete applications

Specific provision is made for cases where AiB considers that a debtor application is incomplete, further information or evidence is required in relation to the application or any fee or charge is outstanding.² In any such case, AiB must notify the debtor in writing of the further information and/or evidence required and/or the fee or charge to be paid.³ The relevant information, evidence, fee or charge must be provided or paid, as the case may be, within the period of 21 days beginning with the day on which the notice is sent or such longer period as AiB may specify⁴ and AiB may refuse to award sequestration if, after that time, the application remains incomplete, sufficient information and/or evidence has not been provided or any fee or charge remains outstanding.⁵ **8-04**

¹ Bankruptcy (Scotland) Act 2016 s.228(12).

² Bankruptcy (Scotland) Act 2016 s.20. The relevant provisions were originally contained in the Bankruptcy (Scotland) Regulations 2008, but were incorporated into the primary legislation (then the Bankruptcy (Scotland) Act 1985) following the enactment of the Bankruptcy and Debt Advice (Scotland) Act 2014.

³ Bankruptcy (Scotland) Act 2016 s.20(2).

⁴ Bankruptcy (Scotland) Act 2016 s.20(3).

⁵ Bankruptcy (Scotland) Act 2016 s.20(4).

Inappropriate applications

- 8–05** Specific provision is also made for cases where AiB considers that an award of sequestration may not be appropriate in the circumstances of the case.⁶ In any such case, AiB must notify the debtor in writing of the reason why they consider the application may not be appropriate and any further information which the debtor is to provide within the period of 21 days beginning with the day on which the notice is sent or such longer period as AiB may specify.⁷ If after the expiry of that period, AiB remains of the view that an award of sequestration would be inappropriate in the circumstances of the case, they may refuse to award sequestration.⁸ No guidance is given as to what is meant by inappropriate in this context, and at the time of writing the provision has not been the subject of judicial consideration. The provision does, however, appear to confer a general discretion on AiB to refuse to make an award of sequestration. If this is correct, it would represent a substantial innovation on the previously established principles relating to the making of an award of sequestration which apply in the case of a petition for sequestration, which are discussed further below.

Determination of the application

- 8–06** Separate provision is made for the determination of a debtor application made by an executor or person entitled to be appointed executor on the estate of a deceased debtor and other debtor applications. In the case of a debtor application made by an executor or person entitled to be appointed executor on the estate of a deceased debtor, it is provided that AiB must award sequestration forthwith if they are satisfied that the application has been made in accordance with the statutory provisions and the requirement to provide a statement of assets and liabilities has been complied with.⁹ In contrast to the provisions for other debtor applications, there is no proviso that this provision is subject to the provisions relating to incomplete or inappropriate applications discussed above. These provisions would not therefore appear to apply in such a case and there is therefore no discretion as to the making of an award of sequestration in such a case. In the case of other debtor applications, it is provided that unless the provisions relating to incomplete or inappropriate applications discussed above apply, AiB must award sequestration forthwith if they are satisfied that the application has been made in accordance with the statutory provisions, the debtor satisfies the standard criteria for a debtor application by a living debtor and the requirement to provide a statement of assets and liabilities has been complied with.¹⁰ These requirements are expressed cumulatively, with the result that the provision does not appear to encompass debtor applications made by living debtors who satisfy the minimal asset criteria rather than the standard criteria¹¹ or debtor applications by entities, so that on the face of it, there is no provision for the making of an award of sequestration by AiB in

⁶ Bankruptcy (Scotland) Act 2016 s.21. The relevant provisions were originally contained in the Bankruptcy (Scotland) Regulations 2008, but were incorporated in the primary legislation (then the Bankruptcy (Scotland) Act 1985) following the enactment of the Bankruptcy and Debt Advice (Scotland) Act 2014.

⁷ Bankruptcy (Scotland) Act 2016 s.21(2).

⁸ Bankruptcy (Scotland) Act 2016 s.21(3).

⁹ Bankruptcy (Scotland) Act 2016 s.22(2). For the statutory requirements for such an application generally and the specific requirement to provide a statement of assets and liabilities, see Ch.7.

¹⁰ Bankruptcy (Scotland) Act 2016 s.22(1). For the statutory requirements for such an application generally, the standard criteria for a debtor application by a living debtor and the requirement to provide a statement of assets and liabilities, see Ch.7.

¹¹ For the minimal asset criteria for a debtor application by a living debtor, see Ch.7.

relation to such applications. Presumably, however, this cannot be what was intended. The issue of whether the conditions for making an award of sequestration have been complied with and the effect of any failure in this respect is discussed further below in the context of petitions since the principles which apply are the same.

AiB or Depute AiB is required to sign a daily schedule listing those debtors whose estates have been sequestrated and to enter the schedule into the register of insolvencies.¹² They must notify in writing those debtors in respect of whom an award of sequestration has been made without delay after the making of the award.¹³ Where sequestration is refused, AiB or Depute AiB is required to complete and sign a form of refusal of award of sequestration in respect of the debtor and send a copy of it to the applicant or applicants without delay.¹⁴ The procedure for challenging a refusal to award sequestration is discussed further below.

Petitions for sequestration

A petition for sequestration is presented when the petition is received by the sheriff clerk.¹⁵

Warrant to cite

Where a petition is presented by a creditor or a trustee under a trust deed, the sheriff is required to grant warrant to cite the debtor to appear on a specified date not less than six and not more than 14 days after the date of citation to show cause why sequestration should not be awarded.¹⁶ Curiously, there is no specific provision for the granting of a warrant to cite where a petition for sequestration is presented by someone other than a creditor or a trustee acting under a trust deed.

A warrant to cite will normally be granted without a hearing unless a caveat has been lodged, in which case there will be a hearing.¹⁷ A warrant to cite will be refused only in exceptional circumstances, for example, where the debtor can show conclusively that all debts due to the petitioning creditor have been paid or there is an issue with the competency of the petition.¹⁸ It has been held that the provisions of reg.30 of the Debt Arrangement Scheme (Scotland) Regulations 2011, which provides inter alia that it is not competent for a creditor to petition for sequestration during certain periods, does not prevent the presentation of a petition for sequestration and the granting of a warrant to cite during the relevant period.¹⁹

¹² Bankruptcy (Scotland) Regulations 2016 reg.12(3). The schedule is in Form 7 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.

¹³ Bankruptcy (Scotland) Regulations 2016 reg.12(4).

¹⁴ Bankruptcy (Scotland) Regulations 2016 reg.12(5). The form is Form 8 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.

¹⁵ Bankruptcy (Scotland) Act 2016 s.228(11).

¹⁶ Bankruptcy (Scotland) Act 2016 s.22(3) and (4).

¹⁷ A caveat may be lodged against an order for intimation, service and advertisement of a petition for a person's sequestration: Act of Sederunt (Sheriff Court Caveat Rules) 2006 (SSI 2006/198) r.2. For examples of cases in which a caveat has been lodged, see *Wylie, Petitioner*, 1928 S.L.T. 665 (caveat lodged by creditor); *Mackin v Mackin*, 2015 S.C. GLA 73 (caveat lodged by debtor).

¹⁸ *Mackin v Mackin*, 2015 S.C. GLA 73 at para.[2].

¹⁹ *Mackin v Mackin*, 2015 S.C. GLA 73. Cf *Milne, Petitioner* 14 May 2012 Peterhead Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=445987a6-8980-69d2-b500-ff0000d74aa7> [Accessed 16 September 2017], where the view was expressed that the prohibition against a creditor petitioning for sequestration did prevent the presentation of a petition

8–11 As noted, citation of the debtor must take place not less than six and not more than 14 days before the date fixed by the court.²⁰ Prior to changes brought about in 2011, citation by way of service by post was competent, although it had been observed judicially that in order to avoid the difficulties which could arise with postal service, service should be by sheriff officer²¹ and this was the usual practice. The difficulties with the existing provisions on service were recognised in the Scottish Executive's consultation *Personal Bankruptcy Reform in Scotland: A Modern Approach*, which proposed changes to address the issue,²² and the subsequent consultation *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* indicated an intention to go ahead with these changes.²³ Changes were not, in fact, made at that time, but were eventually made in 2011.²⁴ The current provisions are contained in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016, which makes provision for service to be by sheriff officer by specified methods of service for each type of debtor within Scotland²⁵ and for service by specified methods of service on persons furth of Scotland.²⁶ A petitioner may, however, apply to the sheriff for authority to serve by any other method and the sheriff may authorise the petitioner to effect service by any method that the sheriff thinks fit.²⁷ The documents which must be served on the debtor are a citation in the prescribed form, a copy of the petition for sequestration and a copy of the warrant to cite.²⁸ Following service, the petitioner must lodge in court a certificate of citation in the prescribed form no later than two days before the date on which the debtor has been cited to appear.²⁹

8–12 If service within the specified period fails, the petitioner may seek a fresh warrant to cite. The granting of a fresh warrant to cite is a matter for the discretion of the sheriff.³⁰ Any fresh warrant to cite should be in the same form as the original and specify the date on which the debtor should appear to show cause why sequestration should not be awarded.³¹

for sequestration (and thus by implication the granting of a warrant to cite) during the relevant periods. This case was not referred to in *Mackin v Mackin*. The inter-relationship of sequestration and the debt arrangement scheme is not free from difficulty: this is discussed further at para.8–21 and in Ch.21.

²⁰ Bankruptcy (Scotland) Act 2016 s.22(4). Detailed rules as to the citation of the debtor are set out in rr.6.3–6.6 of the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.

²¹ *MacDonald's Trustee v MacDonald*, 1992 S.L.T. (Sh Ct) 25 at 26.

²² Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (2003), para.10.13 onwards.

²³ Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (2004), para.5.81 onwards.

²⁴ See Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No.2) 2011 (SSI 2011/289), which made appropriate amendments to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008.

²⁵ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.4.

²⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.5.

²⁷ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.6. For a case which citation by any legal mode was allowed in the unusual circumstances of the case, see *Mackin v Mackin*, 2015 S.C. GLA 73.

²⁸ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.3(1), (2). The citation must be in Form 6.3-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: r.6.3(2)(a).

²⁹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.3(3). The certificate of citation must be in Form 6.3-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: r.6.3.

³⁰ See, for example, *Guthrie Newspaper Group v McNamara*, 1992 G.W.D. 22-1245, where a decision to refuse to grant a fresh warrant to cite on the basis that it was pointless in the circumstances of the case was upheld on appeal.

³¹ *Hodgson v Hodgson's Trustee*, 1984 S.L.T. 97.

The hearing

The petition will call in court on the date specified in the warrant to cite. The debtor may or may not appear or be represented. The Bankruptcy and Diligence etc. (Scotland) Act 2007 introduced the possibility of lay representation at such a hearing³² and appropriate provision for such representation was duly made in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008.³³ The Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 now contains more extensive provisions relating to representation and support in sequestration proceedings generally. In particular, it provides that a natural person who is a party to proceedings may appear and act on that party's own behalf³⁴ and may be assisted in the conduct of proceedings by a lay supporter.³⁵ Any party may be represented by a legal representative or an authorised person.³⁶ For this purpose, a legal representative is an advocate or solicitor³⁷ and an authorised person is a person authorised to act as such in accordance with any enactment authorising a person to conduct proceedings in the sheriff court.³⁸ A natural person may also be represented by a lay representative.³⁹ The sheriff may award a party who is represented by an authorised person or lay representative any expenses or outlays to which that party would be entitled by virtue of the Litigants in Person (Costs and Expenses) Act 1975.⁴⁰

Determination of petition

In the case of a petition for sequestration presented by a creditor or a trustee under a trust deed, the sheriff must award sequestration forthwith if they are satisfied of specified matters.⁴¹ This provision is, however, subject to s.23,⁴²

³² Bankruptcy and Diligence etc. (Scotland) Act 2007 s.33 amending s.32(1) of the Sheriff Courts (Scotland) Act 1971.

³³ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 Sch., rr.15 and 16. Rule 15 provided that where the sheriff was satisfied that the debtor was not represented by an advocate or solicitor and that another person who was able to represent the debtor properly had been authorised by the debtor to do so, the debtor might be represented by that person; that any party might be represented by a person authorised under any enactment to conduct proceedings in the sheriff court in accordance with the terms of that enactment; and that any such representative might do everything for the preparation and conduct of the proceedings that could be done by a party litigant. Rule 16 provided that a party who was or had been represented by any such representative and who would have been found entitled to expenses if represented by an advocate or solicitor might be awarded any outlays or expenses to which a party litigant might be entitled under the Litigants in Person (Costs and Expenses) Act 1975, in which connection see *The City of Edinburgh Council v Stevens* 18 November 2011 Edinburgh Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=219787a6-8980-69d2-b500-ff0000d74aa7> [Accessed 16 September 2017].

³⁴ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.4.1(1). Such a party is known as a party litigant: r.4.1(2).

³⁵ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.4.1(5). Detailed provisions regarding lay supporters are set out in r.4.6.

³⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.4.1(3).

³⁷ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.4.2.

³⁸ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.4.3(1), (2). An example of such an enactment would be the Courts Reform (Scotland) Act 2014 which, inter alia, makes provision for lay representation of non-natural persons in civil proceedings: see Courts Reform (Scotland) Act 2014 Pt 3, Ch.4 and Act of Sederunt (Lay Representation for Non-Natural Persons) 2016 (SSI 2016/243).

³⁹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.4.1(4). Detailed provisions regarding lay representatives are set out in r.4.4. Certain non-natural persons may also be represented by a lay representative in certain circumstances by virtue of the Courts Reform (Scotland) Act 2014 Pt 3, Ch.4 and Act of Sederunt (Lay Representation for Non-Natural Persons) 2016.

⁴⁰ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.4.5 and see *The City of Edinburgh Council v Stevens* 18 November 2011 Edinburgh Sheriff Court, as above.

⁴¹ Bankruptcy (Scotland) Act 2016 s.22(5).

⁴² Bankruptcy (Scotland) Act 2016 s.22(6).

which makes provision for certain cases where sequestration is not to be awarded. Section 23 is discussed in detail below. Once again, there is no specific provision for the case where a petition for sequestration is presented by someone other than a creditor or a trustee acting under a trust deed.

8-15 The matters of which the sheriff must be satisfied before awarding sequestration are:

- (a) if the debtor has not appeared, proper citation has been made of the debtor⁴³;
- (b) the petition has been presented in accordance with the provisions of the Bankruptcy (Scotland) Act 2016⁴⁴;
- (c) the provisions of s.13(1), which require the petitioner to send a copy of the petition to AiB on the day the petition for sequestration is presented, have been complied with⁴⁵;
- (d) in the case of a petition by a trustee under a trust deed, at least one of the conditions in s.2(7)(a) applies or the petition includes an averment that it would be in the best interests of the creditors for an award of sequestration to be made⁴⁶; and
- (e) in the case of a petition by a creditor, the requirements relating to the apparent insolvency of the debtor have been fulfilled.⁴⁷

8-16 Where the sheriff is not satisfied of any of these matters, they will normally refuse to award sequestration and dismiss the petition, but there may be cases in which another course of action is more appropriate. For example, if the sheriff is not satisfied that there has been proper citation of the debtor, it might be appropriate to grant a fresh warrant to cite rather than dismiss the petition, or if there has been a failure to comply with the requirements of s.13(1), it may be possible for this to be cured in an appropriate case.⁴⁸

8-17 Where the sheriff is satisfied of the specified matters, unless s.23 applies, they have no discretion in deciding whether or not to award sequestration.⁴⁹ As noted above, the provisions relating to debtor applications appear, in contrast, to give a general discretion to AiB in relation to the making of an award of sequestration which, if correct, is somewhat surprising given the existence of this well-established principle. Furthermore, the sheriff is required to award sequestration “*forthwith*”. There has been some debate as to precisely what this means in practice,⁵⁰ but the case law stresses that sequestration is a summary process. The classic statement of this principle, often referred to in subsequent cases, is that of Lord President Normand in *Scottish Milk Marketing Board v*

⁴³ Bankruptcy (Scotland) Act 2016 s.22(5)(a). The requirements in relation to citation are discussed at para.8-11.

⁴⁴ Bankruptcy (Scotland) Act 2016 s.22(5)(b). These provisions are discussed in Ch.7.

⁴⁵ Bankruptcy (Scotland) Act 2016 s.22(5)(c). These provisions are discussed in Ch.7.

⁴⁶ Bankruptcy (Scotland) Act 2016 s.22(5)(d). The conditions for a petition by a trustee under a trust deed are discussed in Ch.7.

⁴⁷ Bankruptcy (Scotland) Act 2016 s.22(5)(e). The requirements for a creditor petition in relation to apparent insolvency are discussed in Ch.7 apparent insolvency is discussed further in Ch.1.

⁴⁸ See further para.7-40.

⁴⁹ See, for example, *Joel v Gill* (1859) 21 D. 929; *Stuart & Stuart v Macleod* (1891) 19 R. 223; *British General Insurance Co v Borthwick* (1924) 40 Sh Ct Rep 198; *Scottish Milk Marketing Board v Wood*, 1936 S.C. 604.

⁵⁰ See, for example, Stewart, “‘Forthwith’ and Avoiding Sequestration”, 1995 S.L.T. (News) 19 and reply by McKenzie, “‘Forthwith’ and Avoiding Sequestration: Some Observations”, 1995 S.L.T. (News) 151. There have been changes to the law since these articles were written.

Wood⁵¹: “Sequestration is a summary process, and it is of the highest importance that dilatory proceedings should not be permitted.”

The reason that dilatory proceedings should not be permitted is that any delay in awarding sequestration can have unfortunate consequences in cases other than debtor applications because of the way in which the date of sequestration, to which many effects and time limits are linked, is defined in these cases.⁵² For example, where a time limit runs from the date of sequestration, if there is any delay in making an award of sequestration, there may be little time left to act within the time limit or the time limit may even have expired by the time the award of sequestration is made.⁵³ 8–18

The summary nature of sequestration proceedings means that the continuation or sist of a petition for sequestration is not generally competent,⁵⁴ although it has been held that there are some circumstances in which such a course of action may be competent. In *Scottish Milk Marketing Board v Wood*,⁵⁵ Lord President Normand noted that it was the invariable practice of the court to dispose of any objection to the sequestration raised by the debtor at the hearing without proof and on the basis of ex parte statements, even where the objection was to the jurisdiction of the court.⁵⁶ Lord Moncrieff, however, in a dissenting judgment, took the view that proof might be appropriate in some cases,⁵⁷ and subsequent cases, while acknowledging the summary nature of the process, have recognised that there may be exceptional cases in which it is not possible for a decision on the petition to be made at the hearing without further inquiry.⁵⁸ In such a case, it is up to the court to decide what further procedure is appropriate, including whether answers are required, bearing in mind the summary nature of the sequestration process and the need to minimise delay.⁵⁹ 8–19

It has also been held that it is competent to continue or sist a sequestration petition where the petitioner has been interdicted from proceeding with the

⁵¹ *Scottish Milk Marketing Board v Wood*, 1936 S.C. 604 at 611. See also *Royal Bank of Scotland Plc v Aitken*, 1985 S.L.T. (Sh Ct) 13; *Royal Bank of Scotland Plc v Forbes*, 1988 S.L.T. 73; *Drybrough & Co Ltd, Petitioners*, 1989 S.C.L.R. 279; *Campbell v Sheriff*, 1991 S.L.T. (Sh Ct) 37; *Bank of Scotland v Mackay*, 1991 S.L.T. 163; *Pattison v Halliday*, 1991 S.L.T. 645; *National Westminster Bank Plc v W & J Elrick*, 1991 S.L.T. 709; *Racal Vodac v Hislop*, 1992 S.L.T. (Sh Ct) 21; *Sales Lease Ltd v Minty*, 1993 S.C.L.R. 130; *Chris Hart Business Sales Ltd v Campbell*, 1993 S.C.L.R. 383; *Paganelli Properties (Glasgow) Ltd v Biba*, 1994 S.C.L.R. 1008; *Clydesdale Bank Plc v Grantly Developments*, 2000 S.L.T. 1369; *Advocate General v Zaoui*, 2001 S.C. 448; *Advocate General v Dickie*, 2010 G.W.D. 31–650.

⁵² The date of sequestration is discussed further at para.8–31.

⁵³ For an example of the difficulties which can ensue, see *Pattison v Halliday*, 1991 S.L.T. 645.

⁵⁴ See *Royal Bank of Scotland Plc v Aitken*, 1985 S.L.T. (Sh Ct) 13; *Campbell v Sheriff*, 1991 S.L.T. (Sh Ct) 37; *MacDonald's Trustee v MacDonald*, 1992 S.L.T. (Sh Ct) 25.

⁵⁵ *Scottish Milk Marketing Board v Wood*, 1936 S.C. 604.

⁵⁶ *Scottish Milk Marketing Board v Wood*, 1936 S.C. 604 at 611. The nature of the objections which may be raised are mentioned above and discussed further below.

⁵⁷ *Scottish Milk Marketing Board v Wood*, 1936 S.C. 604 at 623–624.

⁵⁸ See, for example, *Royal Bank of Scotland Plc v Forbes*, 1988 S.L.T. 73; *Racal Vodac v Hislop*, 1992 S.L.T. (Sh Ct) 21; *Sales Lease Ltd v Minty*, 1993 S.C.L.R. 130; *Paganelli Properties (Glasgow) Ltd v Biba*, 1994 S.C.L.R. 1008; *Clydesdale Bank Plc v Grantly Developments*, 2000 S.L.T. 1369. Cf *Sales Lease Ltd v Minty*, 1993 S.C.L.R. 130, in which a continuation was not found to be competent.

⁵⁹ See, for example, *Royal Bank of Scotland Plc v Forbes*, 1988 S.L.T. 73; *Racal Vodac v Hislop*, 1992 S.L.T. (Sh Ct) 21; *Paganelli Properties (Glasgow) Ltd v Biba*, 1994 S.C.L.R. 1008. Where answers are ordered and are lodged by a creditor who subsequently withdraws or dies, another creditor may be sisted in that creditor's place: Bankruptcy (Scotland) Act 2016 s.10(4).

petition.⁶⁰ Prior to changes brought about by the Bankruptcy and Diligence etc. (Scotland) Act 2007, there was some debate as to whether it was competent to continue a sequestration petition to allow the debtor further time to pay.⁶¹ Such continuations did happen in practice, but it is suggested that the better view was that they were not in fact competent.⁶² The point is now moot in so far as the Bankruptcy and Diligence etc. (Scotland) Act 2007 introduced specific provisions allowing the sheriff to continue a sequestration petition for payment in specified circumstances as well as specific provisions allowing the sheriff to continue a sequestration petition where the debtor has applied for or intends to apply for approval of a debt payment programme. These provisions are discussed further below. While they have undoubtedly expanded the circumstances in which a continuation is competent, it is suggested that they should not be regarded as detracting further than necessary from the general principle that sequestration remains, so far as possible, a summary process.⁶³

8–20 As noted above, the requirement to award sequestration forthwith is subject to the provisions of s.23. The effect of these provisions is as follows:

- (a) Section 23(1) provides that the sheriff must not award sequestration if:
 - (i) cause is shown why sequestration cannot competently be awarded.⁶⁴ Normally, it will be the debtor who argues that sequestration cannot competently be awarded, but the sheriff may decide sequestration is not competent *ex proprio motu*.⁶⁵ Lack of jurisdiction would amount to cause why sequestration could not competently be awarded⁶⁶ as would proof that the person comparing, on whom the charge for payment relied on as constituting the debtor's apparent insolvency had been served, was not the true debtor.⁶⁷ It has been held that sequestration could not competently be awarded where the creditor had presented the debtor with "directly contrary ultimata" in the form of a charge for payment in respect of which the days of charge had expired without payment and a statutory demand for payment of debt in respect of which the period allowed for payment had not expired at the time the petition was presented.⁶⁸ On the other hand, an offer to prove solvency does not amount to cause why sequestration cannot competently be awarded where apparent insolvency has been established.⁶⁹ It has been held that an allegation that the decree against the debtor on which the sequestration petition was based proceeded on a forgery did not amount to cause why

⁶⁰ See *Pattison v Halliday*, 1991 S.L.T. 645 (petition sisted); *Chris Hart Business Sales Ltd v Campbell*, 1993 S.C.L.R. 383 (petition continued *sine die*).

⁶¹ See Stewart, "'Forthwith' and Avoiding Sequestration", 1995 S.L.T. (News) 19 and reply by McKenzie, "'Forthwith' and Avoiding Sequestration: Some Observations", 1995 S.L.T. (News) 151.

⁶² McKenzie, "'Forthwith' and Avoiding Sequestration: Some Observations", 1995 S.L.T. (News) 151.

⁶³ See *Advocate General v Dickie*, 2010 G.W.D. 31-650.

⁶⁴ Bankruptcy (Scotland) Act 2016 s.23(1)(a).

⁶⁵ See *Campbell v Dunbar*, 1989 S.L.T. (Sh Ct) 89, where the sheriff held that a joint petition for sequestration was not competent.

⁶⁶ See, for example, *Paganelli Properties (Glasgow) Ltd v Biba*, 1994 S.C.L.R. 1008.

⁶⁷ *Racal Vodac Ltd v Hislop*, 1992 S.L.T. (Sh Ct) 21.

⁶⁸ *Unity Trust Bank Plc v Ahmed*, 1993 S.C.L.R. 53.

⁶⁹ See *Scottish Milk Marketing Board v Wood*, 1936 S.L.T. 470.

sequestration could not competently be awarded.⁷⁰ In a case on recall, it was said that a clerical error regarding the amount of the debt in the copy of the petition served on debtor would not amount to cause why sequestration could not competently be awarded although it might ground a claim for the expenses of appearing to answer the petition for sequestration.⁷¹ It has been held that the fact that interest on the debt was not included in the charge for payment but was included in the creditor's oath did not amount to cause why sequestration could not competently be awarded.⁷² On the basis that sequestration is not a diligence which is suspended by an application for reponing, it has been held that a pending application for reponing is not cause why sequestration cannot competently be awarded.⁷³ In that case, the sheriff reserved his opinion on the general question of whether it was competent to award sequestration where there was an ongoing attempt to challenge the underlying decree on which the petition was based. He expressed the tentative view that sequestration could—but would not necessarily—be awarded in such circumstances. The view expressed in the commentary on the case, however, was that so long as the decree stands, sequestration should be awarded if the requirements are otherwise satisfied, and it is suggested that this is the better view. Where the basis of the sequestration is challenged, it may be open to the debtor to seek interdict and interim interdict against the presentation of a petition for sequestration or, where the petition has already been presented, any further steps in the petition including moving for an award of sequestration⁷⁴; or

- (ii) the debtor forthwith pays or satisfies, or produces written evidence of the payment or satisfaction of, the debt in respect of which the debtor became apparently insolvent and any other debt due to the petitioning creditor or any creditor concurring in the petition.⁷⁵ It should be noted that prior to the changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014, this provision also allowed sequestration to be refused where the debtor had given or shown that there was sufficient security for the payment of these debts, but that part of the provision, together with the provision which allowed the debtor to seek recall of sequestration on the provision of sufficient security for payment of their debts where sequestration had already been awarded, was repealed by the Bankruptcy and Debt Advice (Scotland) Act 2014 on the basis that the provisions had caused confusion since it was not clear what constituted sufficient security.⁷⁶ It is important to

⁷⁰ *Sales Lease Ltd v Minty*, 1993 S.C.L.R. 130.

⁷¹ *Lochrie v McGregor*, 1911 S.C. 21.

⁷² *Lord Advocate v MacKenzie*, 1993 S.C.L.R. 153.

⁷³ *G & A Barnie v Stevenson*, 1993 S.C.L.R. 318.

⁷⁴ For a discussion of the circumstances in which such an order may or may not be granted and, if granted, subsequently recalled, see, for example, *Aitken v Aitken* [2005] CSOH 105; *Watson v The Cheque Shop Ltd* [2005] CSOH 114; *McLaughlin, Petitioner* [2010] CSIH 24; *Cowan v Royal Bank of Scotland Plc* [2011] CSOH 85; *Kipling v Dunbar Bank Plc* [2012] CSOH 40; and see further Ch.1.

⁷⁵ Bankruptcy (Scotland) Act 2016 s.23(1)(b). The reference to a creditor concurring in the petition would now appear to be otiose since concurrence by a creditor is only relevant in certain debtor applications following the replacement of debtor petitions for sequestration by debtor applications for sequestration made to AiB.

⁷⁶ See *Bankruptcy and Debt Advice (Scotland) Bill Policy Memorandum* SP Bill 34-PM, para.249. The provisions regarding recall of sequestration are discussed in Ch.8. The part of the

note that the debtor is required to act *forthwith* in order to satisfy the requirements of this provision. With regard to payment of the relevant debts, it is suggested that this would entail the debtor making payment in cash or by bankers draft rather than, say, by tendering a cheque or offering to make payment at some point after the hearing: if payment by cheque or at some time after the hearing is proposed, the correct procedure would be to move for the hearing to be continued in accordance with the provisions which now allow for a continuation for payment discussed below. If payment of the relevant debts is made at the hearing with the result that an award of sequestration is refused, the sheriff may dismiss the petition but award expenses against the debtor. With regard to producing written evidence of the payment or satisfaction of the relevant debts, it is suggested that in accordance with the principle that sequestration is a summary process, the debtor must ordinarily produce this at the hearing and the sheriff should not continue the petition to allow it to be produced at a later stage, unless perhaps there is a sufficiently good reason why it cannot be produced immediately.

- (b) Section 23(2) provides that where the sheriff is satisfied that the debtor will pay or satisfy the debt in respect of which the debtor became apparently insolvent and any other debt due to the petitioning creditor or any creditor concurring in the petition within the period of 42 days beginning with the day of the hearing, the sheriff may continue the petition for a period of no more than 42 days.⁷⁷ As already noted, this provision was introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007. It did not form part of the Bill when introduced, but was added by amendment at Stage 3. It was not, however, uncontroversial, with concerns being raised as to the effect of such continuations in light of the summary nature of sequestration proceedings and the potentially unfortunate consequences of delay referred to above.⁷⁸ The decision as to whether to grant a continuation is a matter for the discretion of the sheriff. Before granting a continuation, the sheriff must be satisfied that the debtor will pay or satisfy the relevant debts within the 42 day period, and it is therefore suggested that detailed submissions as to how the debts will be paid or satisfied will be required and vague assurances that payment will be made should not be sufficient to obtain a continuation. A continuation may be for any period up to 42 days, and it is

provision under discussion here which related to sufficient security was first introduced by the Bankruptcy (Scotland) Act 1985. It proved problematic in practice, however, and despite amendment by the Bankruptcy (Scotland) Act 1993, it continued to be so, not least because it was often the case that further procedure was required before a decision could be made on the sequestration petition with the unwelcome delay that entailed. For an account of some of the issues, see McKenzie, "Avoiding Sequestration by Provision of Sufficient Security", 1993 S.L.T. (News) 269, which includes a discussion of the earlier cases, including *Royal Bank of Scotland Plc v Forbes*, 1988 S.L.T. 73; *Drybrough & Co Ltd, Petitioners*, 1989 S.C.L.R. 279; *Bank of Scotland v Mackay*, 1991 S.L.T. 163; *National Westminster Bank Plc v W & J Elrick*, 1991 S.L.T. 709. See also the later cases of *Clydesdale Bank Plc v Grantly Developments*, 2000 S.L.T. 1369; *Advocate General v Zaoui*, 2001 S.C. 448; *Advocate General v Dickie*, 2010 G.W.D. 31-650; *Glasgow City Council v Chaudhry*, 2015 S.L.T. (Sh Ct) 107.

⁷⁷ Again, the reference to a creditor concurring in the petition would now appear to be otiose since concurrence by a creditor is only relevant in certain debtor applications following the replacement of debtor petitions for sequestration by debtor applications for sequestration made to AiB.

⁷⁸ See Scottish Parliament, *Official Report* (30 November 2006), col.29929–29931.

suggested that in accordance with the principle that sequestration is a summary process, it should be for the shortest period necessary in the circumstances. So if, for example, a cheque is tendered at the hearing, a relatively short continuation to allow the cheque to clear would appear to be appropriate; if, on the other hand, the debtor is awaiting receipt of funds before being in a position to pay, a longer continuation to reflect the time at which those funds are expected to be available might be appropriate. It is suggested that the provision would allow for more than one continuation provided that the total period for which the petition was continued did not exceed 42 days. It is not, however, competent to continue the petition beyond the 42 day time limit, and where payment is still not forthcoming at the end of that period, sequestration should be awarded where the requirements for sequestration as set out above are satisfied.⁷⁹

- (c) Section 23(3) provides that where the sheriff is satisfied that a debt payment programme relating to the debt in respect of which the debtor became apparently insolvent and any other debt due to the petitioning creditor or any creditor concurring in the petition has *either* been applied for and not yet approved or rejected *or* will be applied for, they may continue the petition for such period as they think fit.⁸⁰ As already noted, this provision was also introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, but again it did not form part of the Bill as introduced and was added by amendment, in this case at Stage 2, without debate. It reflects a policy intention to encourage the use of the debt arrangement scheme as an alternative to sequestration where appropriate and is based on the premise that once a debt payment programme has been approved, no award of sequestration may competently be made thereafter.⁸¹ The provision accordingly allows the debtor the opportunity to have a debt payment programme approved notwithstanding the extant petition for sequestration and thus ultimately avoid sequestration. The interaction between the provisions relating to the award of sequestration and those relating to the debt arrangement scheme (and the pre-application moratorium, which now applies beyond the debt arrangement scheme) is not, however, free from difficulty: this is discussed in more detail in the following paragraph.⁸² The decision as to whether to grant a continuation is a matter for the discretion of the sheriff.⁸³ Before granting a continuation, the sheriff must be satisfied either that a debt payment programme has been applied for but not determined or that it will be applied for, and it is therefore suggested that in order to obtain a continuation, there should be either the production of evidence of the making of an application or detailed submissions as to the intention to make an application, and vague assurances that an application has been or will be made should not be sufficient

⁷⁹ See *Advocate General for Scotland v King*, 2015 SCSTRAN 5.

⁸⁰ Again, the reference to a creditor concurring in the petition would now appear to be otiose since concurrence by a creditor is only relevant in certain debtor applications following the replacement of debtor petitions for sequestration by debtor applications for sequestration made to AiB.

⁸¹ See Revised Explanatory Notes to the Bankruptcy and Diligence etc. (Scotland) as amended at Stage 2, paras 78–79.

⁸² See also Ch.21.

⁸³ See *Milne*, *Petitioner* 14 May 2012 Peterhead Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=445987a6-8980-69d2-b500-ff0000d74aa7> [Accessed 16 September 2017]; *Mackin v Mackin*, 2015 S.C. GLA 73.

to obtain a continuation. In contrast to the provisions of s.23(2), where a continuation (or continuations) is limited to a maximum of 42 days, a continuation under this provision is for such period as the sheriff thinks fit. It is suggested, however, that in accordance with the principle that sequestration is a summary process, any continuation or continuations should be for the shortest period necessary in the circumstances, so that there will have been no more delay than necessary if sequestration is ultimately awarded. If a continuation is not granted, sequestration should be awarded provided the requirements for sequestration as set out above are satisfied.

8-21 As noted above, the interaction between the statutory provisions relating to the award of sequestration and those relating to the debt arrangement scheme, and the pre-application moratorium which now applies beyond the debt arrangement scheme, is not free from difficulty. A number of situations require to be distinguished:

- (i) On the date of the hearing, the pre-application moratorium applies. While the pre-application moratorium prevents the presentation of a petition for sequestration,⁸⁴ there would appear to be nothing to prevent an award of sequestration being made where the petition was presented prior to the coming into force of the pre-application moratorium. This conclusion would seem to be supported by the terms of s.198(2) of the Bankruptcy (Scotland) Act 2016, which provides for the moratorium to come to an end on the recording of an award of sequestration in the register of insolvencies: the reference to the award of sequestration in this provision is not restricted to an award of sequestration made on a debtor application, and thus appears to contemplate an award of sequestration being made on a petition for sequestration. Where the sheriff is advised at the hearing either that the debtor intends to apply for a debt payment programme but has not yet done so or that the debtor has applied for a debt payment programme but no decision has yet been made on that application, the sheriff would have the option to continue the petition in accordance with the provisions of s.23(3) of the Bankruptcy (Scotland) Act 2016 discussed in the preceding paragraph or to refuse to do so and make an award of sequestration if the conditions for making such an award are satisfied.
- (ii) On the date of the hearing, the pre-application moratorium does not apply and the sheriff is advised that the debtor intends to apply for a debt payment programme but has not yet done so. The sheriff may continue the petition in accordance with the provisions of s.23(3) of the Bankruptcy (Scotland) Act 2016 discussed in the preceding paragraph or may refuse to do so and make an award of sequestration if the conditions for making such an award are otherwise satisfied.
- (iii) On the date of the hearing, the pre-application moratorium does not apply and the sheriff is advised that the debtor has applied for a debt payment programme but no decision has yet been made on that application. In this situation, provided the application has been entered into the debt arrangement scheme register, reg.30 of the Debt Arrangement Scheme (Scotland) Regulations 2011 provides that it is not competent

⁸⁴ See further Ch.5.

for a creditor to petition for sequestration. As noted previously, however, there is some doubt as to the precise meaning of “to petition for sequestration” in this context.⁸⁵ In the case of *Mackin v Mackin*,⁸⁶ it was held that after the debtor had applied for a debt payment programme, a creditor was not prevented from presenting a petition for sequestration but was prevented from moving for an award of sequestration. In the earlier case of *Milne, Petitioner*,⁸⁷ however, which was not referred to in that decision, it was held that the same provision, which at that time also applied where there was a pre-application moratorium in the debt arrangement scheme, prevented a creditor presenting a petition for sequestration during that moratorium but did not prevent an award of sequestration being made on a petition presented before that moratorium came into force.⁸⁸

Where the debtor has already applied for the debt payment programme before the presentation of the petition, it would not appear to matter which interpretation is correct, since either would prevent an award of sequestration being made: if the interpretation adopted in *Milne* is correct, the subsequent presentation of the petition would not be competent and an award of sequestration on that petition would not therefore be competent, while if the interpretation adopted in *Mackin* is correct, although the presentation of the petition would have been competent, moving for an award of sequestration on that petition would not. Where the debtor has applied for the debt payment programme only after presentation of the petition, however, the different interpretations would give different results, since if the interpretation adopted in *Milne* is correct, it follows that an award of sequestration on that petition would be competent as it was presented before the debt payment programme was applied for, while if the interpretation adopted in *Mackin* is correct, moving for an award of sequestration would not be competent. In addition, the interpretation in *Mackin* seems difficult if not impossible to reconcile with the provisions of s.23(3) of the Bankruptcy (Scotland) Act 2016, discussed in the preceding paragraph, which allow the sheriff to continue a petition for sequestration where the debtor has applied for a debt payment programme but no decision has yet been made on that application *or* to award sequestration, and with the provisions of reg.40 of the Debt Arrangement Scheme (Scotland) Regulations 2011, discussed further below, which provide that the debt arrangement scheme administrator must revoke a debt payment programme where an award of sequestration is made on a petition for sequestration presented by a creditor before the approval of the debt payment programme: both of these provisions clearly contemplate that an award of sequestration may be made even where a debt payment programme has been applied for or approved following a petition for sequestration. In contrast, the interpretation in *Milne* can be more easily reconciled with those provisions. The interpretation in *Milne* therefore appears to be the better one. It was recognised, and regarded

⁸⁵ See para.7–35.

⁸⁶ *Mackin v Mackin*, 2015 S.C. GLA 73.

⁸⁷ *Milne, Petitioner* 14 May 2012 Peterhead Sheriff Court, available on the Scottish Courts website.

⁸⁸ The current provisions for the pre-application moratorium now make it clear that it is the presentation of a petition for sequestration which is prevented by that moratorium; the pre-application moratorium is discussed in detail in Ch.5.

as questionable, in *Mackin* that such an interpretation would favour an application for a debt payment programme made prior to the presentation of a petition for sequestration over one made after the presentation of a petition for sequestration, and it is not clear that this is entirely consistent with the underlying policy referred to above. It does, however, appear to be the most consistent interpretation on the provisions as they stand.

- (iv) On the date of the hearing, there is an approved debt payment programme in relation to the debtor.

While it is not competent for a creditor to present a petition for sequestration following the approval of a debt payment programme in relation to the debtor if the debt which would be founded on in the petition is *either* included in the debt payment programme *or* is another debt owed to the creditor and the creditor has been given notice in the prescribed form of the approval of the debt payment programme,⁸⁹ there would appear to be nothing to prevent an award of sequestration being made where a petition founding on such a debt was presented prior to the approval of the debt payment programme. This conclusion would seem to be supported by the terms of reg.40 of the Debt Arrangement Scheme (Scotland) Regulations 2011, which provide *inter alia* that the debt arrangement scheme administrator must revoke a debt payment programme where an award of sequestration is made on a petition for sequestration presented by a creditor before the approval of the debt payment programme.

Where the debt founded on in the petition is not one of the debts referred to above, a creditor will be entitled to present a petition for sequestration notwithstanding the approval of a debt payment programme in relation to the debtor, and there would appear to be nothing to prevent an award of sequestration on such a petition whether presented prior to or after the approval of the debt payment programme.

- (v) On the date of the hearing, the petition for sequestration is continued under the provisions of s.23(3) of the Bankruptcy (Scotland) Act 2016.

There would appear to be nothing to prevent an award of sequestration being made following such a continuation, even if a debt payment programme has been approved in the interim.⁹⁰ This conclusion would seem to be supported by the terms of reg.40 of the Debt Arrangement Scheme (Scotland) Regulations 2011, which provide *inter alia* that the debt arrangement scheme administrator must revoke a debt payment programme where an award of sequestration is made on a petition for sequestration presented by a creditor before the approval of the debt payment programme.

- 8–22 Thus, it may be seen that notwithstanding the policy intention to encourage the use of the debt arrangement scheme as an alternative to sequestration, sequestration may always be awarded where the petition for sequestration preceded the application for a debt payment programme.

⁸⁹ Debt Arrangement and Attachment (Scotland) Act 2002 s.4(3), (5), discussed further in Chs 7 and 21.

⁹⁰ *Accountant in Bankruptcy, Petitioner* unreported 12 November 2014 Edinburgh Sheriff Court.

CONCURRENT PROCEEDINGS

In order to try to avoid multiple awards of sequestration or other analogous remedies with the attendant problems this would bring,⁹¹ the legislation imposes a duty on specified parties to disclose to the court or AiB (as the case may be) the existence of specified circumstances and makes provision for dealing with those circumstances where they arise. 8-23

It is therefore provided that if, in the course of sequestration proceedings (subsequently referred to as the instant proceedings), a petitioner for sequestration, the debtor or a creditor concurring in a debtor application for sequestration is or becomes aware of specified circumstances, that person must as soon as may be notify the circumstances to the sheriff to whom the petition was presented (in the case of a petition for sequestration) or AiB (in the case of debtor application).⁹² What is meant by “in the course of sequestration proceedings” is not defined, but it is thought that in the light of the options which are available in cases where the relevant circumstances exist, which are discussed further below, the duty to notify can apply only up to the point where sequestration is awarded. 8-24

The specified circumstances are that, notwithstanding the instant proceedings: 8-25

- (a) a petition for sequestration of the debtor’s estate is before a sheriff⁹³;
- (b) an award of sequestration on such a petition has been made⁹⁴;
- (c) a debtor application has been made in relation to the debtor’s estate⁹⁵;
- (d) an award of sequestration on such an application has been made⁹⁶;
- (e) a petition for the appointment of a judicial factor on the debtor’s estate is before a court⁹⁷;
- (f) a judicial factor on the debtor’s estate has been appointed⁹⁸;
- (g) a petition for the winding up of the debtor under Pts 4 or 5 of the Insolvency Act 1986 or s.372 of the Financial Services and Markets Act 2000 is before a court⁹⁹;
- (h) an application for an analogous remedy in respect of the debtor’s estate is proceeding.¹⁰⁰ For this purpose, “analogous remedy” is defined as: (i) in relation to England and Wales, an individual voluntary arrangement or bankruptcy order under the Insolvency Act 1986, an administration order under s.112 of the County Courts Act 1984 or a remedy having the like effect to either of those or to sequestration¹⁰¹; and (ii) in relation to Northern Ireland or any other country, a remedy having the like effect to any of the aforesaid¹⁰²; and
- (i) an analogous remedy is in force.¹⁰³

⁹¹ For an example of the difficulties, see *Stewart v Auld* (1851) 13 D. 1337, which involved concurrent Scottish and Australian sequestrations.

⁹² Bankruptcy (Scotland) Act 2016 s.17(1), (3).

⁹³ Bankruptcy (Scotland) Act 2016 s.17(2)(a).

⁹⁴ Bankruptcy (Scotland) Act 2016 s.17(2)(b).

⁹⁵ Bankruptcy (Scotland) Act 2016 s.17(2)(c).

⁹⁶ Bankruptcy (Scotland) Act 2016 s.17(2)(d).

⁹⁷ Bankruptcy (Scotland) Act 2016 s.17(2)(e).

⁹⁸ Bankruptcy (Scotland) Act 2016 s.17(2)(f).

⁹⁹ Bankruptcy (Scotland) Act 2016 s.17(2)(g).

¹⁰⁰ Bankruptcy (Scotland) Act 2016 s.17(2)(h).

¹⁰¹ Bankruptcy (Scotland) Act 2016 s.17(8)(a).

¹⁰² Bankruptcy (Scotland) Act 2016 s.17(8)(b).

¹⁰³ Bankruptcy (Scotland) Act 2016 s.17(2)(i).

8-26 A petitioner for sequestration who fails to comply with their obligations under these provisions may be made liable for the expenses of presenting the petition for sequestration,¹⁰⁴ while a debtor who fails to do so is guilty of an offence and liable to a fine¹⁰⁵ and a creditor concurring in a debtor application for sequestration who fails to do so may be made liable for the expenses of making the debtor application.¹⁰⁶

8-27 The provisions for dealing with the various circumstances differ somewhat. It is provided that:

- (1) where the instant proceedings are by way of a petition for sequestration and any of the circumstances set out above other than those relating to analogous remedies exist, the sheriff to whom the petition was presented may, either *ex proprio motu* or at the instance of the debtor, any creditor or any other person having an interest, allow the petition to proceed or sist or dismiss it¹⁰⁷;
- (2) without prejudice to that provision, where the instant proceedings are by way of a petition for sequestration and any of the circumstances set out above other than those relating to debtor applications and analogous remedies exist, the Court of Session may, either *ex proprio motu* or at the instance of the debtor, any creditor or any other person having an interest, direct the sheriff before whom any of the petitions is pending to sist or dismiss that petition or may order the petitions to be heard together¹⁰⁸;
- (3) also without prejudice to that provision, where the instant proceedings are by way of a petition for sequestration and either a debtor application has been made in relation to the debtor's estate or an award of sequestration on such an application has been made, the sheriff to whom the petition was presented may, either *ex proprio motu* or at the instance of the debtor, any creditor or any other person having an interest, direct AiB to dismiss the debtor application.¹⁰⁹ Where the sheriff makes such a direction in a case where sequestration has already been awarded on the debtor application, AiB must recall that award of sequestration¹¹⁰ and send a certified copy of the recall decision to the keeper of the register of inhibitions and adjudications for recording in that register without delay.¹¹¹ The effect of the recall is to restore, so far as practicable, the debtor and any other person affected by the sequestration to the position they would have been in had the sequestration not been awarded.¹¹² It does not, however, affect the interruption of the running of prescription which flows from the presentation of a petition for sequestration, the making of a debtor application or the submission of a claim in the sequestration or invalidate any transaction entered into before the recall by the trustee or any interim trustee with a person acting in

¹⁰⁴ Bankruptcy (Scotland) Act 2016 s.17(4).

¹⁰⁵ Bankruptcy (Scotland) Act 2016 s.17(5) and (6).

¹⁰⁶ Bankruptcy (Scotland) Act 2016 s.17(7).

¹⁰⁷ Bankruptcy (Scotland) Act 2016 s.18(1).

¹⁰⁸ Bankruptcy (Scotland) Act 2016 s.18(2).

¹⁰⁹ Bankruptcy (Scotland) Act 2016 s.18(3).

¹¹⁰ Bankruptcy (Scotland) Act 2016 s.18(4).

¹¹¹ Bankruptcy (Scotland) Act 2016 s.18(7).

¹¹² Bankruptcy (Scotland) Act 2016 s.18(5).

- good faith or affect any bankruptcy restrictions order which has not been annulled¹¹³;
- (4) where the instant proceedings are by way of a debtor application and any of the circumstances set out above other than those relating to analogous remedies exist, AiB may dismiss the debtor application¹¹⁴;
 - (5) where a petition for sequestration is pending before a sheriff and an application for an analogous remedy in respect of the same estate is proceeding or an analogous remedy is in force, the sheriff may, either *ex proprio motu* or at the instance of the debtor, any creditor or any other person having an interest, allow the petition to proceed or sist or dismiss it¹¹⁵; and
 - (6) where a debtor application for sequestration has been made but not determined and an application for an analogous remedy in respect of the same estate is proceeding or an analogous remedy is in force, AiB may proceed to determine the application or may dismiss it.¹¹⁶

In all cases, the decision as to how to proceed is a matter of discretion. It has been said that the guiding principle in the exercise of that discretion is what, in the interests of the creditors, is the most convenient and least expensive mode of procedure.¹¹⁷ Where there is an existing award of sequestration, the extent to which progress has been made in that sequestration is also a relevant factor in the exercise of the discretion.¹¹⁸ Preference may be given to existing foreign proceedings in an appropriate case.¹¹⁹ 8-28

SEQUESTRATION NOT TO FALL ASLEEP

It is provided that where sequestration has been awarded, the process of sequestration shall not fall asleep.¹²⁰ This provision is effectively redundant, however, since there is no longer provision for a court process to fall asleep. 8-29

TRANSFER OF SEQUESTRATION

Where sequestration is awarded, the sheriff may at any time thereafter transfer the sequestration to any other sheriff on an application being made to them.¹²¹ The persons who may make such an application and the grounds on which such an application may be made are not specified. The debtor may appeal to the Sheriff Appeal Court against a decision to transfer the sequestration but only with the leave of the sheriff.¹²² 8-30

¹¹³ Bankruptcy (Scotland) Act 2016 s.18(6).

¹¹⁴ Bankruptcy (Scotland) Act 2016 s.18(8).

¹¹⁵ Bankruptcy (Scotland) Act 2016 s.18(9) and (10).

¹¹⁶ Bankruptcy (Scotland) Act 2016 s.18(11) and (12).

¹¹⁷ See *Fletcher v Anderson*, 1883 10 R. 835 at 837; *P & W Duncan, Petitioners*, 1936 S.L.T. 162.

¹¹⁸ See, for example, *Fletcher v Anderson*, 1883 10 R. 835; *Welsh v Hourston*, 1914 2 S.L.T. 333. Both cases were concerned with recall of sequestration but the principle applies equally in this context.

¹¹⁹ See *Goetze v Aders* (1874) 2 R. 150; *Gibson v Munro* (1894) 21 R. 840.

¹²⁰ Bankruptcy (Scotland) Act 2016 s.27(12).

¹²¹ Bankruptcy (Scotland) Act 2016 s.27(1).

¹²² Bankruptcy (Scotland) Act 2016 s.27(2). (3). The procedure in relation to such an appeal is set out in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.10.1.

DATE OF SEQUESTRATION

- 8–31** Where sequestration is awarded, the date of sequestration is of critical importance since many of the effects of sequestration and many time limits are linked to it.
- 8–32** In the case of a debtor application, the date of sequestration is the date on which sequestration is awarded.¹²³
- 8–33** In the case of a petition presented by a creditor or a trustee acting under a trust deed, the date of sequestration is the date on which warrant to cite the debtor was granted or, if there is more than one warrant to cite, the date on which the first warrant to cite is granted.¹²⁴ Curiously, there is no specific provision defining the date of sequestration where a petition for sequestration is presented by someone other than a creditor or a trustee acting under a trust deed. As referred to at para.8–18, the fact that the date of sequestration is defined in this way can cause difficulties where there is a delay in making an award of sequestration, particularly in relation to time limits. One solution to this would be to change the date from which a time limit runs from the date of sequestration to another date, such as the date on which the award of sequestration is made,¹²⁵ and this was done in the case of the time limit for the calling of the statutory meeting.¹²⁶ Another solution would be to change the definition of the date of sequestration itself. Such an approach has been considered previously but not implemented. Various changes to the definition of the date of sequestration were proposed during the passage of the Bill which became the Bankruptcy (Scotland) Act 1993, but these were not ultimately accepted.¹²⁷ In its *Consultation on Bankruptcy Law Reform* in 2012, the Scottish Government acknowledged the difficulties caused by the current definition and sought views on whether it should be changed to make the date of sequestration the date on which sequestration was awarded in all cases or, if not, whether the debtor's discharge in particular should be linked to the date of the award rather than the date of sequestration.¹²⁸ The majority of consultees were in favour of

¹²³ Bankruptcy (Scotland) Act 2016 s.22(7)(a).

¹²⁴ Bankruptcy (Scotland) Act 2016 s.22(7)(b). The provision makes clear that where there is more than one warrant to cite, the date of sequestration is the date of the first such warrant. Specific provision to this effect was originally added to the Bankruptcy (Scotland) Act 1985 by amendment by the Bankruptcy (Scotland) Act 1993 following confusion on the point in case law. In the case of *Campbell v Sheriff*, 1991 S.L.T. (Sh Ct) 37, Sheriff Kelbie had expressed the view that where a second warrant to cite was granted and sequestration was subsequently awarded on the date of the hearing specified in that warrant, the date of sequestration would be the date of the second warrant to cite rather than the first warrant to cite. AiB, in a paper entitled *Date of Sequestration—“Re-Service Cases”* (August 1991), referred to in *Sutherland v Lord Advocate*, 1999 S.C. 104, argued to the contrary that in such a case, the date of sequestration remained the date of the first warrant to cite, and the same view was expressed by Sheriff Principal Hay in *MacDonald's Trustee v MacDonald*, 1992 S.L.T. (Sh Ct) 25. In *Arthur v HM Advocate*, 1994 S.L.T. 244, the High Court of Justiciary held that the views of AiB and Sheriff Principal Hay was to be preferred to that of Sheriff Kelbie. The Bankruptcy (Scotland) Act 1993 subsequently clarified the position on the face of the legislation. The decision in *Arthur v HM Advocate* was subsequently approved by the Inner House in *Sutherland v Lord Advocate*, 1999 S.C. 104.

¹²⁵ This is, of course, the same as the date of sequestration in the case of a debtor application.

¹²⁶ See change made to s.21A(2) of the Bankruptcy (Scotland) Act 1985 (now s.44(3) of the Bankruptcy (Scotland) Act 2016) by the Bankruptcy and Diligence etc. (Scotland) Act 2007. The statutory meeting is discussed further below.

¹²⁷ See McBryde's annotations to the Bankruptcy (Scotland) Act 1993 at s.4.

¹²⁸ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), paras 14.10.1–14.10.4.

the proposed changes¹²⁹ but they were not specifically mentioned in the Scottish Government's response to the consultation, and ultimately the Bankruptcy and Debt Advice (Scotland) Act 2014 did not change the definition of the date of sequestration although it did make provision for the debtor's discharge to be linked to the date of the award of sequestration rather than the date of sequestration.¹³⁰ It has been said that there are merits in the existing provisions which should not be changed except after full consideration.¹³¹ Given that the definition remains as it is, it is suggested that in dealing with petitions for sequestration, sheriffs should always bear in mind the reasons for the summary nature of sequestration proceedings and ensure that any delay in awarding sequestration is kept to the minimum necessary in order to avoid the difficulties which such delay can cause.

The date of sequestration is determined by the terms of the statute and cannot be altered.¹³² **8–34**

It has been held that the sequestration commences at the first moment of the date of sequestration.¹³³ **8–35**

REGISTRATION OF WARRANT TO CITE OR DETERMINATION OF DEBTOR APPLICATION

Debtor applications

Where AiB awards sequestration on a debtor application, they must forthwith after the date of sequestration send a certified copy of the determination to the keeper of the register of inhibitions and adjudications for recording in that register.¹³⁴ **8–36**

Petitions for sequestration

Where the sheriff grants warrant to cite the debtor in a petition for sequestration by a creditor or trustee under a trust deed, the sheriff clerk must forthwith send a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register,¹³⁵ a copy of the order to AiB¹³⁶ and, where the debtor is taking part in a debt payment programme, a copy to the order to the debt arrangement scheme administrator.¹³⁷ Where there is more than one warrant to cite, this provision applies only to the first.¹³⁸ Curiously, there are no corresponding provisions in the case of a petition by someone other than a creditor or trustee under a trust deed. **8–37**

¹²⁹ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), paras 9.29–9.31.

¹³⁰ The debtor's discharge is discussed further in Ch.17.

¹³¹ See McBryde's annotations to the Bankruptcy (Scotland) Act 1993 at s.4.

¹³² *Accountant in Bankruptcy v Allans of Gillock*, 1991 S.L.T. 765.

¹³³ *Cook's Trustee, Petitioner*, 1985 S.L.T. 33. The case was decided under the Bankruptcy (Scotland) Act 1913, but the reasoning applies equally to the current legislation.

¹³⁴ Bankruptcy (Scotland) Act 2016 s.26(2). The certified copy is in Form 9 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016 and may be sent to the keeper electronically: Bankruptcy (Scotland) Regulations 2016 reg.12(6), (7).

¹³⁵ Bankruptcy (Scotland) 2016 s.26(1)(a).

¹³⁶ Bankruptcy (Scotland) Act 2016 s.26(1)(b).

¹³⁷ Bankruptcy (Scotland) Act 2016 s.26(1)(c).

¹³⁸ Bankruptcy (Scotland) Act 2016 s.26(1), which refers to the granting of a warrant to cite under s.22(3), which is the first warrant to cite.

- 8–38 Where sequestration is subsequently awarded, the Bankruptcy (Scotland) Act 2016 does not contain any provision for a copy of the order awarding sequestration to be sent for recording in the register, to AiB or (where relevant) to the debt arrangement scheme administrator. It does, however, make provision for the case where sequestration is refused. It is provided that on the final determination or abandonment of any appeal against the refusal of sequestration or, if there is no such appeal, within the period of 14 days allowed for the making of such an appeal, the sheriff clerk must send a certified copy of the order refusing to award sequestration to the keeper of the register of inhibitions and adjudications for recording in that register¹³⁹ and must send forthwith a copy of that order to AiB¹⁴⁰ and, if the debtor is taking part in a debt payment programme, to the debt arrangement scheme administrator.¹⁴¹ These provisions do not, however, mirror exactly the corresponding provisions of the Bankruptcy (Scotland) Act 1985. Under s.15(5) of the Bankruptcy (Scotland) Act 1985, it was provided that if there was no appeal against a refusal of sequestration, the sheriff clerk was required to send a certified copy of the order refusing to award sequestration to the keeper of the register of inhibitions and adjudications on the *expiry* of the period of 14 days allowed for the making of such an appeal. Furthermore, under that provision, the sheriff clerk was required to send a copy of the order refusing *or awarding* sequestration to AiB and, where relevant, to the debt arrangement scheme administrator. There is, therefore, a significant difference in the requirements.

Effect of recording of warrant to cite or determination of debtor application

- 8–39 The recording of AiB's determination or the warrant to cite (as the case may be) has the effect as from the date of sequestration of an inhibition and a citation in an adjudication of the debtor's heritable estate at the instance of the creditors who subsequently have claims accepted in the sequestration.¹⁴² This effect expires at the end of the period of three years beginning with the date of sequestration or on the earlier recording of a certified copy of an order of the sheriff refusing to award sequestration *or* recalling the sequestration or a certified copy of a decision of AiB recalling an award of sequestration under specified provisions.¹⁴³ Where sequestration has not been refused or recalled, however, the effect may be renewed. The trustee, if not discharged, may send a memorandum in the prescribed form to the keeper of the register of inhibitions and adjudications for recording in that register before the end of the original three year period from the date of sequestration or the end of the period of any earlier renewal as the case may be, and the recording of that memorandum renews the effect for a further period of three years from the expiry of the original three year period from the date of sequestration or the expiry of the period of the earlier renewal as appropriate.¹⁴⁴ There is conflicting authority as to whether a failure to send such a memorandum timeously can be remedied under the statutory provisions relating to the power to cure defects in procedure. In *Tewnion's*

¹³⁹ Bankruptcy (Scotland) Act 2016 s.27(11)(a).

¹⁴⁰ Bankruptcy (Scotland) Act 2016 s.27(11)(b)(i).

¹⁴¹ Bankruptcy (Scotland) Act 2016 s.27(11)(b)(ii).

¹⁴² Bankruptcy (Scotland) Act 2016 s.26(3).

¹⁴³ Bankruptcy (Scotland) Act 2016 s.26(4). Refusal of sequestration is discussed above and at para.8–43 onwards; as to recall of sequestration, see further Ch.9.

¹⁴⁴ Bankruptcy (Scotland) Act 2016 s.26(5), (6) and (7). The prescribed form is Form A in the Appendix to Sch.2 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.1.4(2) and Sch.2, para.1 and 2(1).

*Trustee, Noter*¹⁴⁵ and *Roy's Trustee, Noter*,¹⁴⁶ it was held that an application under s.63 of the Bankruptcy (Scotland) Act 1985 requesting the court to allow the trustee to send such a memorandum late was incompetent. In *Fraser's Trustee, Noter*,¹⁴⁷ however, the sheriff distinguished these cases and held that it was within his power to authorise the trustee to send a document having the effect of a memorandum to the keeper and to authorise the keeper to receive and record it, albeit on the basis that it would have effect only in relation to the remainder of the period of three years for which the renewal took effect and not for any part of the period when the original effect had expired.¹⁴⁸

The Bankruptcy (Scotland) Act 2014 introduced additional provisions to deal with the situation where a trustee in sequestration had been discharged but a new trustee was subsequently appointed or the discharged trustee was re-appointed under the provisions for appointment of a trustee on the discovery of newly identified estate introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007.¹⁴⁹ In such a case, the new or re-appointed trustee may send a memorandum in the prescribed form to the keeper of the register of inhibitions and adjudications for recording in that register at any time before the expiry of his appointment.¹⁵⁰ The recording of that memorandum has the effect of an inhibition and a citation in an adjudication of the debtor's heritable estate at the instance of the creditors who subsequently have claims accepted in the sequestration for a period of three years beginning with the date of notification to the debtor and any other interested party by AiB of their intention to make an appointment under the provisions for appointment of a trustee on the discovery of newly identified estate.¹⁵¹ It does not appear to be possible to renew the effect in this case: there is no specific provision allowing renewal in this case and the provisions for renewal discussed above do not encompass renewal on the expiry of the three year period in this case. Presumably, it was thought that there would in practice be no need for renewal.

In the case of *Fortune's Trustee v Medwin Investments Ltd*,¹⁵² the effect of these provisions was described as follows (the references being to the corresponding provisions of the Bankruptcy (Scotland) Act 1985):

"Where the trustee has not completed title [to the debtor's heritage], and the title remains in the name of the debtor, the effect of sec. 14(2) is to put all the world on notice of the sequestration, and thus of the impediment that the trustee in sequestration has a personal right to the property in question. An individual with such knowledge is no longer entitled in

¹⁴⁵ *Tewnion's Trustee, Noter*, 2000 S.L.T. (Sh Ct) 37.

¹⁴⁶ *Roy's Trustee, Noter*, 2000 S.L.T. (Sh Ct) 77.

¹⁴⁷ *Fraser's Trustee, Noter*, 2011 G.W.D. 27-604 and also available on the Scottish Courts website.

¹⁴⁸ See also *Fortune's Trustee v Medwin Investments Ltd* [2016] CSIH 49, where reference is made to a similar course of action having been adopted in the sequestration at issue in that case, albeit in somewhat different circumstances where there had also been an omission to send the original warrant to cite for recording which was discovered only when the trustee sent the memorandum for renewal to the keeper. The court did not, however, comment on the validity or otherwise of this course of action.

¹⁴⁹ As to the provisions for appointment of a trustee on the discovery of newly identified estate, see further Ch.18.

¹⁵⁰ Bankruptcy (Scotland) Act 2016 s.26(8). The prescribed form is Form B in the Appendix to Sch.2 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.1.4(2) and Sch.2, paras 1 and 2(2).

¹⁵¹ Bankruptcy (Scotland) Act 2016 s.26(9).

¹⁵² *Fortune's Trustee v Medwin Investments Ltd* [2016] CSIH 49.

safety to rely on the face of the register. Where recording in terms of sec. 14(2) has taken effect, a trustee will not require to prove actual knowledge of the impediment on the part of a third party in order to challenge any transaction. The knowledge is effectively deemed by operation of statute, as a consequence of the sequestration. Once the effect of sec. 14(2) has expired, such individuals are no longer deemed to have that knowledge, and transactions with such individuals cannot be challenged merely on the basis of the sequestration. However, the fact that the effect of sec. 14(2) has expired does not affect individuals who, as a matter of fact, have knowledge of the trustee's prior personal right. Such an individual is not entitled to rely on the expiry of public notification of the sequestration to transact with the debtor to the prejudice of the trustee and the creditors."¹⁵³

- 8-42** The court in that case dismissed an argument that the transactions at issue were not challengeable under s.44(4)(c) of the Conveyancing (Scotland) Act 1924, which provides in broad terms that no deed granted by a sequestrated debtor in relation to heritage belonging to them at the date of sequestration is to be challengeable or denied effect on the ground of the sequestration where the trustee has not taken title to the heritage and the effect of recording has expired and not been renewed. The court said that that provision did not entitle a person who had actual knowledge of the sequestration to transact with the debtor in relation to the sequestrated estate in such a way as to deprive the trustee of their rights: it could not have been the intention of Parliament under that section to grant immunity to a deed in favour of a party who had actual knowledge of the fact of sequestration and the vesting of the estate in the trustee for the benefit of the creditors of the debtor.¹⁵⁴ The result is that where the trustee has not taken title to heritage and the effect of recording has expired and not been renewed, the debtor will be able to give a good title to that heritage where the recipient has no actual knowledge of the sequestration but not where the recipient has such knowledge.

REFUSAL TO AWARD SEQUESTRATION

- 8-43** Where sequestration is refused, the provisions for challenging that decision vary depending on whether the decision is made following a debtor application or a petition for sequestration.

Debtor applications

- 8-44** Where AiB refuses to award sequestration, the debtor or a creditor concurring in the debtor application may apply to AiB for review of the decision within 14 days beginning with the day on which sequestration is refused.¹⁵⁵ AiB must without delay send a copy of the review application to the debtor or creditor concurring in the debtor application (where that person is not the applicant) and any other interested person¹⁵⁶ and advise the persons so notified that they

¹⁵³ *Fortune's Trustee v Medwin Investments Ltd* [2016] CSIH 49, per the Lord Justice Clerk at [25]–[27].

¹⁵⁴ *Fortune's Trustee v Medwin Investments Ltd* [2016] CSIH 49, at [28]–[29].

¹⁵⁵ Bankruptcy (Scotland) Act 2016 s.27(5). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(a).

¹⁵⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3)(a).

have the right to make representations within 21 days of the day the application was made.¹⁵⁷ Any such representations must be made in writing.¹⁵⁸

In determining an application for review, AiB must take account of any representations made by an interested party within the 21 day period¹⁵⁹ and must confirm the refusal to award sequestration or award sequestration within the period of 28 days beginning with the day the application is made.¹⁶⁰ AiB must notify the debtor, a creditor concurring in the debtor application and any other interested party of the decision.¹⁶¹ Where AiB confirms the decision to refuse to award sequestration, the debtor or a creditor concurring in the debtor application may appeal that decision to the sheriff within 14 days beginning with the day of the confirmation.¹⁶² Where the sheriff on such an appeal considers that sequestration should be awarded, the result will be a direction to AiB to award sequestration. **8-45**

Where sequestration is ultimately awarded as a result of either an application for review or any subsequent appeal, the provisions for determining the date of sequestration and for registration of the award of sequestration will apply in the same way as discussed above. **8-46**

Petitions for sequestration

The petitioner may appeal against a decision to refuse to award sequestration within 14 days after the date of the making of the order.¹⁶³ The appeal is to the Sheriff Appeal Court and must be made in accordance with Ch.6 of the Sheriff Appeal Court Rules.¹⁶⁴ **8-47**

Where sequestration is awarded following an appeal, the provisions for determining the date of sequestration will apply in the same way as discussed above. **8-48**

PROCEDURE FOLLOWING AWARD OF SEQUESTRATION

Notification of award of sequestration and appointment of trustee

In the case of a debtor application, as noted above, AiB must enter details of the sequestration in the register of insolvencies and notify the debtor in writing **8-49**

¹⁵⁷ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3)(b).

¹⁵⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(4).

¹⁵⁹ Bankruptcy (Scotland) Act 2016 s.27(7)(a).

¹⁶⁰ Bankruptcy (Scotland) Act 2016 s.27(7)(b).

¹⁶¹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹⁶² Bankruptcy (Scotland) Act 2016 s.27(8). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(2)(a). The appeal must be made in Form 9.1 in Sch.1 of the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) r.9.1. Rule 9.2 requires the appellant to lodge a copy of the debtor application where the appeal relates to "an AiB sequestration". Strictly speaking, if an award of sequestration has been refused, there is no sequestration, but it is suggested that a copy of the debtor application should be lodged where available. The sheriff may order such intimation and such further procedure in the appeal as he thinks appropriate: r.9.3.

¹⁶³ Bankruptcy (Scotland) Act 2016 s.27(4).

¹⁶⁴ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 rr.10.1(1)(b), 10.1(2). The Sheriff Appeal Court Rules means the Act of Sederunt (Sheriff Appeal Court Rules) 2015: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.10.1(6)(a). For the provisions for giving notice of the appeal, see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.10.1(3)-(5).

of the making of the award of sequestration¹⁶⁵ and send a certified copy of the determination awarding sequestration to the keeper of the register of inhibitions and adjudications for recording in that register.¹⁶⁶ There appears to be no formal requirement to notify the person appointed as trustee where this is someone other than AiB.

- 8–50** In the case of a petition for sequestration, as noted above, the sheriff clerk must send a certified copy of the (first) warrant to cite to the keeper of the register of inhibitions and adjudications for recording in that register,¹⁶⁷ a copy of it to AiB¹⁶⁸ and, where the debtor is taking part in a debt payment programme, a copy of it to the debt arrangement scheme administrator,¹⁶⁹ but in contrast to the Bankruptcy (Scotland) Act 1985, there is no provision in the Bankruptcy (Scotland) Act 2016 for a copy of the order awarding sequestration to be sent to AiB or, where relevant, to the debt arrangement scheme administrator. AiB will therefore be able to enter the date of the first warrant to cite in the register of insolvencies in accordance with the statutory provisions regulating that register, but absent receiving a copy of the order awarding sequestration, it is not clear how they will be able to enter the date of award of sequestration in the register in accordance with those provisions, unless they are appointed trustee.¹⁷⁰ The sheriff clerk must also, without delay, intimate their appointment as trustee in sequestration to the person so appointed and to AiB if they are not the trustee.¹⁷¹ The trustee must then notify the debtor of their appointment as soon as practicable.¹⁷² Prior to changes introduced by the Home Owner and Debtor Protection (Scotland) Act 2010, the trustee was also required to publish a notice in the *Edinburgh Gazette*, but this requirement was repealed by the Home Owner and Debtor Protection (Scotland) Act 2010.¹⁷³

Debtor's statement of undertakings

- 8–51** The Bankruptcy and Debt Advice (Scotland) Act 2014 introduced a requirement for the debtor to sign a statement of undertakings. The rationale for this was to ensure that the debtor is aware of the debtor's duties and obligations following sequestration since failure to comply with these may affect the debtor's ability to obtain a discharge.¹⁷⁴
- 8–52** In the case of a debtor application, the statement of undertakings must be submitted with the application for sequestration and, in fact, forms part of the debtor application.¹⁷⁵ In the case of a petition for sequestration by a creditor or the trustee acting under a trust deed, the trustee must at the same time as

¹⁶⁵ Bankruptcy (Scotland) Regulations 2016 reg.12(3), (4).

¹⁶⁶ Bankruptcy (Scotland) Act 2016 s.26(2).

¹⁶⁷ Bankruptcy (Scotland) 2016 s.26(1)(a).

¹⁶⁸ Bankruptcy (Scotland) Act 2016 s.26(1)(b).

¹⁶⁹ Bankruptcy (Scotland) Act 2016 s.26(1)(c).

¹⁷⁰ The register of insolvencies is discussed in Ch.4.

¹⁷¹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.7. The appointment of trustees is discussed in Ch.10.

¹⁷² Bankruptcy (Scotland) Act 2016 s.51(13). The provision applies where the petition was presented by a creditor or the trustee acting under a trust deed; curiously, there is no corresponding provision where the petition is presented by someone else.

¹⁷³ Bankruptcy (Scotland) Act 1985 s.15(6), repealed by the Home Owner and Debtor Protection (Scotland) Act 2010 s.12.

¹⁷⁴ See Bankruptcy and Debt Advice (Scotland) Bill Policy Memorandum, SP Bill 34-PM, paras 96–99; Bankruptcy and Debt Advice (Scotland) Act 2014, Explanatory Notes, commentary on s.9. Discharge is discussed further in Ch.17.

¹⁷⁵ See Ch.7.

notifying the debtor of their appointment send the debtor a statement of undertakings in the prescribed form for the debtor to sign.¹⁷⁶ Curiously, there is no corresponding provision in the case of a petition by someone else.

Debtor's statement of assets and liabilities and trustee's statement of affairs

The debtor is required to provide the trustee with a statement of assets and liabilities, which is a document in the prescribed form containing details of the debtor's assets and liabilities, income and expenditure, and other prescribed information.¹⁷⁷ **8-53**

In the case of a debtor application, the statement of assets and liabilities must be submitted with the application for sequestration and, in fact, forms part of the debtor application.¹⁷⁸ Where the trustee is not AiB, the debtor is required to send the same statement as was submitted as part of the debtor application to the trustee not later than seven days after the trustee's appointment.¹⁷⁹ **8-54**

In the case of a petition for sequestration by a creditor or the trustee acting under a trust deed, the debtor must prepare and send a statement of assets and liabilities to the trustee not later than seven days after having been notified by the trustee of their appointment.¹⁸⁰ There is no statutory requirement for the trustee to advise the debtor of the debtor's obligations in this respect or to send the debtor a copy of the prescribed form, but in practice the trustee will generally do so, and the requirement to complete the form is also referred to in the statement of undertakings which the trustee must send to the debtor when they notify the debtor of their appointment.¹⁸¹ Curiously, there is no corresponding provision in the case of a petition by someone else. **8-55**

If the debtor fails to disclose any material fact or makes a material misstatement in the statement of assets and liabilities sent to the trustee, they are guilty of an offence and liable to a fine or imprisonment or both.¹⁸² However, it is a defence for the debtor to show that they had a reasonable excuse for the failure to disclose or misstatement.¹⁸³ Prior to changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014, it was also an offence for the debtor to fail to send the statement of assets and liabilities to the trustee as required, subject to the defence that the debtor had a reasonable excuse for the failure, but these provisions were repealed by the Bankruptcy and Debt Advice (Scotland) Act 2014. **8-56**

On receipt of the statement of assets and liabilities the trustee must, as soon as practicable, prepare a statement of the debtor's affairs so far as within their knowledge.¹⁸⁴ Where they form the view that the debtor's assets are unlikely to **8-57**

¹⁷⁶ Bankruptcy (Scotland) Act 2016 s.51(14). The prescribed form for the statement of undertakings is Form 13 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.3.

¹⁷⁷ See Bankruptcy (Scotland) Act 2016 s.228(1).

¹⁷⁸ See Ch.7.

¹⁷⁹ Bankruptcy (Scotland) Act 2016 s.41(1).

¹⁸⁰ Bankruptcy (Scotland) Act 2016 s.41(2). In this case, the prescribed form for the statement of assets and liabilities is Form 4 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.

¹⁸¹ See para.8-52.

¹⁸² Bankruptcy (Scotland) Act 2016 s.41(3), (4).

¹⁸³ Bankruptcy (Scotland) Act 2016 s.41(5).

¹⁸⁴ Bankruptcy (Scotland) Act 2016 s.42(1)(a).

be sufficient to pay any dividend to any class of creditors from the preferred creditors downwards, they must say so in the statement of affairs.¹⁸⁵

- 8–58** Where the trustee is not AiB, they must send to AiB the debtor's statement of assets and liabilities (unless it has already been received by the AiB as part of the debtor application); a copy of the statement of the debtor's affairs (unless the trustee has already made up an inventory and valuation of the debtor's estate and sent it to AiB); and their comments on what, in their opinion, are causes of the debtor's insolvency and the extent to which the debtor's conduct may have contributed to it (which are absolutely privileged).¹⁸⁶ The trustee must send the relevant documents to AiB not later than four days before the date fixed for the statutory meeting or, if the trustee does not intend to hold the statutory meeting, not later than 60 days after the date on which sequestration was awarded.¹⁸⁷

Statutory meeting

- 8–59** The statutory meeting,¹⁸⁸ where held, is the first meeting of creditors in the sequestration. It is an opportunity for the creditors to meet, to exchange information and to confirm the appointment of the trustee appointed on the award of sequestration or choose a replacement trustee.

Calling of statutory meeting

- 8–60** Prior to the changes brought about by the Bankruptcy (Scotland) Act 1993, it was necessary to hold the statutory meeting in every case.¹⁸⁹ Following the changes brought about by that Act, however, this was no longer the case. It remained necessary to hold the statutory meeting where the interim trustee (as the trustee appointed on the making of the award of sequestration then was) was not AiB, but where the interim trustee was AiB, they could decide whether or not to hold the statutory meeting, subject to the proviso that where they had decided not to do so, they could be required to do so where not less than one quarter in value of the creditors requested it.¹⁹⁰ Following further changes by the Bankruptcy and Diligence etc. (Scotland) Act 2007, it became optional to hold the statutory meeting in every case: the decision as to whether or not to hold the statutory meeting is a matter for the trustee appointed on the award of sequestration, subject to the proviso that where they decide not to hold the statutory meeting, they can be required to do so where not less than one quarter in value of the creditors request them to do so.¹⁹¹

- 8–61** The trustee must give notice of whether or not they intend to call the statutory meeting to every creditor known to them not later than 60 days after the date on which sequestration is awarded or such longer period as the sheriff may allow on cause shown.¹⁹² The notice must be accompanied by a copy of the trustee's statement of the debtor's affairs.¹⁹³ Where the trustee does not intend to call the statutory meeting, it must also advise the creditors that within seven

¹⁸⁵ Bankruptcy (Scotland) Act 2016 s.42(1)(b). The ranking of creditors is discussed in Ch.16.

¹⁸⁶ See Bankruptcy (Scotland) Act 2016 s.42(2), (3), (4), (5), (6).

¹⁸⁷ Bankruptcy (Scotland) Act 2016 s.42(2). The statutory meeting is discussed at para.8–59 onwards.

¹⁸⁸ See Bankruptcy (Scotland) Act 2016 ss.43, 44.

¹⁸⁹ Bankruptcy (Scotland) Act 1985 s.21(1) as enacted.

¹⁹⁰ See Bankruptcy (Scotland) Act 1985 ss.20A, 21 and 21A as added/amended by the Bankruptcy (Scotland) Act 1993.

¹⁹¹ See now Bankruptcy (Scotland) Act 2016 s.44(1) and (6).

¹⁹² Bankruptcy (Scotland) Act 2016 s.44(3).

¹⁹³ Bankruptcy (Scotland) Act 2016 s.44(4)(a).

days of the giving of the notice, any creditor may request the trustee to call the meeting, and that where not less than one quarter in value of the creditors request them to do so, the trustee must call the statutory meeting no later than 28 days after the giving of the notice or such longer period as the sheriff may allow on cause shown.¹⁹⁴ Where the trustee does intend to hold the statutory meeting, the meeting must be called not later than 28 days after the giving of the notice.¹⁹⁵ Subject to these provisions, the statutory meeting may be held at such time and place as the trustee decides.¹⁹⁶

Where the statutory meeting is to be held, the trustee must notify every creditor known to them of the date, time and place of the meeting not less than seven days before the date of the meeting.¹⁹⁷ The notice must invite the submission of such creditors' claims as have not already been submitted and inform the creditors of some of the trustee's duties at the meeting.¹⁹⁸ **8-62**

Procedure at statutory meeting

The trustee acts as chairperson at the commencement of the meeting.¹⁹⁹ As chairperson, they must first accept or reject, in whole or in part, each claim which has been submitted to them for the purpose of determining the creditors' entitlement to vote at the meeting.²⁰⁰ They must then invite the creditors to elect one of their number as chairperson and preside over the subsequent election, if any.²⁰¹ If no new chairperson is elected, the trustee remains chairperson throughout the meeting.²⁰² The trustee must also arrange for a record of the meeting to be kept.²⁰³ **8-63**

Following this, the trustee must make available the debtor's statement of assets and liabilities and their own statement of the debtor's affairs²⁰⁴ and answer any questions to the best of their ability.²⁰⁵ They must also consider any representations put to them by the creditors relating to the debtor's assets and business or financial affairs, or to the debtor's conduct in relation to such assets and affairs,²⁰⁶ and after considering any such representations, if they form the opinion that the debtor's assets are unlikely to be sufficient to pay any dividend to any class of creditors from the preferred creditors downwards, they must indicate this to the meeting.²⁰⁷ The trustee must also decide whether it is necessary to revise their statement of the debtor's affairs²⁰⁸ and, if they decide that it is, they must do so either at, or as soon as possible after, the meeting²⁰⁹ and **8-64**

¹⁹⁴ Bankruptcy (Scotland) Act 2016 s.44(4)(b), (5) and (6).

¹⁹⁵ Bankruptcy (Scotland) Act 2016 s.44(7).

¹⁹⁶ Bankruptcy (Scotland) Act 2016 s.44(1).

¹⁹⁷ Bankruptcy (Scotland) Act 2016 s.44(8)(a).

¹⁹⁸ Bankruptcy (Scotland) Act 2016 s.44(8)(b). The submission of claims is discussed in Ch.16; the trustee's duties at the meeting are discussed further at para.8-63 onwards.

¹⁹⁹ Bankruptcy (Scotland) Act 2016 s.48(1).

²⁰⁰ Bankruptcy (Scotland) Act 2016 s.48(1)(a). Where the claim is stated in a foreign currency, the trustee must convert it into sterling in the prescribed manner at the rate of exchange prevailing at the close of business on the date of sequestration: Bankruptcy (Scotland) Act 2016 s.48(1)(a). Claims are dealt with in Ch.16.

²⁰¹ Bankruptcy (Scotland) Act 2016 s.48(1)(b), (c).

²⁰² Bankruptcy (Scotland) Act 2016 s.48(2).

²⁰³ Bankruptcy (Scotland) Act 2016 s.48(1)(d).

²⁰⁴ Bankruptcy (Scotland) Act 2016 s.48(4)(a).

²⁰⁵ Bankruptcy (Scotland) Act 2016 s.48(4)(b).

²⁰⁶ Bankruptcy (Scotland) Act 2016 s.48(4)(c).

²⁰⁷ Bankruptcy (Scotland) Act 2016 s.48(4)(d).

²⁰⁸ Bankruptcy (Scotland) Act 2016 s.48(4)(e).

²⁰⁹ Bankruptcy (Scotland) Act 2016 s.48(4)(f).

send a copy of the revised statement to every creditor known to them as soon as possible after the meeting.²¹⁰

- 8–65** The final part of the meeting is the trustee vote, at which the creditors either confirm the appointment of the trustee or elect another person as replacement trustee.²¹¹ This is discussed further in Ch.10, which deals with the appointment and replacement of trustees generally.
- 8–66** The creditors may continue the statutory meeting to a date not later than seven days after the end of the period for holding the meeting or such longer period as the sheriff may allow on cause shown.²¹²

Procedure where no statutory meeting

- 8–67** Where no statutory meeting is held, and the trustee is not AiB, the trustee must forthwith make a report to AiB on the circumstances of the sequestration.²¹³

²¹⁰ Bankruptcy (Scotland) Act 2016 s.48(5).

²¹¹ Bankruptcy (Scotland) Act 2016 s.49(1).

²¹² Bankruptcy (Scotland) Act 2016 s.44(9).

²¹³ Bankruptcy (Scotland) Act 2016 s.45.

CHAPTER 9

REVIEW OF AWARD OF SEQUESTRATION

INTRODUCTION

There is no provision for an appeal against an award of sequestration. Section 9-01 27 of the Bankruptcy (Scotland) Act 2016 provides that, without prejudice to any right to bring an action of reduction of an award of sequestration, such an award is not subject to review otherwise than by recall of the award of sequestration under specified provisions of the Act.¹ Notwithstanding this, however, it may also be possible in certain circumstances to seek suspension of an award of sequestration or to petition the *nobile officium* of the Court of Session to have the sequestration brought to an end.

This chapter deals with the recall, reduction and suspension of an award of sequestration and petitions to the *nobile officium* of the Court of Session. It also considers the issue of damages for what might be described as wrongful sequestration.

RECALL

Introduction.

The Bankruptcy (Scotland) Act 2016 makes provision for the recall of an 9-02 award of sequestration in specified circumstances.

Prior to the changes brought about by the Bankruptcy and Diligence etc. 9-03 (Scotland) Act 2007, the recall of an award of sequestration was a matter for the Court of Session.² In 2003, however, as part of its proposals for streamlining bankruptcy procedures generally by consolidating all bankruptcy proceedings in the sheriff court with limited exceptions, the Scottish Executive proposed to make recall of an award of sequestration a matter for the sheriff court.³ The majority of consultees were in favour of the proposals⁴ and it was therefore decided to proceed to consolidate all bankruptcy proceedings, including recall, in the sheriff court, with the exception of reduction and suspension of sequestration which would remain matters for the Court of Session.⁵ The Bankruptcy and Diligence etc. (Scotland) Act 2007 accordingly amended the provisions on recall to provide for petitions for recall to be presented in the sheriff court rather than the Court of Session. It also replaced

¹ Bankruptcy (Scotland) Act 2016 s.27(9) and (10).

² Bankruptcy (Scotland) Act 1985 s.16(1) as enacted.

³ See Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 10.3–10.4, 10.6.

⁴ See Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), para.5.62.

⁵ Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), paras 5.62–5.64.

the then existing provisions in the Bankruptcy (Scotland) Act 1985 on concurrent proceedings for sequestration or an analogous remedy⁶ with new provisions which included provision for the recall of sequestration in certain circumstances where there are concurrent proceedings for sequestration or an analogous remedy.⁷ These provisions are now found in s.18 of the Bankruptcy (Scotland) Act 2016 and are discussed in Ch.8 in the context of the discussion of the provisions on concurrent proceedings for sequestration or an analogous remedy as a whole.

- 9–04** Further changes to the procedures for recall were made by the Bankruptcy and Debt Advice (Scotland) Act 2014. The Scottish Government's *Consultation on Bankruptcy Law Reform* issued in February 2012 noted that the transfer of recall from the Court of Session to the sheriff court had resulted in some inconsistency in decision-making and sought views on proposed changes to clarify the procedure for payment of creditors and the expenses of the sequestration process on recall following cases where the expenses of the sequestration process had not been paid prior to recall.⁸ These proposals were supported by consultees⁹ and the Scottish Government response to the consultation indicated an intention to proceed with them.¹⁰ The consultation also sought views on the removal of bankruptcy processes from the sheriff court to Accountant in Bankruptcy (AiB), with options ranging from the removal of certain administrative processes through the removal of a wider range of processes to the removal of all such processes.¹¹ It did not, however, specify which processes might fall within the first two options and there was no specific mention of recall. The first two options were generally supported by consultees, while the third option was not.¹² The Scottish Government response to the consultation therefore indicated an intention to proceed with the removal of certain processes from the court, which included recall.¹³ In the event, however, this was implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014 only in part: the changes to clarify the procedure for payment of creditors and the expenses of the sequestration process on recall supported by consultees were introduced and provision was made for recall by AiB in certain cases only, recall in all other cases remaining a matter for the sheriff.

⁶ Bankruptcy (Scotland) Act 1985 s.10.

⁷ Bankruptcy (Scotland) Act 1985 ss.10 and 10A as substituted by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

⁸ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), available at <http://www.gov.scot/Resource/0038/00388465.pdf> [Accessed 16 September 2017], paras 14.7.1–14.7.2. The consultation paper itself did not refer to any specific cases, but see, for example, the case of *Hall v Crawford*, 2002 S.C. 464, where it was held that in the circumstances of the case, the debtor was not personally liable for the balance of the trustee's fees and outlays where there were insufficient funds in the hand of the trustee to meet these in full following recall.

⁹ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 16 September 2017], paras 9.19–9.21.

¹⁰ Scottish Government, *Response to The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 16 September 2017], para.5.

¹¹ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 14.11.1–14.11.15.

¹² Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), paras 10.1–10.9.

¹³ Scottish Government, *Response to The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 16 September 2017], para.5.

Sections 29–38 of the Bankruptcy (Scotland) Act 2016 contain the general rules relating to recall of sequestration, while ss.114 and 115 contain special rules where recall is sought by a non-entitled spouse of the debtor seeking to protect occupancy rights in the matrimonial home or a non-entitled civil partner of the debtor seeking to protect occupancy rights in the family home. 9–05

Petitions for recall

The debtor, any creditor, the trustee in sequestration, AiB or any other person having an interest, including a person who was a petitioner for sequestration or who concurred in a debtor application for sequestration, may present a petition for recall of the award of sequestration.¹⁴ 9–06

It is provided that a petition for recall may not be presented to the sheriff where the only ground for recall is that the debtor has paid or is able to pay the debtor's debts in full.¹⁵ In such a case, recall is a matter for AiB in accordance with the provisions discussed further below. This does not, however, apply where the sequestration was awarded on a petition by a qualified creditor or creditors *and* the petition for recall includes the ground that the debtor was not apparently insolvent.¹⁶ This wording seems rather awkward, however, since if the petition for recall avers that the debtor was not apparently insolvent, it cannot be said to be presented only on the ground that the debtor has paid or is able to pay the debtor's debts in full.¹⁷ 9–07

Except in those cases where a petition for recall is based on the specific provisions for recall by a non-entitled spouse or non-entitled civil partner of the debtor, which are discussed in detail below, a petition for recall may be presented at any time irrespective of the grounds on which recall is sought.¹⁸ Prior to the changes brought about by the Bankruptcy and Debt Advice etc. (Scotland) Act 2014, the position was more complex. Except in those cases where a petition for recall was based on the specific provisions for recall by a non-entitled spouse or non-entitled civil partner of the debtor, a petition for recall had to be presented within a specified time limit unless it was based on specified grounds, in which case it could be presented at any time. The specified time limit was originally within 10 weeks of the date of sequestration,¹⁹ although this was subsequently amended to within 10 weeks of the date of the award of sequestration,²⁰ since it was recognised that in cases other than debtor applications, the date of award of sequestration would be later, and might sometimes be considerably later, than the date of sequestration, with the result that the period within which recall could be sought was reduced or might even have expired.²¹ The Bankruptcy and Debt Advice etc. (Scotland) Act 2014, however, simplified the position by abolishing the time limit altogether, with the result that as noted, a petition for recall may now be presented at any time irrespective of the grounds for recall, except where it is based on the specific 9–08

¹⁴ Bankruptcy (Scotland) Act 2016 s.29(1).

¹⁵ Bankruptcy (Scotland) Act 2016 s.29(2).

¹⁶ Bankruptcy (Scotland) Act 2016 s.29(3).

¹⁷ The grounds for recall are discussed at para.9–12.

¹⁸ Bankruptcy (Scotland) Act 2016 s.29(6), (7).

¹⁹ Bankruptcy (Scotland) Act 1985 s.16(4) as enacted.

²⁰ The amendment was made by the Bankruptcy (Scotland) Act 1993 s.6 and Sch.1, para.5.

²¹ See annotations to the Bankruptcy (Scotland) Act 1993 by McBryde. For a case in which the time limit for applying for recall had expired before the award of sequestration was made, see *Wright v Tennent Caledonian Breweries Ltd*, 1991 S.L.T. 823, referred to further at para.9 15.

provisions for recall by a non-entitled spouse or non-entitled civil partner of the debtor.²²

- 9-09** The petitioner must serve a copy of the petition on the debtor, any person who petitioned for sequestration or concurred in the debtor application for sequestration, the trustee and AiB.²³ The copy petition must be accompanied by a notice stating that the recipient has the right to lodge answers to the petition within 14 days of the service of the notice.²⁴ AiB is required to enter particulars of the petition in the register of insolvencies.²⁵
- 9-10** Notwithstanding the presentation of the petition, proceedings in the sequestration continue as if it had not been presented until such time as recall is granted,²⁶ subject to the proviso that where the sheriff does not forthwith either recall the sequestration or refuse to recall it, they may order the sequestration to continue subject to such conditions as they see fit.²⁷
- 9-11** Where the petitioner for recall or any person who has lodged answers to the petition withdraws or dies, any other person entitled to present or lodge answers to a petition for recall may be sisted in place of the person withdrawing or dying.²⁸
- 9-12** The sheriff may recall the sequestration if they are satisfied that it is appropriate to do so in all the circumstances, including those arising after the date of sequestration.²⁹ In particular, they may recall the sequestration if they are satisfied that:

- (1) The debtor has paid their debts in full.³⁰

Prior to the changes brought about by the Bankruptcy and Debt Advice etc. (Scotland) Act 2014, the corresponding provision of the Bankruptcy (Scotland) Act 1985 also permitted recall where the debtor had provided sufficient security for the payment of their debts. That part of the provision was, however, repealed by the Bankruptcy and Debt Advice etc. (Scotland) Act 2014, together with the provision which allowed a debtor to avoid sequestration in the first place on the basis of the provision of sufficient security for the payment of specified debts,³¹ on the basis that these provisions had caused confusion since it was not clear what constituted sufficient security.³²

It is not sufficient to obtain recall under this ground to aver that funds are, or can be made, available to make payment of the debtor's debts: the debts must actually have been paid.³³ It has been observed that this provision is directed at the case where payment (or, formerly, the

²² For the time limit for such petitions, see para.9-52.

²³ Bankruptcy (Scotland) Act 2016 s.29(4).

²⁴ Bankruptcy (Scotland) Act 2016 s.29(4).

²⁵ Bankruptcy (Scotland) Act 2016 s.29(5).

²⁶ Bankruptcy (Scotland) Act 2016 s.29(8).

²⁷ Bankruptcy (Scotland) Act 2016 ss.29(9) and 30(7).

²⁸ Bankruptcy (Scotland) Act 2016 s.29(10), (11).

²⁹ Bankruptcy (Scotland) Act 2016 s.30(1).

³⁰ Bankruptcy (Scotland) Act 2016 s.30(2)(a).

³¹ See Bankruptcy (Scotland) Act 1985 s.12(3) as enacted and subsequently Bankruptcy (Scotland) Act 1985 s.12(3A) as substituted by the Bankruptcy (Scotland) Act 1993.

³² See *Bankruptcy and Debt Advice (Scotland) Bill Policy Memorandum* SP Bill 34-PM, para.249. The difficulties caused by the provisions on sufficient security in the context of avoiding sequestration are discussed in Ch.7.

³³ *Martin v Martin's Trustee*, 1994 S.L.T. 261.

giving of security) by the debtor has occurred prior to the award of sequestration.³⁴ After an award of sequestration has been made, the whole estate of the debtor as at the date of sequestration vests in the trustee as at that date and any estate acquired by the debtor after that date which constitutes *acquirenda* also vests in the trustee.³⁵ Consequently, it cannot be used to make payment of the debtor's debts in order to obtain a recall of the sequestration: any payment after the award of sequestration would require to be made from assets which have not vested in the trustee, for example, third party funds.³⁶

- (2) A majority in value of the creditors reside in a country other than Scotland and it is more appropriate for the debtor's estate to be administered in that other country.³⁷
- (3) One or more other awards of sequestration or analogous remedies (as defined in s.17(8) of the Bankruptcy (Scotland) Act 2016) have been made.³⁸

Although the grounds of jurisdiction for sequestration proceedings are designed to minimise the risk of more than one award of sequestration being made,³⁹ and there are specific provisions relating to concurrent proceedings for sequestration or an analogous remedy which are designed to avoid multiple awards of sequestration and/or analogous remedies,⁴⁰ it may sometimes happen that more than one such award is made. It is therefore provided that where another award of sequestration has been made, the sheriff may, after such intimation as they consider necessary, recall an award of sequestration, whether the award of sequestration in respect of which the petition for recall was presented or another award.⁴¹ The court will generally allow the sequestration which was awarded first to proceed unless more substantial progress towards distribution of the estate has been made in a later sequestration, in which case the court may decide it is more appropriate to allow that sequestration to proceed and recall the earlier one.⁴²

It is up to the petitioner to satisfy the court that sequestration should be recalled.⁴³ **9-13**

The court has a wide discretion in deciding whether to recall an award of sequestration.⁴⁴ It has been said that if a recall of sequestration can be granted **9-14**

³⁴ *Martin v Martin's Trustee*, 1994 S.L.T. 261.

³⁵ See further Ch.11.

³⁶ But see further below in relation to cases where recall is granted by AiB on this ground.

³⁷ Bankruptcy (Scotland) Act 2016 s.30(2)(b). For examples of such circumstances in earlier case law, see *Smith, Brothers & Co* (1860) 23 D. 140; *Brandon v Stephens* (1862) 24 D. 263; *Moses v Gifford* (1866) 4 M. 1056; *Cooper v Baillie* (1878) 5 R. 564. *Gibson v Munro* (1894) 21 R. 840.

³⁸ Bankruptcy (Scotland) Act 2016 s.30(2)(c) and see *Gibson v Munro* (1894) 21 R. 840. The definition of analogous remedies is discussed in Ch.8.

³⁹ Jurisdiction is discussed in Ch.7.

⁴⁰ The provisions on concurrent proceedings for sequestration or an analogous remedy are discussed in Ch.8.

⁴¹ Bankruptcy (Scotland) Act 2016 s.30(3).

⁴² See *Welsh v Hourston*, 1914 2 S.L.T. 333 and the cases referred to therein.

⁴³ See *Byrne* [2015] CSIH 23.

⁴⁴ See, for example, *Button v Royal Bank of Scotland Plc*, 1987 G.W.D. 27-1019; *Martin v Martin's Trustee*, 1994 S.L.T. 261; *Ritchie v Dickie*, 1999 S.C. 593; *Grantly Developments v Clydesdale Bank Plc*, 2002 G.W.D. 11-339; *Parkes v Cintec International* [2005] CSOH 98; *Milne, Petitioner* 14 May 2012 Peterhead Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=445987a6-8980-69d2-b500-ff0000d74aa7> [Accessed 16 September 2017].

without apparent prejudice to creditors, the sequestration should, in general, be recalled, and the saving of expense, along with the general desirability that sequestrated persons should not be deprived of control of their assets without some reason, points strongly in favour of recall where there is no evident reason in the interests of creditors for continuing the sequestration.⁴⁵ Recall was refused in that case, however, on the basis that there was not sufficient protection for creditors to justify termination of the sequestration.⁴⁶ It has been observed, however, that while the presence or absence of prejudice to creditors is an important factor, it is not determinative, and oppression or unreasonable conduct by a creditor or creditors, unfair prejudice to the debtor if the sequestration is maintained or a conflict of interest between creditors may all conceivably warrant recall even if some creditors are thereby prejudiced by losing the possibility of a dividend in the sequestration.⁴⁷ In making its decision, the court can and should take into account the whole circumstances of the case at the date of considering the application, including any developments since the date of sequestration.⁴⁸

- 9–15** Recall is often sought on the basis of alleged irregularities in obtaining the award of sequestration itself, and it is clear that substantial or procedural irregularities in relation to the award of sequestration may be grounds for recall.⁴⁹ Thus, sequestration has been recalled where the petitioner for sequestration was not in fact a qualified creditor and the statutory requirement to serve a copy of the petition on AiB had not been complied with⁵⁰; where service of the sequestration petition was defective⁵¹; and where the statutory demand on which the petition for sequestration was based was inept.⁵² It is not, however, open to a debtor to argue that they were not in fact insolvent where apparent insolvency has been properly constituted in accordance with the statutory provisions⁵³ and, in general, a person who has not taken steps to set aside the decree and/or diligence on which the award of sequestration was based will not be able to obtain a recall of the sequestration on the basis that the debt was not in fact due—although there are exceptions.⁵⁴ Fraud, if established, may be a ground for recall,⁵⁵ and the denial of the right to a fair hearing in relation to the sequestration petition may be a ground for recall if the debtor was thereby

⁴⁵ *Button v Royal Bank of Scotland Plc*, 1987 G.W.D. 27-1019.

⁴⁶ See also *Welsh v Hourston*, 1914 2 S.L.T. 333, where it was held that in the particular circumstances, it was in the best interests of the creditors for the sequestration to continue.

⁴⁷ *Grantly Developments v Clydesdale Bank Plc*, 2002 G.W.D. 11-339 per Lord Emslie.

⁴⁸ *Murdoch v Newman Industrial Control Ltd*, 1980 S.L.T. 13.

⁴⁹ *Button v Royal Bank of Scotland Plc*, 1987 G.W.D. 27-1019; *Hodgson v Hodgson's Trustee*, 1984 S.L.T. 97; *Ritchie v Dickie*, 1999 S.C. 593. See also *Frost v Cintec International* 18 June 2004, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=918287a6-8980-69d2-b500-ff0000d74aa7> [Accessed 16 September 2017].

⁵⁰ *Mowbray v Valentine*, 1998 S.L.T. 1440. The former was regarded as a fundamental flaw which, of itself, vitiated the sequestration proceedings; the question of whether the case for recall might have been less strong if the only issue had been the failure to comply with requirement to serve copy of the petition on AiB was left open.

⁵¹ *Hodgson v Hodgson's Trustee*, 1984 S.L.T. 97.

⁵² *Liandu v Go Debt Ltd*, 2010 G.W.D. 33-674.

⁵³ *Parkes v Cintec International* [2005] CSOH 98.

⁵⁴ *Murdoch v Newman Industrial Control Ltd*, 1980 S.L.T. 13; *Wright v Tennent Caledonian Breweries Ltd*, 1991 S.L.T. 823.

⁵⁵ See *Thomson v Co-operative Bank*, 1999 G.W.D. 28-1347 (where recall was, however, refused on the basis that there were no relevant averments of fraud in obtaining the original decree on which the sequestration was based) and *Byrne* [2015] CSIH 23 (where fraud was held not to be established after proof).

prevented from presenting a defence which would have made a difference to the outcome.⁵⁶

The fact that other remedies are available to the petitioner for sequestration is not a ground for recall⁵⁷ and the fact that the debtor has no funds is not in itself a good enough reason for recall.⁵⁸ Recall has also been refused where the petitioner sought recall in order to pursue an earlier petition for sequestration in respect of which no award of sequestration had been made but a degree of progress had been made in the existing sequestration and the court was not satisfied that there were any preferences which would escape challenge in the sequestration but would be challengeable if an award of sequestration were made on the earlier petition⁵⁹; where the sequestration had been awarded following a petition by a trustee under a trust deed, the court holding that the fact that the trustee under the trust deed had previously acted as adviser to the debtor was not per se grounds for recall as there was nothing in the legislation which prevented the appointment of the debtor's adviser as trustee and the trustee had not acted as agent for the debtor in petitioning for sequestration⁶⁰; and where, unusually, AiB had applied for recall on the basis that a debt payment programme in respect of the debtor had been approved on review after the award of sequestration.⁶¹

Steps in recall proceedings should be taken promptly.⁶² It is not competent to seek other remedies, such as damages, in a petition for recall.⁶³

Notwithstanding that an undischarged debtor will normally be required to find caution when litigating, this will not normally be required where the debtor is seeking recall of the sequestration, but an order to find caution may be made in appropriate circumstances.⁶⁴

Where sequestration is recalled, the sheriff is required to make provision for the expenses of the sequestration process and, as noted above, the Bankruptcy and Debt Advice (Scotland) Act 2014 introduced certain changes in this respect. As a result, it is now provided that on or before recalling an award of sequestration, the sheriff must make provision for the payment of the outlays and remuneration of the trustee and any interim trustee either by directing that such payment is to be made out of the debtor's estate or by requiring any person who was a party to the petition for sequestration or debtor application to pay the whole or part of the outlays and remuneration.⁶⁵ It is also provided that where the sheriff intends to recall an award of sequestration on the ground that the debtor has paid the debtor's debts in full, the order recalling the award

⁵⁶ *Ross, Petitioner* [2009] CSOH 33, although this ground was not made out on the facts and recall was refused.

⁵⁷ *Bell v McMillan*, 1999 S.L.T. 947.

⁵⁸ *Gardiner v Woodside* (1862) 24 D. 1113; *Grantly Developments v Clydesdale Bank Plc*, 2002 G.W.D. 11-339 per Lord Hamilton.

⁵⁹ *Welsh v Hourston*, 1914 2 S.L.T. 333.

⁶⁰ *Archer Car Sales (Airdrie) Ltd v Gregory's Trustee*, 1993 S.L.T. 223.

⁶¹ *Accountant in Bankruptcy, Petitioner* unreported 12 November 2014 Edinburgh Sheriff Court.

⁶² *Van Overwaele v Hacking and Paterson (No.1)*, 2002 S.C. 62.

⁶³ *Sutherland v Advocate General for Scotland* [2006] CSOH 10.

⁶⁴ See *Ballard v Bohanon (No.2)* [2009] CSOH 89.

⁶⁵ Bankruptcy (Scotland) Act 2016 s.30(5)(a). For a case in which payment was ordered to be made out of the debtor's estate, see *Ritchie v Dickie*, 1999 S.C. 593; for a case in which the petitioning creditor was ordered to pay the outlays and remuneration of the trustee, see *Liandu v Go Debt Ltd*, 2010 G.W.D. 33-674.

may not be made before there has been payment in full of the outlays and remuneration of the trustee and any interim trustee (or be subject to any conditions which have to be fulfilled before the order takes effect).⁶⁶

- 9–20** On or before recalling an award of sequestration, the sheriff may also direct that the expenses of any creditor who petitioned for sequestration or concurred in the debtor application for sequestration should be paid out of the debtor's estate.⁶⁷ This provision is without prejudice to the sheriff's power to make such order as they think fit in relation to the expenses of the petition for recall.⁶⁸
- 9–21** On or before recalling an award of sequestration, the sheriff may also make any further order which they consider necessary or reasonable in all the circumstances of the case⁶⁹ and such order in relation to the expenses of the petition for recall as they think fit.⁷⁰
- 9–22** Where recall is granted, the sheriff may also revoke any bankruptcy restrictions order or interim bankruptcy restrictions order which is in force against the debtor.⁷¹ Where the sheriff refuses to do so, the debtor may appeal to the Sheriff Appeal Court within 28 days after the date on which sequestration is recalled.⁷² The decision of the Sheriff Appeal Court is final.⁷³ Bankruptcy restrictions are discussed further in Ch.17.
- 9–23** The effect of the recall of an award of sequestration is, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position that they would have been in had the sequestration not been granted⁷⁴ and the sheriff may use the powers to make orders discussed above in order to ensure that this is achieved. The inability to restore persons to the position they would have been in had the sequestration not been granted may, however, be a reason for refusing recall. Recall does not, however: (i) affect any interruption of the running of prescription resulting from the presentation of the petition for sequestration, the making of the debtor application for sequestration or the submission of a claim in the sequestration⁷⁵; (ii) invalidate any transaction entered into before recall by the trustee or any interim trustee, so long as the other party to the transaction was in good faith⁷⁶; or (iii) affect a bankruptcy restrictions order which has not been revoked.⁷⁷ Furthermore, no new bankruptcy restrictions order or interim bankruptcy restrictions order may be made in respect of the debtor.⁷⁸
- 9–24** The sheriff clerk is required to send a certified copy of any order recalling an award of sequestration to the keeper of the register of inhibitions and adjudica-

⁶⁶ Bankruptcy (Scotland) Act 2016 s.30(4).

⁶⁷ Bankruptcy (Scotland) Act 2016 s.30(5)(b).

⁶⁸ Bankruptcy (Scotland) Act 2016 s.30(6).

⁶⁹ Bankruptcy (Scotland) Act 2016 s.30(5)(c). It has been said that such an order could include an order that the debtor be personally liable for the expenses of the sequestration process: *Hall v Crawford*, 2002 S.C. 464.

⁷⁰ Bankruptcy (Scotland) Act 2016 s.30(8).

⁷¹ Bankruptcy (Scotland) Act 2016 s.161(1)(a).

⁷² Bankruptcy (Scotland) Act 2016 s.161(2). For the procedure for such an appeal, see Ch.10 of the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.

⁷³ Bankruptcy (Scotland) Act 2016 s.161(3).

⁷⁴ Bankruptcy (Scotland) Act 2016 s.38(1).

⁷⁵ Bankruptcy (Scotland) Act 2016 s.38(3)(a). As to the interruption of prescription, see Chs 7 (presentation of petition and making of debtor application) and 16 (submission of claim).

⁷⁶ Bankruptcy (Scotland) Act 2016 s.38(3)(b).

⁷⁷ Bankruptcy (Scotland) Act 2016 s.38(3)(c).

⁷⁸ Bankruptcy (Scotland) Act 2016 s.161(1)(b).

tions for recording in that register.⁷⁹ They are also required to send a copy of any interim or final order recalling or refusing to recall an award of sequestration to AiB and, where AiB is not the trustee in sequestration, the trustee.⁸⁰

Recall by AiB

Recall is a matter for AiB where the only ground for recall is that the debtor has paid or is able to pay the debtor's debts in full and the exception allowing a petition for recall to be presented to the sheriff discussed at para.9-07 does not apply. There are similarities and differences in comparison to cases involving a petition for recall to the sheriff. **9-25**

The debtor, any creditor (whether or not a petitioner for sequestration or one concurring in a debtor application for sequestration), the trustee (where not AiB) or any other person having an interest (whether or not a petitioner for sequestration) may apply to AiB for the recall of an award of sequestration on the ground that the debtor has paid or is able to pay the debtor's debts in full.⁸¹ There is no time limit for making such an application. **9-26**

The person making the application must, at the same time as making the application, give the debtor (if not the applicant), any person who petitioned for sequestration or concurred in the debtor application for sequestration, and the trustee a copy of the application and a notice stating that the recipient has the right to make representations to AiB within the period of 21 days beginning with the day on which the notice is given.⁸² In contrast to the position where there is a petition to the sheriff, there is no requirement for AiB to enter particulars of the application in the register of insolvencies. **9-27**

AiB may seek further information or evidence in relation to the application or any representations made in response to the application⁸³ and, where there is good reason to do so, may require the applicant or any person making representations to attend a hearing on the application and/or produce such documents or other information as AiB may reasonably require.⁸⁴ **9-28**

Notwithstanding the making of the application, proceedings in the sequestration continue as if it had not been made until such time as recall is granted, subject to such conditions (if any) as AiB sees fit.⁸⁵ **9-29**

Where the applicant withdraws the application or dies, AiB may substitute for the applicant any other person who would have been entitled to make the application.⁸⁶ **9-30**

⁷⁹ Bankruptcy (Scotland) Act 2016 s.30(9)(a).

⁸⁰ Bankruptcy (Scotland) Act 2016 s.30(9)(b).

⁸¹ Bankruptcy (Scotland) Act 2016 s.31(1), (2). The application must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1). See also Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.4 as to the modes of making an application.

⁸² Bankruptcy (Scotland) Act 2016 s.31(3), (4). See also Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.6 which contains further provisions relating to service.

⁸³ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.7. Any further information or evidence must be provided within 21 days of the date of the sending of the notice requiring the further information or evidence by AiB or such shorter period as the notice may specify and any relevant time limits are extended by that period: Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.7(2), 7(3).

⁸⁴ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.8.

⁸⁵ Bankruptcy (Scotland) Act 2016 s.31(5).

⁸⁶ Bankruptcy (Scotland) Act 2016 s.31(6).

9-31 The trustee in sequestration is required to prepare a statement of the debtor's affairs so far as within their knowledge.⁸⁷ The statement must be submitted to AiB with the application for recall where that application is made by the trustee or within the period of 21 days beginning with the day on which notice of the application is given where the application is made by someone else.⁸⁸ AiB will not consider the application for recall until it is submitted,⁸⁹ but may make inquiries regarding it under the provisions referred to above.⁹⁰

9-32 The statement of affairs must include the following information:

- (a) Whether the debtor has agreed to the outlays and remuneration of the trustee and any interim trustee (including any outlays and remuneration which have yet to be incurred).⁹¹

Where the statement indicates that the outlays and remuneration of the trustee are not agreed, the trustee must, at the same time as submitting the statement, provide AiB with their accounts of their intromissions with the debtor's estate for audit and details of their claim for outlays and remuneration (including any outlays and remuneration which have yet to be incurred).⁹² Curiously, these provisions refer only to a failure to agree the trustee's outlays and remuneration and not any interim trustee's outlays and remuneration. The trustee is also required to provide AiB with such further information in relation to the claim for outlays and remuneration as AiB reasonably requires.⁹³ AiB must then issue a determination fixing the amount of the trustee's outlays and remuneration within 28 days of the expiry of the period allowed to a creditor who has not submitted a claim to do so.⁹⁴ The debtor, any creditor, the trustee or any other person having an interest may appeal to the sheriff against that determination within the period of 14 days beginning with the day on which it is made,⁹⁵ and the decision of the sheriff on such an appeal is final.⁹⁶

AiB may also determine the expenses of any petitioning or concurring creditor.⁹⁷ The debtor, any creditor, the trustee or any other person having an interest may apply to AiB for a review of that determination.⁹⁸ Any such application must be made within the period of 14 days beginning with the day on which the determination is made.⁹⁹ AiB must without delay send a copy of the application to the debtor, the creditors, the trustee and any other person having an interest and notify them they have the period of 21 days beginning with the day on which the application is made to make representations to AiB

⁸⁷ Bankruptcy (Scotland) Act 2016 s.32(1), (2).

⁸⁸ Bankruptcy (Scotland) Act 2016 s.32(3).

⁸⁹ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(1).

⁹⁰ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(2).

⁹¹ Bankruptcy (Scotland) Act 2016 s.32(4)(a).

⁹² Bankruptcy (Scotland) Act 2016 s.33(1), (2)(a).

⁹³ Bankruptcy (Scotland) Act 2016 s.33(2)(b).

⁹⁴ Bankruptcy (Scotland) Act 2016 s.33(3), (5).

⁹⁵ Bankruptcy (Scotland) Act 2016 s.37(5)(a).

⁹⁶ Bankruptcy (Scotland) Act 2016 s.37(6).

⁹⁷ Bankruptcy (Scotland) Act 2016 s.33(4).

⁹⁸ Bankruptcy (Scotland) Act 2016 s.37(1)(b), (2). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016; Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1). See also Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.4 as to the modes of making an application.

⁹⁹ Bankruptcy (Scotland) Act 2016 s.37(3).

regarding the application.¹⁰⁰ AiB must take into account any representations made by an interested person within the period of 21 days beginning with the day on which the application is made¹⁰¹ and confirm, amend or revoke the determination within the period of 28 days beginning with that date.¹⁰² AiB must notify the persons who received notice of the review application of their decision¹⁰³ and the debtor, any creditor, the trustee or any other person having an interest may appeal to the sheriff against AiB's decision within the period of 14 days beginning with the day on which the decision is made.¹⁰⁴

- (b) Whether or not the debtor's debts have been paid in full, including the outlays and remuneration of the trustee and any interim trustee.¹⁰⁵
- (c) Where the debtor's debts have not been paid in full, details of any debts which have not been paid and the trustee's opinion as to whether the debtor's assets are likely to be sufficient to pay the debts in full, including the outlays and remuneration of the trustee and any interim trustee, within the period of eight weeks from the date the statement of affairs is submitted.¹⁰⁶ It is, therefore, clearly anticipated that the assets which have vested in the trustee in sequestration can be used to effect payment of the debts.¹⁰⁷
- (d) Details of any distribution of the estate.¹⁰⁸

The trustee is also required to notify every creditor known to them of the making of the application within the period of seven days beginning with the day on which the application is made if the application is made by the trustee themselves or within the period of seven days beginning with the day on which notice of the application is given if the application is made by someone else.¹⁰⁹ In order to be included in the statement of affairs, any creditor who has not previously submitted a claim in the sequestration is required to do so within 14 days beginning with the day on which the notice is given,¹¹⁰ and where this happens, the trustee is required to update and resubmit the statement within seven days of the expiry of that time limit.¹¹¹ The trustee is also required to update and resubmit the statement of affairs where the statement previously submitted did not state that the debtor had paid their debts in full but this is now the case.¹¹²

AiB may recall the sequestration where the trustee's statement of affairs indicates that the debtor's debts have been paid in full, including the outlays and remuneration of the trustee and any interim trustee, and AiB is satisfied that it is appropriate to do so in all the circumstances of the case.¹¹³ The decision to

¹⁰⁰ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹⁰¹ Bankruptcy (Scotland) Act 2016 s.37(4)(a).

¹⁰² Bankruptcy (Scotland) Act 2016 s.37(4)(b).

¹⁰³ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹⁰⁴ Bankruptcy (Scotland) Act 2016 s.37(5)(b). Such an appeal may be on a matter of fact, a point of law or the merits: Bankruptcy (Scotland) Act 2016 s.214(1), (2)(b).

¹⁰⁵ Bankruptcy (Scotland) Act 2016 s.32(4)(b).

¹⁰⁶ Bankruptcy (Scotland) Act 2016 s.32(4)(c).

¹⁰⁷ Cf the position discussed at para.9–12 in relation to a petition for recall on the ground, *inter alia*, that the debtor has paid their debts in full.

¹⁰⁸ Bankruptcy (Scotland) Act 2016 s.32(4)(d).

¹⁰⁹ Bankruptcy (Scotland) Act 2016 s.32(5).

¹¹⁰ Bankruptcy (Scotland) Act 2016 s.32(6), (7).

¹¹¹ Bankruptcy (Scotland) Act 2016 s.32(8).

¹¹² Bankruptcy (Scotland) Act 2016 s.32(9).

¹¹³ Bankruptcy (Scotland) Act 2016 s.34(1).

recall is therefore discretionary. AiB may not, however, recall the sequestration after a certain period of time has elapsed.¹¹⁴

- 9-35** Where the sequestration is recalled, AiB must consider whether to revoke any bankruptcy restrictions order or interim bankruptcy restrictions order which is in force against the debtor.¹¹⁵ A decision of AiB to refuse to revoke a bankruptcy restrictions order or interim bankruptcy restrictions order is subject to review by AiB and, thereafter, appeal.¹¹⁶ Bankruptcy restrictions are discussed further in Ch.17.
- 9-36** As in the case of recall by the sheriff, the effect of recall by AiB is, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position that they would have been in had the sequestration not been granted.¹¹⁷ Unlike the sheriff, however, AiB is not given power make any order which they consider necessary or reasonable in all the circumstances of the case and is not therefore in a position to make any orders which might be necessary to ensure that this is achieved. The inability to restore persons to the position they would have been in had the sequestration not been granted may therefore be a reason for refusing recall; alternatively, if this can be achieved only by the making of a relevant order or orders, it may be a reason for remitting the matter to the sheriff so that any necessary order can be made.¹¹⁸ Also as in the case of recall by the sheriff, recall by AiB does not: (i) affect any interruption of the running of prescription resulting from the presentation of the petition for sequestration, the making of the debtor application for sequestration or the submission of a claim in the sequestration¹¹⁹; or (ii) invalidate any transaction entered into before recall by the trustee or any interim trustee, so long as the other party to the transaction was in good faith.¹²⁰ The provision referred to above in relation to recall by the sheriff that recall is not to affect a bankruptcy restrictions order which has not been revoked appears to apply only where there is recall by the sheriff.¹²¹ This is curious because prior to its consolidation in the Bankruptcy (Scotland) Act 2016, the Bankruptcy (Scotland) Act 1985 specifically provided that recall by AiB was not to affect a bankruptcy restrictions order which had not been revoked by AiB¹²² but no such specific provision was made in relation to recall by the sheriff. The provision should presumably, however, apply in both cases and it may be that there simply has been an error in translation in the course of the consolidation. Finally, as in the case of recall by the sheriff, no new bankruptcy restrictions order or interim bankruptcy restrictions order may be made in respect of the debtor.¹²³
- 9-37** AiB is required to send a copy of their decision on the application for recall to the debtor, any creditor (whether or not a petitioner for sequestration or creditor concurring in a debtor application), the trustee and any other person having

¹¹⁴ Bankruptcy (Scotland) Act 2016 s.34(2).

¹¹⁵ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(6) and Bankruptcy (Scotland) Act 2016 s.161(4)(a).

¹¹⁶ Bankruptcy (Scotland) Act 2016 s.161(5)–(9).

¹¹⁷ Bankruptcy (Scotland) Act 2016 s.38(1).

¹¹⁸ Remit to the sheriff is discussed at para.9–46.

¹¹⁹ Bankruptcy (Scotland) Act 2016 s.38(3)(a). The interruption of prescription is discussed in Chs 7 (presentation of petition and making of debtor application) and 16 (submission of claim).

¹²⁰ Bankruptcy (Scotland) Act 2016 s.38(3)(b).

¹²¹ Bankruptcy (Scotland) Act 2016 s.38(3)(c).

¹²² Bankruptcy (Scotland) Act 1985 s.17D(4)(c).

¹²³ Bankruptcy (Scotland) Act 2016 s.161(4)(b).

an interest (whether or not a petitioner for sequestration).¹²⁴ Where recall is granted, they are also required to send a certified copy of their decision to the keeper of the register of inhibitions and adjudications for recording in that register without delay.¹²⁵

Where AiB does not recall the sequestration, the sequestration continues subject to such conditions as the AiB sees fit.¹²⁶ **9-38**

Recall by AiB where AiB trustee

Special provisions apply where AiB is the trustee and considers that recall of the sequestration should be granted on the ground that the debtor has paid or is able to pay their debts in full, including the payment of the outlays and remuneration of the trustee and any interim trustee.¹²⁷ In such a case, AiB must notify the debtor and every creditor known to them of that fact.¹²⁸ AiB is required to send with such notification a statement of the debtor's affairs and a copy of the application for recall (although there may not in fact be such an application) and to advise the recipients of the notification of the right to make representations within 21 days beginning with the day on which notice is given.¹²⁹ AiB must also notify any other interested person and advise them of the right to make representations within 21 days beginning with the day on which notice is given.¹³⁰ **9-39**

In order to be considered for the payment of a dividend out of the debtor's estate, any creditor who has not previously submitted a claim in the sequestration is required to do so within 14 days beginning with the day on which the notice is given.¹³¹ **9-40**

Before recalling the sequestration, AiB must take into account any representations made to them by any interested party within 21 days beginning with the day on which notice is given and must make a determination of their fees and outlays.¹³² The debtor, any creditor, the trustee or any other person having an interest may appeal to the sheriff against that determination within the period of 14 days beginning with the day on which it is made,¹³³ and the decision of the sheriff on such an appeal is final.¹³⁴ **9-41**

AiB may recall the sequestration where they are satisfied that the debtor's debts have been paid in full, including the outlays and remuneration of the trustee and any interim trustee, that payment was made within the period allowed and that it is appropriate to do so in all the circumstances of the case.¹³⁵ The recall of sequestration is therefore discretionary. **9-42**

As in the other cases discussed above, where sequestration is recalled, AiB must consider whether to revoke any bankruptcy restrictions order or interim **9-43**

¹²⁴ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(3).

¹²⁵ Bankruptcy (Scotland) Act 2016 s.34(4).

¹²⁶ Bankruptcy (Scotland) Act 2016 s.34(3).

¹²⁷ Bankruptcy (Scotland) Act 2016 s.35.

¹²⁸ Bankruptcy (Scotland) Act 2016 s.35(1), (2).

¹²⁹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(4).

¹³⁰ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(5).

¹³¹ Bankruptcy (Scotland) Act 2016 s.35(3), (4).

¹³² Bankruptcy (Scotland) Act 2016 s.35(5).

¹³³ Bankruptcy (Scotland) Act 2016 s.37(5)(a).

¹³⁴ Bankruptcy (Scotland) Act 2016 s.37(6).

¹³⁵ Bankruptcy (Scotland) Act 2016 s.35(6).

bankruptcy restrictions order which is in force against the debtor¹³⁶ and a decision of AiB to refuse to revoke a bankruptcy restrictions order or interim bankruptcy restrictions order is subject to review and, thereafter, appeal.¹³⁷ As noted above, bankruptcy restrictions are discussed in Ch.17.

9-44 The effect of recall is the same as set out above in relation to cases where AiB is not the trustee.

9-45 AiB is required to send a copy of their decision regarding recall to the debtor, any creditor (whether or not a petitioner for sequestration or a concurring creditor in a debtor application), the trustee and any other person having an interest (whether or not a petitioner for sequestration).¹³⁸ Where sequestration is recalled, they are also required to send a certified copy of the decision to the keeper of the register of inhibitions and adjudications for recording in that register without delay.¹³⁹

Remit to sheriff

9-46 At any time before deciding whether to recall an award of sequestration, AiB may remit the case to the sheriff.¹⁴⁰ The sheriff may deal with the case as if it were a petition for recall presented to the sheriff by AiB.¹⁴¹

Review and appeal against decision of AiB in relation to recall of sequestration

9-47 The debtor, any creditor, the trustee or any other person having an interest may apply to AiB for a review of their decision to grant or refuse to grant a recall of sequestration.¹⁴² Any such application must be made within the period of 14 days beginning with the day on which the decision is made¹⁴³ and must specify the change to the decision sought and the reasons therefor.¹⁴⁴ AiB must send a copy of the application to the debtor, the creditors, the trustee and any other person having an interest and advise them of their right to make written representations to AiB within the period of 21 days beginning with the day on which the application is made.¹⁴⁵ AiB must then take into account any representations made by an interested person within that period¹⁴⁶ and confirm, amend or revoke the decision within the period of 28 days beginning with the day on which the application was made.¹⁴⁷ AiB must notify the persons who received notice of the review application of their decision¹⁴⁸ and the debtor, any creditor, the trustee or any other person having an interest may appeal to

¹³⁶ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(6) and Bankruptcy (Scotland) Act 2016 s.161(4)(a).

¹³⁷ Bankruptcy (Scotland) Act 2016 s.161(5)–(9).

¹³⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(3).

¹³⁹ Bankruptcy (Scotland) Act 2016 s.35(7).

¹⁴⁰ Bankruptcy (Scotland) Act 2016 s.36(1), (2).

¹⁴¹ Bankruptcy (Scotland) Act 2016 s.36(3).

¹⁴² Bankruptcy (Scotland) Act 2016 s.37(1)(a), (2). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1). See also Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.4 as to the modes of making an application.

¹⁴³ Bankruptcy (Scotland) Act 2016 s.37(3).

¹⁴⁴ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(2).

¹⁴⁵ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹⁴⁶ Bankruptcy (Scotland) Act 2016 s.37(4)(a).

¹⁴⁷ Bankruptcy (Scotland) Act 2016 s.37(4)(b).

¹⁴⁸ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

the sheriff against AiB's decision within the period of 14 days beginning with the day on which the decision is made.¹⁴⁹

Where as a result of the review the sequestration is recalled, AiB must consider whether to revoke any bankruptcy restrictions order or interim bankruptcy restrictions order which is in force against the debtor¹⁵⁰ and a decision of AiB to refuse to revoke a bankruptcy restrictions order or interim bankruptcy restrictions order is subject to review and, thereafter, appeal.¹⁵¹ **9-48**

Where an original decision regarding recall is amended or revoked on review, AiB must send a certified copy of the revised decision to the keeper of the register of inhibitions and adjudications for recording in that register.¹⁵² **9-49**

Recall by non-entitled spouse or non-entitled civil partner

As noted above, special provisions apply where:

9-50

- (i) the debtor's estate includes a matrimonial home as defined by the Matrimonial Homes (Family Protection) (Scotland) Act 1981 in respect of which, immediately before the date of the order appointing the trustee in the sequestration (or the first such order if there is more than one), the debtor is the entitled spouse and the other spouse is the non-entitled spouse in terms of that Act¹⁵³; or
- (ii) the debtor's estate includes a family home as defined by the Civil Partnership Act 2004 in respect of which, immediately before the date of the order appointing the trustee in the sequestration (or the first such order if there is more than one), the debtor is the entitled partner and the other partner in the civil partnership is the non-entitled partner in terms of that Act.¹⁵⁴

In such a case, where the trustee is aware of the existence of the non-entitled spouse or civil partner (as the case may be) and knows where they are residing, they must, within 14 days of the date of the (first) order appointing a trustee in the sequestration, inform the non-entitled spouse or civil partner of the fact of the sequestration, the right to petition for recall of the sequestration and the powers of the sheriff on such a petition as set out below.¹⁵⁵ It has been held that the requirement to inform a non-entitled spouse of these matters entails ensuring that the non-entitled spouse actually receives the information and failure to do so may have an impact on the trustee's ability to deal with the home thereafter.¹⁵⁶ Given the identical wording of the relevant provisions, it seems safe to assume that the same would apply in the case of a non-entitled civil partner. **9-51**

¹⁴⁹ Bankruptcy (Scotland) Act 2016 s.37(5)(b). Such an appeal may be on a matter of fact, a point of law or the merits; Bankruptcy (Scotland) Act 2016 s.214(1), (2)(b).

¹⁵⁰ See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(6) and Bankruptcy (Scotland) Act 2016 s.161(4)(a).

¹⁵¹ Bankruptcy (Scotland) Act 2016 s.161(5)–(9).

¹⁵² Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.9(7).

¹⁵³ Bankruptcy (Scotland) Act 2016 s.114.

¹⁵⁴ Bankruptcy (Scotland) Act 2016 s.115.

¹⁵⁵ Bankruptcy (Scotland) Act 2016 s.114(2) and s.115(2) respectively. The powers of the sheriff are discussed at para.9-52.

¹⁵⁶ See *J v S*, 2014 W.L. 2807750. The trustee's ability to deal with the home is discussed further in Ch.12.

- 9-52** A petition for recall under these provisions must be presented within the period of 40 days beginning with the date of the (first) order appointing a trustee in the sequestration or 10 weeks beginning with the date of the award of sequestration.¹⁵⁷ If the sheriff is satisfied that the purpose of the sequestration was wholly or mainly to defeat the occupancy rights of the non-entitled spouse or non-entitled civil partner (as the case may be), they may recall the sequestration or make such other order as they think appropriate to protect the occupancy rights of the non-entitled spouse or civil partner.¹⁵⁸ The view has been expressed, however, that the sheriff's power to recall the sequestration is not confined to the circumstances where the purpose of the sequestration was wholly or mainly to defeat the occupancy rights of the non-entitled spouse or non-entitled civil partner (as the case may be), and that the sequestration may be recalled on any applicable ground.¹⁵⁹
- 9-53** The sheriff clerk is required to send a copy of any order made to protect the occupancy rights of the non-entitled spouse or civil partner to AiB and, where AiB is not the trustee in sequestration, the trustee.¹⁶⁰

REDUCTION

- 9-54** As noted above, the review of an award of sequestration by recall is specifically provided to be without prejudice to any right to bring an action for reduction of sequestration.¹⁶¹ The competence of an action for reduction of sequestration is now beyond doubt,¹⁶² but it has not been possible to trace any reported decision where reduction has been granted on the merits.¹⁶³ An action of reduction of sequestration may be raised only in the Court of Session.
- 9-55** Reduction is not available as a right.¹⁶⁴ It has been said that the remedy must be carefully applied¹⁶⁵ and that in the context of bankruptcy, which is regulated by a statutory code, it is a matter of particular delicacy.¹⁶⁶ Generally speaking, reduction will not be available where there is an alternative remedy which has either been utilised unsuccessfully or gone unused,¹⁶⁷ but there may be exceptions.¹⁶⁸ It is clear that reduction will be granted only in

¹⁵⁷ Bankruptcy (Scotland) Act 2016 s.114(3) and s.115(3) respectively.

¹⁵⁸ Bankruptcy (Scotland) Act 2016 s.114(3) and s.115(3) respectively.

¹⁵⁹ See *J v S*, 2014 W.L. 2807750.

¹⁶⁰ Bankruptcy (Scotland) Act 2016 s.30(9)(b).

¹⁶¹ Bankruptcy (Scotland) Act 2016 s.27(10).

¹⁶² *Central Motor Engineering Co v Galbraith*, 1918 S.C. 755 (citing *Gibson v Wilson and Munro* (1894) 21 R. 840 and *Whittle v Gibb & Son* (1898) 25 R. 412).

¹⁶³ In one case, decree was granted by default but following a reponing process, the decree was subsequently recalled and the action ultimately dismissed as irrelevant: see *Parkes v MacGregor* [2011] CSIH 69. In most reported cases, the action has been dismissed as irrelevant, although in *Barlow v City Plumbing Supplies Holdings Ltd* [2009] CSOH 5, a proof before answer was allowed. There is, however, no report of the ultimate outcome in that case.

¹⁶⁴ See *Arthur v SMT Sales and Service Co Ltd (No.2)*, 1999 S.C. 109 (citing *Adair v Colville & Sons Ltd*, 1926 S.C. (HL) 51 and *Philip v Reid*, 1927 S.C. 224 which deal with reduction of decrees generally); *Polley v West Lothian Council* [2015] CSIH 19.

¹⁶⁵ See *Adair v Colville & Sons Ltd*, 1926 S.C. (HL) 51 at 55–56 per Viscount Dunedin.

¹⁶⁶ See *Central Motors Engineering Co v Galbraith*, 1918 S.C. 755; *Arthur v SMT Sales and Service Co Ltd (No.2)*, 1999 S.C. 109.

¹⁶⁷ *Arthur v SMT Sales and Service Co Ltd (No.2)*, 1999 S.C. 109; *Polley v West Lothian Council* [2015] CSIH 19.

¹⁶⁸ See *Bain v Hugh LS McConnell Ltd*, 1991 S.L.T. 691; *Barlow v City Plumbing Supplies Holdings Ltd* [2009] CSOH 5; *Spence v Davie*, 1993 S.L.T. 217.

exceptional circumstances.¹⁶⁹ The courts have resisted any attempt to define what constitutes exceptional circumstances¹⁷⁰ but it is clear that they include fraud, which has been described as

“one of the recognised, indeed the classic, means of establishing exceptional circumstances that would justify the court in exercising its discretion to reduce an award of sequestration”.¹⁷¹

Fraud in this context means a fraud on the court granting sequestration¹⁷² and there must be specific and detailed averments of the nature of the fraud.¹⁷³ Exceptional circumstances might also include lack of jurisdiction,¹⁷⁴ although it has been held that such an argument, if not raised previously, may come too late.¹⁷⁵ It is necessary to demonstrate that the sequestration proceedings are fundamentally null, not simply that the person making the award of sequestration made an error in law or took an approach or view of the facts with which the pursuer did not agree.¹⁷⁶ Post-sequestration events such as the conduct of the trustee in sequestration, although they may be relevant in the context of recall, cannot amount to exceptional circumstances justifying reduction.¹⁷⁷ Nor can the motive of the petitioning creditor or the alleged incompatibility of the bankruptcy and other legislation with human rights.¹⁷⁸ The fact that the pursuer has been wrongly advised will also not generally be sufficient to justify reduction, but there may be exceptions.¹⁷⁹ The reduction of the documents on which the sequestration is founded would, however, amount to exceptional circumstances justifying reduction and the sequestration may be suspended while such an action is pursued.¹⁸⁰ It has been observed that where a relevant case of exceptional circumstances is averred, a proof will almost always be required.¹⁸¹

The lapse of a sufficiently long period of time before reduction is sought may be fatal to success because of the complexity and unfortunate consequences of attempting to undo the effects of the sequestration where it has reached an

9-56

¹⁶⁹ *Central Motors Engineering Co v Galbraith*, 1918 S.C. 755; *Arthur v SMT Sales and Service Co Ltd (No.2)*, 1999 S.C. 109; *Smillie Olympic House Ltd*, 2004 S.L.T. 1244; *Barlow v City Plumbing Supplies Holdings Ltd* [2009] CSOH 5; *Parkes v MacGregor* [2011] CSIH 69; *Polley v West Lothian Council* [2014] CSOH 98, affirmed [2015] CSIH 19; *Garg v McNaught* [2015] CSOH 148.

¹⁷⁰ See *Adair v Colville & Sons Ltd*, 1926 S.C. (HL) 51; *Bain v Hugh LS McConnell Ltd*, 1991 S.L.T. 691.

¹⁷¹ *Polley v West Lothian Council* [2014] CSOH 98 at [17]; affirmed [2015] CSIH 19. See also *Adair v Colville & Sons Ltd*, 1926 S.C. (HL) 51; *Smillie Olympic House Ltd*, 2004 S.L.T. 1244; *Parkes v MacGregor* [2008] CSOH 43, affirmed [2011] CSIH 69.

¹⁷² *Smillie Olympic House Ltd*, 2004 S.L.T. 1244; *Parkes v MacGregor* [2011] CSIH 69.

¹⁷³ *Smillie Olympic House Ltd*, 2004 S.L.T. 1244; *Polley v West Lothian Council* [2014] CSOH 98, affirmed [2015] CSIH 19.

¹⁷⁴ *Parkes v MacGregor* [2008] CSOH 43; affirmed [2011] CSIH 69.

¹⁷⁵ *Polley v West Lothian Council* [2014] CSOH 98; affirmed [2015] CSIH 19.

¹⁷⁶ *Parkes v MacGregor* [2008] CSOH 43; affirmed [2011] CSIH 69.

¹⁷⁷ *Parkes v MacGregor* [2011] CSIH 69.

¹⁷⁸ *Parkes v MacGregor* [2008] CSOH 43; [2011] CSIH 69.

¹⁷⁹ See *Spence v Davie*, 1993 S.L.T. 217; *Barlow v City Plumbing Supplies Holdings Ltd* [2009] CSOH 5.

¹⁸⁰ *Parkes v MacGregor* [2008] CSOH 43 at 66; [2011] CSIH 69. Suspension is discussed further at para.9-59.

¹⁸¹ *Barlow v City Plumbing Supplies Holdings Ltd* [2009] CSOH 5.

advanced stage.¹⁸² The solvency or otherwise of the debtor is also a relevant consideration.¹⁸³

- 9–57 Although an undisclosed debtor will normally be required to find caution when litigating, this will not normally be required where the debtor is seeking reduction of the sequestration, although an order for caution may be made in appropriate circumstances.¹⁸⁴
- 9–58 It is not necessary to call the trustee in sequestration as a defender to an action for reduction, although it is competent to do so, and the trustee may apply to be sisted as a party to the action if not called as a defender.¹⁸⁵

OTHER REMEDIES

Suspension and interdict

- 9–59 A person whose estate has been sequestrated may seek suspension of the sequestration and interdict against further proceedings in the sequestration and may obtain interim orders for suspension and interdict.¹⁸⁶ Such orders would normally be appropriate pending the outcome of other relevant proceedings: for example, in *Sutherland v Campbell*,¹⁸⁷ the petitioner obtained orders for interim suspension of sequestration and interim interdict pending the outcome of an action of reduction of the sequestration.¹⁸⁸ The interim orders were subsequently recalled for the avoidance of doubt when the action for reduction failed.¹⁸⁹ It is not clear whether sequestration may be suspended on a permanent basis: in *Sutherland v Campbell*¹⁹⁰ it was argued that this was not possible because a decree awarding sequestration is a decree *in foro*, but the Lord Ordinary reached his decision on other grounds and found it unnecessary to express a concluded view on this argument and the point was not considered on appeal. It is difficult, however, to think of any circumstances in which it would be appropriate for sequestration to be suspended on a permanent basis, particularly since this would have implications for the debtor including the matter of the debtor's discharge. Any interim orders for suspension and interdict cannot be considered to have become final as a result of a failure by a respondent to lodge answers to the petition.¹⁹¹

¹⁸² *Arthur v SMT Sales and Service Co Ltd (No.2)*, 1999 S.C. 109 (where the period involved was 11 years); *Polley v West Lothian Council* [2014] CSOH 98, affirmed [2015] CSIH 19 (where the period involved was three years but the sequestration was at an advanced stage). Cf *Smillie Olympic House Ltd*, 2004 S.L.T. 1244 (where a delay of eight months was not fatal).

¹⁸³ *Arthur v SMT Sales and Service Co Ltd (No.2)*, 1999 S.C. 109 (where there were no averments of solvency and it was obvious from the information before the court that the debtor's estate was "grossly insolvent").

¹⁸⁴ See *Ballard v Bohanon* [2009] CSOH 56. See also *Thomson v Co-operative Bank*, 1999 S.L.T. 701.

¹⁸⁵ *Arthur v SMT Sales and Service Co Ltd (No.1)*, 1998 S.C. 525.

¹⁸⁶ *Sutherland v Campbell*, 2003 S.L.T. 1138; *Parkes v MacGregor* [2008] CSOH 43 at [66]. See also *Chaudhry v Advocate General for Scotland*, 2013 S.L.T. 548 where the pursuer's application for suspension was, however, held to be incompetent by virtue of the provisions of the Crown Proceedings Act 1947.

¹⁸⁷ *Sutherland v Campbell*, 2003 S.L.T. 1138.

¹⁸⁸ See also *Parkes v MacGregor* [2008] CSOH 43 at [66]; *Nolan v Patullo* [2017] SAC (Civ) 25.

¹⁸⁹ *Sutherland v Campbell*, 2003 S.L.T. 1138. The decision was upheld on appeal: see *Sutherland v Campbell* unreported 17 December 2003 Inner House, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=358487a6-8980-69d2-b500-ff0000d74aa7> [Accessed 16 September 2017].

¹⁹⁰ *Sutherland v Campbell*, 2003 S.L.T. 1138.

¹⁹¹ *Sutherland v Campbell* unreported 17 December 2003 Inner House, as above.

Petition to the nobile officium

It has been held that where no other remedy is available, a sequestration may in appropriate circumstances be declared to be at an end on the exercise of the *nobile officium* of the Inner House of the Court of Session.¹⁹² A petition to the *nobile officium* seeking the extension of the time limit for applying for recall where compliance with that time limit had become impossible through no fault of the petitioner was, however, held to be competent even though the petitioner had another remedy available to her apart from recall: the court distinguished this case from the earlier cases cited on the basis that what was being sought was not an end to the sequestration but the opportunity to apply for recall of the sequestration.¹⁹³

On declaring the sequestration to be at an end, the court has also declared the sequestrated estate to be re-vested in the debtor.¹⁹⁴ It is thought that the court could also make any other orders which might be necessary as a consequence of declaring the sequestration to be at an end.

DAMAGES FOR WRONGFUL SEQUESTRATION

It may be possible to seek damages for what might be described as wrongful sequestration in appropriate circumstances. In the case of *Thomson v Newey and Eyre Ltd*,¹⁹⁵ the pursuer sought damages for personal injury and economic loss resulting from breach of a contractual agreement to withdraw sequestration proceedings which led to an award of sequestration against him. The decision was concerned with issues of time bar, but a proof before answer on the parties' averments, including those on time bar, was allowed.¹⁹⁶

¹⁹² See *Central Motor Engineering Co v Gibbs*, 1917 S.C. 490 (where the petition was, however, refused on the facts); *Craig & Co, Petitioners*, 1946 S.C. 19 (where the petition was granted).

¹⁹³ See *Wright v Tennent Caledonian Breweries Ltd*, 1991 S.L.T. 823. The petition was not, however, granted on the facts of the case, the court finding that the basis on which recall was intended to be pursued was unsound and any application for recall was bound to fail. Cf *Brown v Middlemas of Kelso Ltd*, 1994 S.C. 401, where a petition to the *nobile officium* to allow an application for recall to be made after the statutory time limit had expired was refused in the absence of any reasonable explanation for the failure to make the application for recall timeously.

¹⁹⁴ *Craig & Co, Petitioners*, 1946 S.C. 19.

¹⁹⁵ *Thomson v Newey & Eyre Ltd*, 2005 S.L.T. 439.

¹⁹⁶ See also *Aslam v Glasgow City Council* [2016] CSIH 78, where the pursuer's case was ultimately based on breach of an undertaking not to move for sequestration. In that case, however, decree of absolvitor was granted following a failure to comply with an order to find further caution.

CHAPTER 10

THE INTERIM TRUSTEE, THE TRUSTEE, THE COMMISSIONERS AND THE CREDITORS

INTRODUCTION

The sequestration process is administered by a trustee who is appointed on the making of the award of sequestration or by their replacement. The trustee may be supervised and assisted by commissioners in those cases in which they are appointed. In certain cases, an interim trustee may be appointed prior to the making of the award of sequestration to safeguard the debtor's estate pending a decision on the award of sequestration. The creditors as a body also have various roles in the sequestration process. **10-01**

This chapter considers the role of the interim trustee, the trustee, the commissioners and the creditors as a body. **10-02**

BACKGROUND TO THE CURRENT LAW

Following the recommendations of the Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* in 1982,¹ the Bankruptcy (Scotland) Act 1985 introduced provision for an interim trustee to be appointed in every sequestration either on the making of the award of sequestration or, in certain cases, before the making of the award of sequestration.² The interim trustee had the same functions whether they were appointed on the making of the award of sequestration or before the making of the award of sequestration, namely to safeguard the debtor's estate pending the appointment of a permanent trustee, to ascertain the reasons for the debtor's insolvency and the circumstances surrounding it, to ascertain the state of the debtor's liabilities and assets, to administer the sequestration process pending the appointment of a permanent trustee and, whether or not still acting in the sequestration, to supply Accountant in Bankruptcy (AiB) with information,³ and was given a wide range of powers commensurate with those functions.⁴ The interim trustee was then succeeded by a permanent trustee who carried out the administration of the sequestration process.⁵ **10-03**

¹ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), Ch.2.

² See Bankruptcy (Scotland) Act 1985 ss.2(1) and 13(1) as enacted and thereafter s.2 as substituted by the Bankruptcy (Scotland) Act 1993 s.2.

³ See Bankruptcy (Scotland) Act 1985 s.2(1) as enacted and thereafter s.2(4) as substituted by the Bankruptcy (Scotland) Act 1993 s.2.

⁴ Bankruptcy (Scotland) Act 1985 s.18 as enacted and subsequently amended by the Bankruptcy (Scotland) Act 1993.

⁵ Bankruptcy (Scotland) Act 1985 s.3 as enacted and subsequently amended by the Bankruptcy (Scotland) Act 1993.

- 10-04** In 2003, however, the Scottish Executive in its consultation paper *Personal Bankruptcy Reform in Scotland: A Modern Approach*⁶ sought views on combining the roles (and powers) of the interim trustee appointed on the award of sequestration and the permanent trustee in order to simplify the system.⁷ A large majority of consultees were in favour of this proposal and the Scottish Executive indicated its intention to proceed with it accordingly.⁸ The Bankruptcy and Diligence etc. (Scotland) Act 2007 therefore amalgamated the roles and powers of the interim trustee appointed on the award of sequestration and the permanent trustee by providing for the appointment of a trustee on the making of the award of sequestration with all the powers previously exercised by both interim and permanent trustees. The original right of the creditors to choose the permanent trustee was retained in the form of provision for the creditors to elect a replacement trustee in place of the trustee appointed on the award of sequestration in appropriate cases. The possibility of appointing an interim trustee prior to the award of sequestration in certain cases was also retained, but with correspondingly reduced functions and powers for the interim trustee.
- 10-05** The Bankruptcy and Diligence etc. (Scotland) Act 2007 also altered the role of the commissioners, which was in some respects reduced. The question of whether commissioners should be retained as part of the sequestration process was considered as part of the process leading to the enactment of the Bankruptcy and Debt Advice (Scotland) Act 2014 although not formally consulted on. The general view, however, was that commissioners performed a valuable role in those cases where they were elected, and they have therefore been retained.
- 10-06** The role of the creditors as a body has, by and large, not been the subject of consultation, and has remained largely unchanged since the introduction of the Bankruptcy (Scotland) Act 1985.

THE INTERIM TRUSTEE

Appointment of interim trustee

- 10-07** Where a petition for sequestration is presented by a creditor or a trustee acting under a trust deed, the sheriff may appoint an interim trustee before sequestration is awarded if the debtor consents *or* the trustee acting under the trust deed or any creditor (not only the petitioning creditor) shows cause.⁹ Common reasons for seeking the appointment of an interim trustee include the need to take control of a debtor's business and the danger of the debtor destroying records, disposing of assets or absconding.¹⁰ The ability to appoint an interim trustee may be particularly important in cases where the petition is continued for any reason.¹¹

⁶ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0030743.pdf> [Accessed 16 September 2017].

⁷ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 10.8–10.10.

⁸ See Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), available at <http://www.scotland.gov.uk/Resource/Doc/203606/0054275.pdf> [Accessed 16 September 2017], paras 5.71–5.76.

⁹ Bankruptcy (Scotland) Act 2016 s.54(1).

¹⁰ For an example of the first-mentioned see the background narrated in *Clark's Trustee, Noter*, 1993 S.L.T. 667.

¹¹ Continuation of sequestration petitions is discussed further in Ch.8.

Where the petition nominates a person to act as the trustee in sequestration, the petition states that the person so nominated is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee, and a copy of the undertaking is annexed to the petition, the sheriff may appoint that person to be the interim trustee.¹² A requirement that the person nominated be resident within the jurisdiction of the Court of Session was repealed by the Bankruptcy and Diligence etc. (Scotland) Act 2007.¹³ In practice, an insolvency practitioner will normally give the necessary undertaking only if it appears that there will be sufficient assets in the estate to pay their fees and outlays or the petitioning creditor has given an undertaking to pay these if there are insufficient assets in the estate to do so. 10-08

Where the petition does not nominate a person to act as the trustee in sequestration or the sheriff declines to appoint the person nominated, AiB will be appointed as interim trustee.¹⁴ 10-09

Considerations to be taken into account in relation to appointment of interim trustee

It is provided that no one, with the exception of AiB, may act as an interim trustee in a sequestration if they are ineligible for election as a replacement trustee in that sequestration by virtue of s.49(3) of the Bankruptcy (Scotland) Act 2016.¹⁵ 10-10

In a case in which the debtor objected to the appointment of the interim trustee as the permanent trustee on the basis that the debtor had previously consulted someone else in the interim trustee's firm, which was therefore in a confidential relationship with the debtor, it was observed that the appointment of a trustee is in every case the appointment of an individual and the question must be whether circumstances exist which might affect a person's ability to perform their statutory functions as such trustee; whether or not a particular person is suitable for appointment in any particular case will therefore depend on the circumstances of that case.¹⁶ 10-11

Notification of appointment of interim trustee

The sheriff clerk must, without delay, intimate the appointment of the interim trustee to the person appointed and, where they are not the interim trustee, AiB.¹⁷ 10-12

The interim trustee must notify the debtor of their appointment as soon as practicable¹⁸ and, at the same time, send to the debtor a statement of undertakings in the prescribed form for signature by the debtor.¹⁹ 10-13

¹² Bankruptcy (Scotland) Act 2016 s.54(2)(a). Insolvency practitioners are discussed further in Ch.4.

¹³ See Bankruptcy and Diligence etc. (Scotland) Act 2007 s.7.

¹⁴ Bankruptcy (Scotland) Act 2016 s.54(2)(b).

¹⁵ Bankruptcy (Scotland) Act 2016 s.55(8).

¹⁶ *Clydesdale Bank Plc v Grantly Developments* unreported 24 March 2000 OH. See also *Archer Car Sales (Airdrie) Ltd v Gregory's Trustee*, 1993 S.L.T. 223, where it was held that a permanent trustee's appointment was not tainted by the fact that he had previously advised the debtor and acted as the trustee under a trust deed for creditors granted by the debtor, in which capacity he had petitioned for sequestration of the debtor's estates.

¹⁷ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.7(1)(b) and (2).

¹⁸ Bankruptcy (Scotland) Act 2016 s.54(3).

¹⁹ Bankruptcy (Scotland) Act 2016 s.54(4). The statement of undertakings is discussed further in Chs 7 and 8.

Replacement of interim trustee

- 10–14** Normally, the interim trustee will be in office for a short period only, but where there is a delay in deciding whether to award sequestration, for example, where there is more than one warrant to cite or the petition is continued for some other reason,²⁰ they may be in office for an extended period of time. Provision is therefore made for the replacement of an interim trustee following their removal, resignation or death prior to the determination of the sequestration petition.

Removal

- 10–15** Where the sheriff removes the interim trustee following a report to the sheriff by AiB under s.200(4) of the Bankruptcy (Scotland) Act 2016 that the interim trustee has failed to perform any of their duties without reasonable excuse, the sheriff must, on the application of AiB, appoint a new interim trustee.²¹
- 10–16** Without prejudice to that provision, where the sheriff is satisfied *either* that an interim trustee is unable to act for specified reasons *or* that an interim trustee's conduct has been such that they should no longer continue to act, they must, on the application of the debtor, a creditor or AiB, remove the interim trustee and appoint a new one.²² The reasons for an interim trustee being unable to act are that they are incapable within the meaning of s.1(6) of the Adults with Incapacity (Scotland) Act 2000, that they have some other incapacity as a result of which they are unable to act as interim trustee or that they are unable to act by, under or by virtue of any other provision of the Bankruptcy (Scotland) Act 2016.²³

Resignation

- 10–17** An interim trustee other than AiB may apply to the sheriff for authority to resign, and where the sheriff is satisfied *either* that the interim trustee is unable to act for any of the reasons discussed in the preceding paragraph *or* that the interim trustee's conduct has been such that they should no longer continue to act, the sheriff must grant the application.²⁴ As noted above, it is specifically provided that no one, with the exception of AiB, may act as an interim trustee in a sequestration if they are ineligible for election as a replacement trustee in that sequestration by virtue of s.49(3) of the Bankruptcy (Scotland) Act 2016,²⁵ and where an interim trustee is prohibited from so acting, they must forthwith apply for authority to resign under this provision.²⁶

²⁰ See further Ch.8.

²¹ Bankruptcy (Scotland) Act 2016 s.55(1), (2). The provisions of s.200(4) of the Bankruptcy (Scotland) Act 2016 are discussed at para.10–51.

²² Bankruptcy (Scotland) Act 2016 s.55(3).

²³ Bankruptcy (Scotland) Act 2016 s.55(3)(a) and (4). Section 1(6) of the Adults with Incapacity (Scotland) Act 2000 provides that “incapable” means incapable of acting, making decisions, communicating decisions, understanding decisions or retaining the memory of decisions by reason of mental disorder or of inability to communicate because of physical disability, but that a person does not fall within that definition by reason only of a lack or deficiency in a faculty of communication which can be made good by human or mechanical aid (whether of an interpretative nature or otherwise).

²⁴ Bankruptcy (Scotland) Act 2016 s.55(5).

²⁵ Bankruptcy (Scotland) Act 2016 s.55(8).

²⁶ Bankruptcy (Scotland) Act 2016 s.55(9). Ineligibility to act as replacement trustee is discussed at para.10–62.

Where an interim trustee resigns following the granting of an application for authority to resign, the sheriff must appoint a new interim trustee.²⁷ 10-18

Death

Where an interim trustee dies, the sheriff must appoint a new interim trustee on the application of the debtor, a creditor or AiB.²⁸ 10-19

The new interim trustee

Where an application for the appointment of a new interim trustee nominates a person to act as such, states that the person nominated is qualified to act as an insolvency practitioner and has given an undertaking to act as such, and a copy of the undertaking is annexed to the application, the sheriff may appoint that person to be the new interim trustee.²⁹ Where the application does not nominate a person to act as the new interim trustee or where the sheriff declines to appoint the person nominated, AiB will be appointed as the new interim trustee.³⁰ 10-20

Notification of appointment of new interim trustee

The sheriff clerk must, without delay, intimate the appointment of the new interim trustee to the person appointed and, where they are not the interim trustee, AiB.³¹ 10-21

There does not appear to be any requirement for the new interim trustee to notify the debtor of their appointment. 10-22

Handover to new interim trustee

There appears to be a lacuna in the legislation in so far as no specific provision is made for a handover to the new interim trustee or for the outlays and remuneration of the interim trustee who is replaced: the statutory provisions relating to the termination of an interim trustee's functions, discussed below, apply only where the sheriff either awards sequestration and appoints another person to be the trustee or refuses to award sequestration. 10-23

However, where the sheriff removes an interim trustee following a report by AiB under s.200(4) of the Bankruptcy (Scotland) Act 2016, they have the power to make such other order as the circumstances of the case may require, and it is suggested that in such a case, the sheriff could be asked to make an appropriate order dealing with these matters. In any other case, it is suggested that an appropriate order might be sought under s.211(1)(b) of the Bankruptcy (Scotland) Act 2016, in terms of which the sheriff, on the application of any person having an interest, may make such order as is necessary to enable something to be done where for any reason it is required to be done but cannot otherwise be done.³² 10-24

²⁷ Bankruptcy (Scotland) Act 2016 s.55(6).

²⁸ Bankruptcy (Scotland) Act 2016 s.55(7).

²⁹ Bankruptcy (Scotland) Act 2016 s.55(10) applying a modified version of s.51(1), (2).

³⁰ Bankruptcy (Scotland) Act 2016 s.55(10) applying a modified version of s.51(3).

³¹ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.6.7(1)(c) and (2).

³² The provisions of s.211 are discussed further in Ch.12.

Function of interim trustee

- 10–25** The general function of the interim trustee is to safeguard the debtor's estate pending the determination of the sequestration petition.³³
- 10–26** An interim trustee other than AiB must also, whether or not still acting in the sequestration, supply AiB with such information as they consider necessary to allow them to discharge their functions.³⁴

Powers of interim trustee

- 10–27** The powers of the interim trustee are found primarily in s.39 of the Bankruptcy (Scotland) Act 2016 which deals with interim preservation of the estate.

Power to give the debtor directions

- 10–28** The interim trustee may, in pursuance of their function of safeguarding the debtor's estate pending determination of the sequestration petition, give the debtor general or particular directions about the management of the debtor's estate.³⁵
- 10–29** Where the interim trustee is AiB, the debtor may apply to AiB for a review of any such direction on the ground that it is unreasonable.³⁶ Where such an application is made, AiB must without delay send a copy of the application to any interested person and advise that person of the right to make representations within 21 days beginning with the day on which the application is made.³⁷ AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke the direction within 28 days beginning with the day on which the application is made³⁸; and (ii) notify their decision to the debtor and any interested person.³⁹ The debtor must comply with the direction pending the outcome of the review.⁴⁰ If the debtor is dissatisfied with AiB's decision on review, they may apply to the sheriff within 14 days beginning with the day on which the decision is made.⁴¹ The sheriff may set aside the original or amended direction if they consider that it is unreasonable and, whether they do so or not, they may give the debtor such directions regarding the management of the debtor's estate as they consider appropriate.⁴² Subject to any interim order of the sheriff, the debtor must comply with the original or amended direction pending the outcome of the appeal.⁴³
- 10–30** Where the interim trustee is not AiB, the debtor may appeal to the sheriff on the ground that any such direction is unreasonable.⁴⁴ The sheriff may set aside the direction if they consider that it is unreasonable and, whether they do so or

³³ Bankruptcy (Scotland) Act 2016 s.53(1).

³⁴ Bankruptcy (Scotland) Act 2016 s.53(2).

³⁵ Bankruptcy (Scotland) Act 2016 s.39(1).

³⁶ Bankruptcy (Scotland) Act 2016 s.39(5). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(c).

³⁷ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

³⁸ Bankruptcy (Scotland) Act 2016 s.39(6).

³⁹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

⁴⁰ Bankruptcy (Scotland) Act 2016 s.39(8)(a).

⁴¹ Bankruptcy (Scotland) Act 2016 s.39(7).

⁴² Bankruptcy (Scotland) Act 2016 s.39(7).

⁴³ Bankruptcy (Scotland) Act 2016 s.39(8)(b).

⁴⁴ Bankruptcy (Scotland) Act 2016 s.39(9).

not, they may give the debtor such directions regarding the management of the debtor's estate as they consider appropriate.⁴⁵ Subject to any interim order of the sheriff, the debtor must comply with the direction pending determination of the appeal.⁴⁶

The debtor is guilty of an offence if they fail without reasonable excuse to comply with a direction of the interim trustee (including an amended direction following review by AiB) or the sheriff.⁴⁷ **10-31**

General powers

The interim trustee may, in pursuance of their function of safeguarding the debtor's estate pending determination of the sequestration petition, do any of the following things: **10-32**

- (1) Require the debtor to deliver to them any money, valuables or documents relating to the debtor's business or financial affairs which belong to, or are in the possession of, the debtor or are under the debtor's control⁴⁸ and place them in safe custody.⁴⁹ The debtor is guilty of an offence if they fail without reasonable excuse to comply with any such requirement of the interim trustee.⁵⁰
- (2) Require the debtor to deliver to them any perishable goods belonging to the debtor or under the debtor's control⁵¹ and arrange for their sale or disposal.⁵² Normally, the sale or disposal of the estate would be a matter for the trustee, but in the case of perishable goods, it may be necessary to act quickly so that the value of the goods, if not the goods themselves, is preserved. The debtor is guilty of an offence if they fail without reasonable excuse to comply with any such requirement of the interim trustee.⁵³
- (3) Make or cause to be made an inventory or valuation of any of the debtor's property.⁵⁴
- (4) Require the debtor to implement any transaction entered into by the debtor.⁵⁵ The debtor is guilty of an offence if they fail without reasonable excuse to comply with any such requirement of the interim trustee.⁵⁶
- (5) Effect or maintain insurance policies in relation to the debtor's business or property.⁵⁷
- (6) Carry on any business of the debtor in so far as it is necessary to safeguard the debtor's estate.⁵⁸ Carrying on the debtor's business may be necessary, for example, in order to preserve assets or the value of goodwill, but it will not always be necessary. The interim trustee has the power to request the continuation of supplies made by specified

⁴⁵ Bankruptcy (Scotland) Act 2016 s.39(9).

⁴⁶ Bankruptcy (Scotland) Act 2016 s.39(10).

⁴⁷ Bankruptcy (Scotland) Act 2016 s.40(1)(a).

⁴⁸ Bankruptcy (Scotland) Act 2016 s.39(2)(a).

⁴⁹ Bankruptcy (Scotland) Act 2016 s.39(2)(b).

⁵⁰ Bankruptcy (Scotland) Act 2016 s.40(1)(a).

⁵¹ Bankruptcy (Scotland) Act 2016 s.39(2)(c).

⁵² Bankruptcy (Scotland) Act 2016 s.39(2)(d).

⁵³ Bankruptcy (Scotland) Act 2016 s.40(1)(a).

⁵⁴ Bankruptcy (Scotland) Act 2016 s.39(2)(e).

⁵⁵ Bankruptcy (Scotland) Act 2016 s.39(2)(f).

⁵⁶ Bankruptcy (Scotland) Act 2016 s.40(1)(a).

⁵⁷ Bankruptcy (Scotland) Act 2016 s.39(2)(g).

⁵⁸ Bankruptcy (Scotland) Act 2016 s.39(2)(h).

utilities for the purposes of any business which is or has been carried on by or on behalf of the debtor, and in such a case certain restrictions apply in relation to the conditions which may be imposed by the suppliers on those supplies.⁵⁹ Prior to the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, an interim trustee also had the power to close down the debtor's business, but this power was controversial. It was accordingly removed on the basis that even if it had been appropriate for an interim trustee as originally conceived by the Bankruptcy (Scotland) Act 1985, it was not appropriate in the context of the limited role and function of an interim trustee appointed prior to the award of sequestration. It is indisputable that where the sequestration does not ultimately proceed, a debtor may be unable to re-open a business which has been closed by an interim trustee. There may be circumstances, however, where the closure of the debtor's business rather than its continuation is necessary in order to safeguard the debtor's estate, for example, to avoid incurring further liabilities or losses or where any statutory or regulatory requirements are not being or can no longer be complied with, and this may be a particular issue where the interim trustee remains in office for an extended period of time as a result, for example, of any continuation of the sequestration petition.⁶⁰ It is suggested that in such a case, an appropriate order could be obtained under the provisions which allow the interim trustee to apply to the sheriff for any other order necessary to safeguard the debtor's estate which are discussed further below.

- (7) Borrow money in so far as it is necessary to safeguard the debtor's estate.⁶¹ The interim trustee may, for example, require to borrow money to continue the debtor's business or preserve an asset. In contrast to the trustee, however, the interim trustee is not given a power to grant security over any part of the debtor's estate, which may limit their ability to borrow. It is suggested that in an appropriate case, an order allowing the interim trustee to grant security for this purpose could be obtained under the provisions which allow the interim trustee to apply to the sheriff for any other order necessary to safeguard the debtor's estate which are discussed further below.

Powers granted by the sheriff

10–33 Where the interim trustee considers that it is necessary to do something beyond what they may do in terms of the provisions discussed above in order to perform their function of safeguarding the debtor's estate pending determination of the sequestration petition, they may apply to the sheriff for additional powers as follows:

- (i) They may apply to the sheriff for a warrant authorising them to enter the debtor's residence or business premises and to search for and take possession of money, valuables or documents relating to the debtor's business or financial affairs which belong to, or are in the possession of, the debtor or are under the debtor's control *or* perishable goods belonging to or under the control of the debtor, if need be by opening

⁵⁹ Bankruptcy (Scotland) Act 2016 s.222 discussed in more detail in Ch.12.

⁶⁰ Continuation of a sequestration petition is discussed in Ch.8.

⁶¹ Bankruptcy (Scotland) Act 2016 s.39(2)(h).

shut and lockfast places.⁶² The sheriff may grant such a warrant on cause shown.⁶³ The debtor is guilty of an offence if they obstruct the interim trustee acting in pursuance of such a warrant.⁶⁴ Although this provision refers only to a warrant to enter the debtor's residence or business premises, it has been suggested, it is thought correctly, that in an appropriate case, an interim trustee could obtain a warrant to search other premises under the provisions which allow the interim trustee to apply to the sheriff for any other order necessary to safeguard the debtor's estate which are discussed further in the following paragraph.⁶⁵

- (ii) They may apply to the sheriff for any other order to safeguard the debtor's estate and the sheriff may grant such order as they think appropriate.⁶⁶ This is very wide. In what appears to be the only reported case on the provision (then s.18(3)(c) of the Bankruptcy (Scotland) Act 1985),⁶⁷ an interim trustee appointed prior to the award of sequestration sought an order authorising them to sell the debtor's public house and the business carried on therein in the particular circumstances of that case. In granting the order prior to the hearing on the sequestration petition, Lord Osborne said:

"I have reached the conclusion that s 18(3)(c) of the Act of 1985 . . . does, on a proper construction, enable the court to grant the noter the authority which he seeks to sell the said public house and the business carried on therein. The words of the subsection 'such other order to safeguard the debtor's estate as it thinks appropriate' are, in my opinion, very wide. I can see nothing in the preceding terms of s 18(3), or indeed elsewhere in the Act of 1985, which would have the effect of curtailing the very wide scope of these words. In particular, while the words . . . in subpara (c) form part of a list of powers given to the court under s 18(3), I do not consider that the *ejusdem generis* rule of construction would apply here to effect a curtailment of the *prima facie* effect of the words concerned, since in my opinion, no genus can be perceived as emerging from the preceding list of powers."

It has therefore been suggested above that in an appropriate case, the interim trustee could inter alia obtain an order allowing them to close down the debtor's business, grant security to enable them to borrow money or enter and search premises other than the debtor's residence or business premises under this provision. 10-34

Power to obtain information

Prior to the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, an interim trustee had powers similar to those of a trustee to request the debtor, the debtor's spouse or civil partner, or any other person believed to have specified information to appear before them and give that information, and to apply to the sheriff for a private examination of the debtor or any such 10-35

⁶² Bankruptcy (Scotland) Act 2016 s.39(4)(a).

⁶³ Bankruptcy (Scotland) Act 2016 s.39(4)(a).

⁶⁴ Bankruptcy (Scotland) Act 2016 s.40(1)(b).

⁶⁵ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 7.43, 7.44.

⁶⁶ Bankruptcy (Scotland) Act 2016 s.39(4)(b).

⁶⁷ *Clark's Trustee, Noter*, 1992 S.C.L.R. 540; 1993 S.L.T. 667.

person.⁶⁸ These powers were removed, however, on the basis that they were no longer necessary in the context of the limited role and function of an interim trustee appointed prior to the award of sequestration and the limited time they would normally be in office. The ability to recover information in this way might be important, however, particularly where the interim trustee in fact remains in office for an extended period of time as a result, for example, of any continuation of the sequestration petition.⁶⁹ It is suggested, however, that in an appropriate case, an appropriate order might be obtained under the provision which allows an interim trustee to apply to the sheriff for any other order necessary to safeguard the debtor's estate discussed above.

Powers in relation to property subject to orders under the proceeds of crime legislation

- 10-36** Where any property in the debtor's estate is subject to a restraint order made under ss.41, 120 or 190 of the Proceeds of Crime Act 2002, the interim trustee's powers do not apply to such property.⁷⁰

Money received by the interim trustee

- 10-37** All money received by the interim trustee in the exercise of their function must be deposited in an interest-bearing account in the name of the debtor's estate in an appropriate bank or institution, subject to the provisos that: (i) where AiB is the interim trustee, it may alternatively be deposited in an interest-bearing account in the name of the Scottish Ministers in an appropriate bank or institution; and (ii) the interim trustee may retain in their hands a sum not exceeding £200 or such other sum as may be prescribed.⁷¹ At the time of writing, no other sum has been prescribed.

Interim trustee not appointed trustee

- 10-38** Provision is made for the termination of the interim trustee's functions where they are not appointed as trustee, either because a different person is appointed as trustee on the award of sequestration or because sequestration is refused. Separate provision is made for cases where the interim trustee is not AiB and cases where the interim trustee is AiB.

Interim trustee not AiB

- 10-39** Where the sheriff awards sequestration and appoints another person as trustee, the interim trustee must hand over to the trustee everything in their possession which relates to the sequestration and thereafter ceases to act in the sequestration.⁷²
- 10-40** The sheriff may make such order as to liability for the interim trustee's outlays and remuneration as he considers appropriate.⁷³ Within three months of the award or refusal of sequestration (as the case may be), the interim trustee must submit their accounts of their intromissions with the debtor's estate (if any) to AiB together with their claims for outlays reasonably incurred and

⁶⁸ The trustee's powers in respect are discussed in Ch.13.

⁶⁹ Continuation of a sequestration petition is discussed in Ch.8.

⁷⁰ Proceeds of Crime Act 2002 s.420(5).

⁷¹ Bankruptcy (Scotland) Act 2016 s.111 as applied by s.39(3). "Appropriate bank or institution" is defined in the Bankruptcy (Scotland) Act 2016 s.228(1).

⁷² Bankruptcy (Scotland) Act 2016 s.56(2).

⁷³ Bankruptcy (Scotland) Act 2016 s.56(3).

remuneration for work reasonably undertaken⁷⁴ and send a copy of the accounts and claims to the debtor, the petitioner and, where sequestration has been awarded, the trustee and all creditors known to them.⁷⁵ AiB must audit the interim trustee's accounts,⁷⁶ issue a determination fixing the amount of their outlays and remuneration⁷⁷ and send a copy of the determination to the interim trustee, the debtor, the petitioner and, where sequestration has been awarded, the trustee and all the creditors known to the interim trustee.⁷⁸ A separate and partly overlapping provision requires AiB to send a copy of the audited accounts and determination to the trustee appointed in the sequestration where that trustee is not AiB.⁷⁹ The interim trustee, the debtor, the petitioner or, where sequestration has been awarded, the trustee or any creditor may, within 14 days after the issuing of the determination, appeal to the sheriff against the determination.⁸⁰ The decision of the sheriff on such an appeal is final.⁸¹

On receiving the copy of the determination, the interim trustee may apply to AiB 10-41 for a certificate of discharge.⁸² They must send notice of their application to the debtor, the petitioner and, where sequestration has been awarded, the trustee and all creditors known to them, and inform them that they may make written representations regarding the application to AiB within the period of 14 days after such notification and of the effect of the discharge.⁸³ On the expiry of the period for making representations, AiB, having considered any representations, must grant or refuse to grant the certificate of discharge and notify the debtor, the petitioner and, where sequestration has been awarded, the trustee and all known creditors accordingly.⁸⁴ Curiously, there does not appear to be any specific requirement to notify the interim trustee themselves, although the fact that they have the right to apply for review of AiB's decision and, if appropriate, appeal the outcome of that review presupposes that such notification will be received.

Provision is made for the interim trustee, the debtor, the petitioner and, where 10-42 sequestration has been awarded, the trustee or any creditor, to apply for a review of AiB's decision within 14 days after its issue.⁸⁵ Where such an application is made, AiB must without delay send a copy of the application to any interested person and advise that person of the right to make representations within 21 days beginning with the day on which the application is made.⁸⁶ AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke their decision within 28 days beginning with the day on which the application is made⁸⁷; and (ii) notify their decision to the debtor and any interested person.⁸⁸ If dissatisfied with AiB's decision on review, the interim trustee, the debtor, the petitioner and, where

⁷⁴ Bankruptcy (Scotland) Act 2016 s.56(4)(a).

⁷⁵ Bankruptcy (Scotland) Act 2016 s.56(4)(b).

⁷⁶ Bankruptcy (Scotland) Act 2016 s.56(5)(a).

⁷⁷ Bankruptcy (Scotland) Act 2016 s.56(5)(b).

⁷⁸ Bankruptcy (Scotland) Act 2016 s.56(5)(c).

⁷⁹ Bankruptcy (Scotland) Act 2016 s.56(5)(d).

⁸⁰ Bankruptcy (Scotland) Act 2016 s.57(1).

⁸¹ Bankruptcy (Scotland) Act 2016 s.57(2).

⁸² Bankruptcy (Scotland) Act 2016 s.56(6).

⁸³ Bankruptcy (Scotland) Act 2016 s.57(3). The effect of the discharge is discussed at para.10-43.

⁸⁴ Bankruptcy (Scotland) Act 2016 s.57(4).

⁸⁵ Bankruptcy (Scotland) Act 2016 s.57(5), (6). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(c).

⁸⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

⁸⁷ Bankruptcy (Scotland) Act 2016 s.57(7).

⁸⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

sequestration has been awarded, the trustee or any creditor may appeal to the sheriff within 14 days after the decision.⁸⁹ Where the sheriff determines that a certificate of discharge which has been refused should be granted, they must order AiB to grant it,⁹⁰ and where they determine that a certificate of discharge which has been granted should have been refused, they must revoke it,⁹¹ and the sheriff clerk must send a copy of the sheriff's decree to AiB.⁹² The decision of the sheriff on such an appeal is final.⁹³

- 10-43** The grant of a certificate of discharge has the effect of discharging the interim trustee from all liability, other than any liability arising from fraud, to the debtor, the petitioner or the creditors in respect of any act or omission of the interim trustee in exercising the functions conferred on them by the Bankruptcy (Scotland) Act 2016.⁹⁴

Interim trustee AiB

- 10-44** Where the sheriff awards sequestration and appoints another person as trustee, AiB must hand over to the trustee everything in their possession which relates to the sequestration and thereupon ceases to act in the sequestration.⁹⁵

- 10-45** The sheriff may make such order as to liability for AiB's outlays and remuneration as interim trustee as they consider appropriate.⁹⁶

- 10-46** Within three months of the award or refusal of sequestration (as the case may be), AiB must send to the debtor and the petitioner their accounts of their intromissions with the debtor's estate (if any)⁹⁷ together with a determination of their fees and outlays calculated in accordance with the Bankruptcy Fees etc. (Scotland) Regulations 2014⁹⁸ and a notice in writing containing specified information.⁹⁹ The specified information is that AiB has commenced the procedure leading to their discharge in relation to their acting as interim trustee, that an application for review and an appeal to the sheriff may be made in terms of specified provisions, and that where the statutory requirements have been complied with and there has either been no appeal, or any appeal in relation to AiB's discharge has been refused, AiB is discharged of any liability incurred while acting as interim trustee.¹⁰⁰ In a case where sequestration has been awarded, AiB must also send a copy of their accounts, the determination of their fees and outlays and the notice to all creditors known to them.¹⁰¹

- 10-47** The debtor, the petitioner or any creditor may, within 14 days beginning with the sending of the notice, apply for a review of the discharge of AiB in relation

⁸⁹ Bankruptcy (Scotland) Act 2016 s.57(8). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(d).

⁹⁰ Bankruptcy (Scotland) Act 2016 s.57(9)(a).

⁹¹ Bankruptcy (Scotland) Act 2016 s.57(9)(b).

⁹² Bankruptcy (Scotland) Act 2016 s.57(10).

⁹³ Bankruptcy (Scotland) Act 2016 s.57(11).

⁹⁴ Bankruptcy (Scotland) Act 2016 s.56(7).

⁹⁵ Bankruptcy (Scotland) Act 2016 s.58(2).

⁹⁶ Bankruptcy (Scotland) Act 2016 s.58(3).

⁹⁷ Bankruptcy (Scotland) Act 2016 s.58(4)(a)(i).

⁹⁸ Bankruptcy (Scotland) Act 2016 s.58(4)(a)(ii). The Bankruptcy Fees etc. (Scotland) Regulations 2014 are the relevant regulations at the time of writing.

⁹⁹ Bankruptcy (Scotland) Act 2016 s.58(4)(a)(iii).

¹⁰⁰ Bankruptcy (Scotland) Act 2016 s.58(5).

¹⁰¹ Bankruptcy (Scotland) Act 2016 s.58(4)(b).

to their actings as interim trustee.¹⁰² Where such an application is made, AiB must without delay send a copy of the application to any interested person and advise that person of the right to make representations within 21 days beginning with the day on which the application is made.¹⁰³ AiB must then: (i) take into account any such representations which are made within that period and confirm or revoke the discharge within 28 days beginning with the day on which the application is made¹⁰⁴; and (ii) notify their decision to the debtor and any interested person.¹⁰⁵

If dissatisfied with AiB's decision on review, or if dissatisfied with AiB's determination of their fees and outlays, the debtor, the petitioner or any creditor may appeal to the sheriff.¹⁰⁶ The appeal must be made within 14 days beginning with the day of AiB's decision on review or the day on which AiB's notice was sent as the case may be.¹⁰⁷ The decision of the sheriff on such an appeal is final.¹⁰⁸ The sheriff clerk must send a copy of the sheriff's decree to AiB.¹⁰⁹ **10-48**

As referred to above, where the statutory provisions have been complied with, and either there has been no appeal or any appeal has been refused in relation to AiB's discharge, AiB is discharged from all liability, other than any liability arising from fraud, to the debtor, the petitioner or the creditors in respect of any act or omission of AiB in exercising the functions conferred on them as interim trustee by the Bankruptcy (Scotland) Act 2016.¹¹⁰ **10-49**

Supervision of interim trustee

AiB is required to supervise the performance of, and investigate any complaints against, interim trustees other than AiB.¹¹¹ **10-50**

Where it appears to AiB that an interim trustee has failed without reasonable excuse to perform any of their duties, they must report the matter to the sheriff who, after hearing the interim trustee, may remove them from office, censure them or make such other order as the circumstances of the case require.¹¹² **10-51**

Where AiB has reasonable grounds to suspect that an interim trustee has committed an offence in the performance of their functions, they must report the matter to the Lord Advocate.¹¹³ AiB is also required to report the matter to the Lord Advocate where they have reasonable grounds to suspect that an offence has been committed in relation to a sequestration by a person other than the debtor in relation to that person's dealings with, inter alia, the debtor **10-52**

¹⁰² Bankruptcy (Scotland) Act 2016 s.59(1), (2). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(f).

¹⁰³ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹⁰⁴ Bankruptcy (Scotland) Act 2016 s.59(3).

¹⁰⁵ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹⁰⁶ Bankruptcy (Scotland) Act 2016 s.59(4). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(e).

¹⁰⁷ Bankruptcy (Scotland) Act 2016 s.59(4).

¹⁰⁸ Bankruptcy (Scotland) Act 2016 s.59(6).

¹⁰⁹ Bankruptcy (Scotland) Act 2016 s.59(5).

¹¹⁰ Bankruptcy (Scotland) Act 2016 s.58(6), (7).

¹¹¹ Bankruptcy (Scotland) Act 2016 s.200(1)(a).

¹¹² Bankruptcy (Scotland) Act 2016 s.200(4). The replacement of an interim trustee who is removed under this provision is discussed at para.10-15.

¹¹³ Bankruptcy (Scotland) Act 2016 s.200(5)(a), (6).

or the trustee in respect of the debtor's assets, business or financial affairs.¹¹⁴ Such a person could include an interim trustee.

THE TRUSTEE

Appointment of trustee

- 10-53** There must be a trustee in every sequestration,¹¹⁵ but there may not be joint trustees.¹¹⁶ The trustee is appointed when the award of sequestration is made.¹¹⁷

Petitions for sequestration

- 10-54** In the case of a petition for sequestration, where the petition nominates a person to act as trustee in the sequestration, the petition states that the person nominated is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee, a copy of the undertaking is annexed to the petition, and no interim trustee has been appointed, the sheriff may appoint the person nominated in the petition to be the trustee.¹¹⁸ A requirement that the trustee be resident within the jurisdiction of the Court of Session was repealed by the Bankruptcy and Diligence etc. (Scotland) Act 2007.¹¹⁹ As already noted in connection with the appointment of an interim trustee, in practice, an insolvency practitioner will normally give the necessary undertaking only if it appears that there will be sufficient assets in the estate to pay their fees and outlays or the petitioning creditor has given an undertaking to pay these if there are insufficient assets in the estate to do so. Where the petitioner has not nominated a person to act as trustee in the petition or the sheriff declines to appoint the person nominated, and no interim trustee has been appointed, AiB will be appointed as trustee.¹²⁰
- 10-55** Where an interim trustee has been appointed, the sheriff may appoint the interim trustee or such other person as may be nominated by the petitioner to be the trustee,¹²¹ provided that, in the latter case, it appears to the sheriff that the person nominated is qualified to act as an insolvency practitioner and has given an undertaking to act as trustee, and a copy of the undertaking has been lodged with the sheriff.¹²² Where the sheriff does not appoint either the interim trustee or a person nominated by the petitioner to act as trustee, AiB will be appointed as trustee.¹²³
- 10-56** A trustee appointed in a sequestration where the petition was presented by a creditor or trustee acting under a trust deed must notify the debtor of their appointment as soon as is practicable.¹²⁴ Curiously, this requirement does not apply where the petition is presented by someone else. The trustee must at the

¹¹⁴ Bankruptcy (Scotland) Act 2016 s.200(5)(c), (6).

¹¹⁵ Bankruptcy (Scotland) Act 2016 s.50(1).

¹¹⁶ *Inland Revenue Commissioners v MacDonald*, 1988 S.L.T. (Sh Ct) 7.

¹¹⁷ Bankruptcy (Scotland) Act 2016 s.51.

¹¹⁸ Bankruptcy (Scotland) Act 2016 s.51(1), (2). Insolvency practitioners are discussed in Ch.4.

¹¹⁹ See Bankruptcy and Diligence etc. (Scotland) Act 2007 s.7.

¹²⁰ Bankruptcy (Scotland) Act 2016 s.51(3).

¹²¹ Bankruptcy (Scotland) Act 2016 s.51(4), (5).

¹²² Bankruptcy (Scotland) Act 2016 s.51(6).

¹²³ Bankruptcy (Scotland) Act 2016 s.51(7).

¹²⁴ Bankruptcy (Scotland) Act 2016 s.51(13). There is no prescribed form of notification.

same time send the debtor a statement of undertakings in the prescribed form for the debtor to sign.¹²⁵

Debtor applications for sequestration

In the case of a debtor application for sequestration, where the debtor application nominates a person to act as trustee in the application and states that the person nominated is qualified to act as an insolvency practitioner and has given a written undertaking to act as trustee, and a copy of the undertaking is annexed to the debtor application, AiB may appoint the person so nominated to be the trustee.¹²⁶ AiB may not make such an appointment, however, where the debtor satisfies the minimal asset criteria for sequestration.¹²⁷ **10-57**

Where the debtor application does not nominate a person to act as trustee or AiB does not appoint the person so nominated, whether because the debtor satisfies the minimal asset criteria or for some other reason, AiB is deemed to be appointed as the trustee.¹²⁸ **10-58**

Considerations to be taken into account in relation to appointment of trustee

As already noted in connection with the appointment of an interim trustee, in a case in which the debtor objected to the appointment of the interim trustee as the permanent trustee on the basis that the debtor had previously consulted someone else in the interim trustee's firm, which was therefore in a confidential relationship with the debtor, it was observed that the appointment of a trustee is in every case the appointment of an individual and the question must be whether circumstances exist which might affect a person's ability to perform their statutory functions as such trustee; whether or not a particular person is suitable for appointment in any particular case will therefore depend on the circumstances of that case.¹²⁹ **10-59**

Replacement of trustee as a result of trustee vote at statutory meeting

The trustee appointed when the award of sequestration is made may be replaced as a result of the trustee vote at the statutory meeting where that meeting is held. **10-60**

Trustee vote at statutory meeting

As noted in Ch.8, where the statutory meeting is held, the final part of that meeting is the trustee vote, in which the creditors are to confirm the appointment of the trustee appointed on the award of sequestration (referred to as the original trustee) or elect another person to be the trustee (referred to as the replacement trustee).¹³⁰ **10-61**

¹²⁵ Bankruptcy (Scotland) Act 2016 s.51(14) and see further Ch.8. The prescribed form for the statement of undertakings is Form 13 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.3.

¹²⁶ Bankruptcy (Scotland) Act 2016 s.51(8), (9). Insolvency practitioners are discussed in Ch.4.

¹²⁷ Bankruptcy (Scotland) Act 2016 s.51(10), (11). The minimal asset criteria are discussed in Ch.7.

¹²⁸ Bankruptcy (Scotland) Act 2016 s.51(12).

¹²⁹ *Clydesdale Bank Plc v Grantly Developments* unreported 24 March 2000 OH. See also *Archer Car Sales (Airdrie) Ltd v Gregory's Trustee*, 1993 S.L.T. 223, where it was held that a permanent trustee's appointment was not tainted by the fact that he had previously advised the debtor and acted as the trustee under a trust deed for creditors granted by the debtor, in which capacity he had petitioned for sequestration of the debtor's estates.

¹³⁰ Bankruptcy (Scotland) Act 2016 s.49(1).

10-62 The replacement trustee may not be the debtor; a person who is not qualified to act as an insolvency practitioner or who, although qualified to act as an insolvency practitioner, is not qualified to act as such in relation to the debtor; a person who holds an interest opposed to the general interests of the creditors; a person who has not given a written undertaking to act as trustee; or AiB.¹³¹ Where the replacement trustee becomes a person who may not be a replacement trustee after their election, they may not continue to act as trustee.¹³²

10-63 It may be noted that any person who, other than by succession, acquires after the date of sequestration a debt due by the debtor, and any creditor to the extent that their debt is a postponed debt, is disqualified from voting in the trustee vote.¹³³

No replacement trustee elected

10-64 If no creditor entitled to vote in the trustee vote attends the statutory meeting or no replacement trustee is elected, then the original trustee will continue to act as trustee.¹³⁴ The original trustee must forthwith report the proceedings at the statutory meeting to the sheriff and, if not AiB, notify AiB accordingly.¹³⁵

Replacement trustee elected

10-65 Where a replacement trustee is elected, the original trustee must immediately make a report of the proceedings to AiB (if the original trustee is not AiB) or the sheriff (if the original trustee is AiB).¹³⁶

10-66 The debtor, a creditor, the original trustee, the replacement trustee or AiB may object to any matter connected with the election.¹³⁷ Where the objector is anyone other than AiB, the objection is made by way of an application to AiB¹³⁸; where the objector is AiB, the objection is made by way of an application to the sheriff.¹³⁹ In either case, the application must be made within four days beginning with the day of the statutory meeting and must specify the grounds on which the objection is taken.¹⁴⁰

10-67 Where there is no timeous objection under these provisions, AiB must without delay declare the replacement trustee to be the trustee in the sequestration¹⁴¹

¹³¹ Bankruptcy (Scotland) Act 2016 s.49(3), (5). Insolvency practitioners are discussed in Ch.4.

¹³² Bankruptcy (Scotland) Act 2016 s.49(4).

¹³³ Bankruptcy (Scotland) Act 2016 s.49(6), (7). Postponed debts are discussed in Ch.16.

¹³⁴ Bankruptcy (Scotland) Act 2016 s.49(8)(b) (where the original trustee is AiB) and 49(9)(b) (where the original trustee is not AiB).

¹³⁵ Bankruptcy (Scotland) Act 2016 s.49(8)(a) (where the original trustee is AiB) and 49(9)(a) (where the original trustee is not AiB). The report to the sheriff must be in Form 7.5 in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.5.

¹³⁶ Bankruptcy (Scotland) Act 2016 s.60(1), (2). A report to AiB under these provisions must be in Form 4 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.11(1). There is, however, no prescribed form for the report to the sheriff.

¹³⁷ Bankruptcy (Scotland) Act 2016 s.60(3).

¹³⁸ Bankruptcy (Scotland) Act 2016 s.60(3)(a). The application must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1)(b).

¹³⁹ Bankruptcy (Scotland) Act 2016 s.60(3)(b). The application must be in Form 7.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1.

¹⁴⁰ Bankruptcy (Scotland) Act 2016 s.60(4).

¹⁴¹ Bankruptcy (Scotland) Act 2016 s.60(5).

and send a copy of their decision to the original trustee and the replacement trustee.¹⁴²

Where there is such an objection, in the case of an application to AiB, AiB must without delay notify the original trustee, the replacement trustee, the objector and any other interested person and give them an opportunity to make written submissions on the application within 14 days beginning with the date on which the notification was given before making a decision on the application.¹⁴³ Where AiB decides to reject the objection, they must without delay declare the replacement trustee to be the trustee in the sequestration,¹⁴⁴ and where they decide to sustain the objection, they must order the original trustee to arrange a new meeting at which a new trustee vote must be held.¹⁴⁵ In either case, they must notify the original trustee, the replacement trustee, the objector and any other interested person of their decision, without delay in the case of an order to arrange a new meeting.¹⁴⁶ The same provisions will apply to the new meeting and trustee vote as in the case of the original.¹⁴⁷ 10-68

The original trustee, the replacement trustee, the objector and any other interested person may apply to AiB for review of AiB's decision within 14 days beginning with the day on which notice of the decision is given.¹⁴⁸ Where such an application is made, AiB must without delay send a copy of the application to those persons and advise them of the right to make representations within 21 days beginning with the day on which the application is made.¹⁴⁹ AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke the decision within 28 days beginning with the day on which the application is made¹⁵⁰; and (ii) notify their decision to those persons.¹⁵¹ If the trustee, the objector or any other interested person is dissatisfied with AiB's decision on review, they may appeal to the sheriff within 14 days beginning with the day of the decision.¹⁵² 10-69

In the case of an application by AiB to the sheriff or an appeal to the sheriff against a decision of AiB on a review as referred to in the preceding paragraph, the sheriff must without delay give the parties an opportunity to be heard on the application before making a decision.¹⁵³ Where the sheriff decides to reject an objection to the appointment of the replacement trustee, they must without delay declare them to be the trustee in the sequestration and make an order appointing them as such,¹⁵⁴ and where they decide to sustain such an objection, they must order the original trustee to arrange a new meeting at which a new 10-70

¹⁴² See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.11(2).

¹⁴³ See Bankruptcy (Scotland) Act 2016 s.61(1), (2) and Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.11(3).

¹⁴⁴ Bankruptcy (Scotland) Act 2016 s.61(3)(a).

¹⁴⁵ Bankruptcy (Scotland) Act 2016 s.61(3)(b).

¹⁴⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.11(4).

¹⁴⁷ Bankruptcy (Scotland) Act 2016 s.61(4).

¹⁴⁸ Bankruptcy (Scotland) Act 2016 s.61(5), (6). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(g).

¹⁴⁹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹⁵⁰ Bankruptcy (Scotland) Act 2016 s.61(7).

¹⁵¹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹⁵² Bankruptcy (Scotland) Act 2016 s.61(8). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(f).

¹⁵³ Bankruptcy (Scotland) Act 2016 s.62(1), (2).

¹⁵⁴ Bankruptcy (Scotland) Act 2016 s.62(3)(a).

trustee vote must be held.¹⁵⁵ The same provisions will apply to the new meeting and trustee vote as in the case of the original.¹⁵⁶ The decision of the sheriff is final.¹⁵⁷ It may be noted that the provisions for review and appeal may result in considerable delay before the replacement trustee's appointment is finally confirmed, during which time the replacement trustee will not be in position to fulfil their functions.

- 10-71** The expenses of any objection in relation to the election are not to fall on the sequestrated estate.¹⁵⁸
- 10-72** Provision is made for a handover from the original trustee to the replacement trustee, the termination of the original trustee's functions and the original trustee's discharge. Separate provision is made for those cases where the original trustee was not AiB and those cases where the original trustee was AiB.
- 10-73** Where the original trustee was not AiB, they must hand over to the replacement trustee everything in their possession which relates to the sequestration, including the statement of assets and liabilities prepared by the debtor, a copy of the trustee's statement of the debtor's affairs (as revised where relevant) and a copy of their written comments as to the causes of the insolvency and the extent to which the debtor's conduct contributed to the insolvency.¹⁵⁹ They must then cease to act in the sequestration.¹⁶⁰ No time limit is specified for the handover, although the requirement that it take place on the replacement trustee's appointment suggests it should be done immediately.
- 10-74** Within three months of the replacement trustee's appointment, the original trustee must submit their accounts of their intromissions with the debtor's estate (if any) to AiB together with their claim for outlays reasonably incurred and remuneration for work reasonably undertaken¹⁶¹ and send a copy of the accounts and claim to the replacement trustee.¹⁶² Where the original trustee was also the interim trustee in the sequestration, the accounts and claim must include their accounts and a claim in respect of the period of their appointment as interim trustee.¹⁶³
- 10-75** AiB must audit the original trustee's accounts,¹⁶⁴ issue a determination fixing the amount of their outlays and remuneration¹⁶⁵ and send a copy of the determination to the original trustee¹⁶⁶ and a copy of the audited accounts and determination to the replacement trustee.¹⁶⁷ The original trustee, the replacement trustee, the debtor or any creditor may appeal to the sheriff against the determination within 14 days after it is issued.¹⁶⁸ The decision of the sheriff on such an appeal is final.¹⁶⁹

¹⁵⁵ Bankruptcy (Scotland) Act 2016 s.62(3)(b).

¹⁵⁶ Bankruptcy (Scotland) Act 2016 s.62(4).

¹⁵⁷ Bankruptcy (Scotland) Act 2016 s.62(5).

¹⁵⁸ Bankruptcy (Scotland) Act 2016 ss.60(6) and 61(9).

¹⁵⁹ Bankruptcy (Scotland) Act 2016 s.63(1), (2)(a). The documents mentioned are discussed further in Ch.8.

¹⁶⁰ Bankruptcy (Scotland) Act 2016 s.63(2)(b).

¹⁶¹ Bankruptcy (Scotland) Act 2016 s.63(3)(a).

¹⁶² Bankruptcy (Scotland) Act 2016 s.63(3)(b).

¹⁶³ Bankruptcy (Scotland) Act 2016 s.63(4).

¹⁶⁴ Bankruptcy (Scotland) Act 2016 s.63(5)(a).

¹⁶⁵ Bankruptcy (Scotland) Act 2016 s.63(5)(b).

¹⁶⁶ Bankruptcy (Scotland) Act 2016 s.63(5)(c)(i).

¹⁶⁷ Bankruptcy (Scotland) Act 2016 s.63(5)(c)(ii).

¹⁶⁸ Bankruptcy (Scotland) Act 2016 s.63(6).

¹⁶⁹ Bankruptcy (Scotland) Act 2016 s.63(7).

On receiving the copy of the determination, the original trustee may apply to AiB for a certificate of discharge.¹⁷⁰ They must send notice of their application to the debtor, all creditors known to them and the replacement trustee,¹⁷¹ and inform the debtor that the debtor, the replacement trustee or any creditor may make written representations regarding the application to AiB within the period of 14 days after such notification, that the audited accounts of the original trustee's intromissions with the debtor's estate (if any) are available for inspection at the original trustee's office, that a copy of these accounts has been sent to the replacement trustee, and of the effect of the discharge.¹⁷² On the expiry of the period for making representations, having considered any representations, AiB must grant or refuse to grant the certificate of discharge and notify the original trustee, the debtor, the replacement trustee and all creditors who made representations accordingly.¹⁷³ 10-76

The original trustee, the replacement trustee, the debtor or any creditor who made representations may apply to AiB for a review of their decision within 14 days beginning with the day on which it was issued.¹⁷⁴ Where such an application is made, AiB must without delay send a copy of the application to specified persons and advise them of the right to make representations within 21 days beginning with the day on which the application is made.¹⁷⁵ They must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke their decision within 28 days beginning with the day on which the application is made¹⁷⁶; and (ii) notify their decision to the debtor and any interested person.¹⁷⁷ If dissatisfied with AiB's decision on review, the original trustee, the replacement trustee, the debtor or any creditor who made representations may appeal to the sheriff within 14 days after the decision.¹⁷⁸ Where the sheriff determines that a certificate of discharge which has been refused should be granted, they must order AiB to grant it,¹⁷⁹ and the sheriff clerk must send a copy of the sheriff's decree to AiB.¹⁸⁰ The decision of the sheriff on such an appeal is final.¹⁸¹ 10-77

The grant of a certificate of discharge has the effect of discharging the original trustee from all liability, other than any liability arising from fraud, to the debtor or the creditors in respect of any act or omission of the original trustee in exercising the functions conferred on them by the Bankruptcy (Scotland) Act 2016.¹⁸² 10-78

Where the original trustee was AiB, AiB must hand over to the replacement trustee everything in their possession which relates to the sequestration and which they obtained in the capacity of original trustee, including the debtor's 10-79

¹⁷⁰ Bankruptcy (Scotland) Act 2016 s.65(1).

¹⁷¹ Bankruptcy (Scotland) Act 2016 s.65(2).

¹⁷² Bankruptcy (Scotland) Act 2016 s.65(2)(a), (b) and (c). The effect of the discharge is discussed at para.10-78.

¹⁷³ Bankruptcy (Scotland) Act 2016 s.65(3).

¹⁷⁴ Bankruptcy (Scotland) Act 2016 s.65(4), (5). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(i).

¹⁷⁵ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹⁷⁶ Bankruptcy (Scotland) Act 2016 s.65(6).

¹⁷⁷ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹⁷⁸ Bankruptcy (Scotland) Act 2016 s.65(7). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(h).

¹⁷⁹ Bankruptcy (Scotland) Act 2016 s.65(8).

¹⁸⁰ Bankruptcy (Scotland) Act 2016 s.65(9).

¹⁸¹ Bankruptcy (Scotland) Act 2016 s.65(10).

¹⁸² Bankruptcy (Scotland) Act 2016 s.65(11).

statement of assets and liabilities.¹⁸³ They must thereupon cease to act in the sequestration.¹⁸⁴

10–80 Within three months of the appointment of the replacement trustee, AiB must send to the replacement trustee their accounts of their intromissions with the debtor's estate (if any)¹⁸⁵ together with a determination of their fees and outlays calculated in accordance with the Bankruptcy Fees etc. (Scotland) Regulations 2014¹⁸⁶ and a copy of the notice in writing referred to below.¹⁸⁷ They must also send to the debtor and all creditors known to them a copy of the determination of their fees and outlays and a written notice stating that they have commenced the procedure leading to their discharge in relation to their actings as trustee, that the accounts of their intromissions with the debtor's estate (if any) are available for inspection at a specified address, that an application for review and an appeal to the sheriff may be made in terms of specified provisions, and that where the statutory requirements have been complied with and there has either been no appeal, or any appeal in relation to AiB's discharge has been refused, AiB is discharged from all liability, other than liability for fraud, to the debtor or the creditors in respect of any act or omission in exercising the functions of trustee.¹⁸⁸

10–81 The replacement trustee, the debtor or any creditor may, within 14 days beginning with the day on which the notice is sent, apply for a review of the discharge of AiB in relation to their actings as trustee.¹⁸⁹ Where such an application is made, AiB must without delay send a copy of the application to those persons and advise them of the right to make representations within 21 days beginning with the day on which the application is made.¹⁹⁰ AiB must then: (i) take into account any such representations which are made within that period and confirm or revoke the discharge within 28 days beginning with the day on which the application is made¹⁹¹; and (ii) notify this decision to the replacement trustee, the debtor and the creditors.¹⁹²

10–82 If dissatisfied with AiB's decision on review, or with AiB's determination of their fees and outlays, the replacement trustee, the debtor or any creditor may appeal to the sheriff.¹⁹³ The appeal must be made within 14 days beginning with the day of AiB's decision on review or the day on which AiB's notice was sent as the case may be.¹⁹⁴ The decision of the sheriff on such an appeal is final.¹⁹⁵

As referred to above, where the statutory provisions have been complied with, and either there has been no appeal to the sheriff or any appeal has been refused

¹⁸³ Bankruptcy (Scotland) Act 2016 s.64(1), (2)(a).

¹⁸⁴ Bankruptcy (Scotland) Act 2016 s.64(2)(b).

¹⁸⁵ Bankruptcy (Scotland) Act 2016 s.64(3)(a).

¹⁸⁶ Bankruptcy (Scotland) Act 2016 s.64(3)(b). The Bankruptcy Fees etc. (Scotland) Regulations 2014 are the relevant regulations at the time of writing.

¹⁸⁷ Bankruptcy (Scotland) Act 2016 s.64(3)(c).

¹⁸⁸ Bankruptcy (Scotland) Act 2016 s.64(4).

¹⁸⁹ Bankruptcy (Scotland) Act 2016 s.64(5), (6). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(h).

¹⁹⁰ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹⁹¹ Bankruptcy (Scotland) Act 2016 s.64(7).

¹⁹² Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹⁹³ Bankruptcy (Scotland) Act 2016 s.64(8). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(g).

¹⁹⁴ Bankruptcy (Scotland) Act 2016 s.64(8).

¹⁹⁵ Bankruptcy (Scotland) Act 2016 s.64(9).

in relation to AiB's discharge, AiB is discharged from all liability, other than any liability arising from fraud, to the debtor or the creditors in respect of any act or omission of AiB in exercising the functions of trustee in the sequestration.¹⁹⁶

Replacement of trustee in other circumstances

Provision is made for the replacement of a trustee following their resignation, death or removal. There is also a special procedure for the replacement of a trustee acting in more than one sequestration in certain cases. **10–83**

Resignation

A trustee other than AiB may apply to AiB for authority to resign, and AiB must grant that application where they are satisfied that the trustee is unable to act as a result of any provision of the Bankruptcy (Scotland) Act 2016 or from any other cause *or* that the trustee's conduct has been such that they should no longer continue to act.¹⁹⁷ AiB may make the granting of the application subject to the election of a new trustee and any other conditions they consider appropriate in all the circumstances of the case.¹⁹⁸ **10–84**

Where the application is granted subject to the election of a new trustee, the resigning trustee must call a meeting of the creditors, to be held within 28 days after the granting of the application, for the purpose of electing a new trustee.¹⁹⁹ In any other case, the commissioners or, if there are no commissioners, AiB must call such a meeting, to be held within 28 days after the trustee's resignation, for that purpose.²⁰⁰ The provisions for the election and appointment of a replacement trustee which apply where there is a trustee vote at the statutory meeting also apply, subject to any necessary modifications, in relation to the election and appointment of a trustee under these provisions.²⁰¹ Where no new trustee is elected at the meeting, AiB may appoint as the new trustee any person who applies to AiB within 14 days beginning with the day of the relevant meeting or any other person selected by AiB who consents to the appointment.²⁰² In either case, the new trustee must not be ineligible for election as replacement trustee under s.49(3) of the Bankruptcy (Scotland) Act 2016.²⁰³ Where AiB does not make such an appointment, AiB is deemed to be the new trustee.²⁰⁴ **10–85**

Death

Where the trustee dies, the commissioners or, if there are no commissioners, AiB must, as soon as practicable after becoming aware of the death, call a meeting of the creditors for the purpose of electing a new trustee.²⁰⁵ The provisions for the election and appointment of a replacement trustee which apply where there is a trustee vote at the statutory meeting also apply, subject to any necessary modifications, in relation to the election and appointment of **10–86**

¹⁹⁶ Bankruptcy (Scotland) Act 2016 s.64(10), (11).

¹⁹⁷ Bankruptcy (Scotland) Act 2016 s.69(1).

¹⁹⁸ Bankruptcy (Scotland) Act 2016 s.69(2).

¹⁹⁹ Bankruptcy (Scotland) Act 2016 s.69(3)(b).

²⁰⁰ Bankruptcy (Scotland) Act 2016 s.69(3)(a).

²⁰¹ Bankruptcy (Scotland) Act 2016 s.69(5). These provisions are discussed at para.10–61 onwards.

²⁰² Bankruptcy (Scotland) Act 2016 s.69(6).

²⁰³ Bankruptcy (Scotland) Act 2016 s.69(7). The persons who are ineligible to be elected as replacement trustee are discussed at para.10–62.

²⁰⁴ Bankruptcy (Scotland) Act 2016 s.69(8).

²⁰⁵ Bankruptcy (Scotland) Act 2016 s.69(4).

a trustee under these provisions.²⁰⁶ Where no new trustee is elected at the meeting, AiB may appoint as the new trustee any person who applies to AiB within 14 days beginning with the day of the relevant meeting or any other person selected by AiB who consents to the appointment.²⁰⁷ In either case, the new trustee must not be ineligible for election as replacement trustee under s.49(3) of the Bankruptcy (Scotland) Act 2016.²⁰⁸ Where AiB does not make such an appointment, AiB is deemed to be the new trustee.²⁰⁹

Removal

10–87 A trustee other than AiB²¹⁰ may be removed in a number of different circumstances as follows:

- (a) The trustee may be removed by the creditors at a meeting called for that purpose if they also forthwith elect a new trustee.²¹¹ For this purpose, “creditors” does not include anyone acquiring a debt due by the debtor other than by succession after the date of sequestration and any creditor whose debt is postponed.²¹² There is no requirement for any reason to be given for the trustee’s removal under this provision.
- (b) The trustee may be removed by order of AiB where they are satisfied that there are reasons to remove the trustee from office other than the fact that the trustee is unable to act as a result of any provision of the Bankruptcy (Scotland) Act 2016 or from any other cause *or* that the trustee’s conduct has been such that they should no longer continue to act.²¹³ Such an order may be made by AiB *ex proprio motu* or on the application of the commissioners or any person representing not less than one quarter in value of the creditors.²¹⁴ As well as, or instead of, making such an order, AiB may make such further or other order as they think fit.²¹⁵ AiB must notify the trustee, the debtor, the commissioners and any creditor of any order made under these provisions.²¹⁶ Where there is an application for removal of the trustee, particulars of the application must be entered in the register of insolvencies, the application must be served on the trustee and the trustee must be given an opportunity to make representations on the application to AiB within 21 days beginning with the date on which the application was sent to the trustee.²¹⁷ Within 14 days beginning after the expiry of that period, AiB must decide whether or not to remove the trustee

²⁰⁶ Bankruptcy (Scotland) Act 2016 s.69(5). These provisions are discussed at para.10–61 onwards.

²⁰⁷ Bankruptcy (Scotland) Act 2016 s.69(6).

²⁰⁸ Bankruptcy (Scotland) Act 2016 s.69(7). The persons who are ineligible to be elected as replacement trustee are discussed at para.10–62.

²⁰⁹ Bankruptcy (Scotland) Act 2016 s.69(8).

²¹⁰ See Bankruptcy (Scotland) Act 2016 s.70(6).

²¹¹ Bankruptcy (Scotland) Act 2016 s.70(1)(a).

²¹² Bankruptcy (Scotland) Act 2016 s.70(3). Postponed debts are discussed in Ch.16.

²¹³ Bankruptcy (Scotland) Act 2016 s.70(1)(b). The order must be in Form 5 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(1).

²¹⁴ Bankruptcy (Scotland) Act 2016 s.70(2). An application must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1)(d).

²¹⁵ Bankruptcy (Scotland) Act 2016 s.70(5).

²¹⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(6).

²¹⁷ Bankruptcy (Scotland) Act 2016 s.70(4) and Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(2). See also the provisions of the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.6.

or make any other order which they may make or to refer the matter to the sheriff under s.71(7)(a) of the Bankruptcy (Scotland) Act 2016.²¹⁸ Section 71(7)(a) of the Bankruptcy (Scotland) Act 2016 provides *inter alia* that AiB may refer a case to the sheriff for a direction before making an order to remove the trustee or any other order under these provisions. It is not restricted in its terms to cases where an application has been made, however: AiB may therefore refer a case to the sheriff for a direction where they are considering making any order under these provisions even where no application has been made.

The trustee, the commissioners or any creditor may apply to AiB for a review of any decision of AiB under these provisions.²¹⁹ An application for review may not, however, be made in relation to any matter on which AiB has applied to the sheriff for a direction.²²⁰ An application for review must be made within 14 days beginning with the day on which the decision is given.²²¹ Where such an application is made, AiB must without delay send a copy of the application to those persons and advise them of the right to make representations within 21 days beginning with the day on which the application is made.²²² AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke the decision within 28 days beginning with the day on which the application is made²²³; and (ii) notify their decision to the trustee, the commissioners and the creditors.²²⁴ AiB may refer the case to the sheriff for a direction before undertaking the review.²²⁵ If dissatisfied with AiB's decision on review, the trustee, the commissioners or any creditor may appeal to the sheriff.²²⁶ The appeal must be made within 14 days beginning with the day on which AiB's decision is given.²²⁷

Where the trustee is removed as a result of these provisions, the commissioners or, if there are no commissioners, AiB, must call a meeting of creditors, to be held within 28 days after the trustee's removal, for the purpose of electing a new trustee.²²⁸ Where an application for review of AiB's decision has been made in accordance with the provisions discussed above, AiB is required to notify the commissioners accordingly, the period for calling the meeting is extended and AiB is required to notify the commissioners of the review decision.²²⁹ The provisions for the election and appointment of a replacement trustee which apply where there is a trustee vote at the statutory meeting also apply, subject to any necessary modifications, in relation to the election and appointment of a new trustee under these

²¹⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(3).

²¹⁹ Bankruptcy (Scotland) Act 2016 s.71(1). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(k).

²²⁰ Bankruptcy (Scotland) Act 2016 s.71(8).

²²¹ Bankruptcy (Scotland) Act 2016 s.71(2).

²²² Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

²²³ Bankruptcy (Scotland) Act 2016 s.71(3).

²²⁴ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

²²⁵ Bankruptcy (Scotland) Act 2016 s.71(7)(b).

²²⁶ Bankruptcy (Scotland) Act 2016 s.71(4). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(j).

²²⁷ Bankruptcy (Scotland) Act 2016 s.71(4).

²²⁸ Bankruptcy (Scotland) Act 2016 s.71(5), (6).

²²⁹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(7), (8) and (9).

provisions.²³⁰ Where no new trustee is elected at the meeting, AiB may appoint as the new trustee any person who applies to AiB within 14 days beginning with the day of the relevant meeting or any other person selected by AiB who consents to the appointment.²³¹ In either case, the new trustee must not be ineligible for election as replacement trustee under s.49(3) of the Bankruptcy (Scotland) Act 2016.²³² Where AiB does not make such an appointment, AiB is deemed to be the new trustee.²³³

These provisions are expressly stated to be without prejudice to the provisions for removal of the trustee following a report to the sheriff by AiB which are discussed further below.²³⁴

- (c) AiB may declare the office of trustee to have become or to be vacant where they are satisfied that the trustee is unable to act as a result of any provision of the Bankruptcy (Scotland) Act 2016 or from any other cause whatsoever other than death *or* their conduct has been such that they should no longer continue to act.²³⁵ They may also make any order necessary to enable the sequestration to proceed or to safeguard the estate pending the election of a new trustee.²³⁶ Before making any such declaration or order, AiB must give the trustee the opportunity to make representations.²³⁷ AiB must notify the trustee, the debtor, the commissioners and any creditor of any decision or order made under these provisions.²³⁸

The declaration and any order may be made by AiB *ex proprio motu* or on the application of the commissioners, the debtor or a creditor.²³⁹

Where there is an application, AiB must order such intimation of the application as they consider necessary.²⁴⁰ It is provided that within 14 days beginning after the expiry of the period for making representations in relation to the application, AiB must decide whether to make any declaration or other order or to refer the matter to the sheriff under s.71(7)(a) of the Bankruptcy (Scotland) Act 2016.²⁴¹ The reference to s.71(7)(a) would appear to be an error. As noted above s.71(7)(a) of the Bankruptcy (Scotland) Act 2016 provides *inter alia* that AiB may refer a case to the sheriff for a direction before making an order to remove the trustee or any other order under the provisions of s.70 of the Bankruptcy (Scotland) Act 2016. The corresponding provision in relation to a declaration that the office of trustee has become or is vacant is s.73(6), which provides *inter alia* that before making a declaration or any order under these provisions, AiB may refer a case to the sheriff for a direction.²⁴² The correct reference would therefore

²³⁰ Bankruptcy (Scotland) Act 2016 s.74. These provisions are discussed at para.10–61 onwards.

²³¹ Bankruptcy (Scotland) Act 2016 s.69(6) as applied by s.75.

²³² Bankruptcy (Scotland) Act 2016 s.69(7) as applied by s.75. The persons who are ineligible to be elected as replacement trustee are discussed at para.10–62.

²³³ Bankruptcy (Scotland) Act 2016 s.69(8) as applied by s.75.

²³⁴ Bankruptcy (Scotland) Act 2016 s.70(7).

²³⁵ Bankruptcy (Scotland) Act 2016 s.72(1)(a) and (2).

²³⁶ Bankruptcy (Scotland) Act 2016 s.72(1)(b).

²³⁷ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(4).

²³⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(6).

²³⁹ Bankruptcy (Scotland) Act 2016 s.72(3). An application must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1)(e).

²⁴⁰ Bankruptcy (Scotland) Act 2016 s.72(4). See also the provisions of the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.6.

²⁴¹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(5).

²⁴² Bankruptcy (Scotland) Act 2016 s.73(6)(a).

appear to be to referring the matter to the sheriff under s.73(6)(a) of the Bankruptcy (Scotland) Act 2016. Like s.71(7)(a), that provision is not restricted in its terms to cases where an application has been made: AiB may therefore refer a case to the sheriff for a direction where they are considering making a declaration or order under these provisions even where no application has been made.

The trustee, the commissioners, the debtor or any creditor may apply to AiB for a review of any declaration or order made by AiB under these provisions.²⁴³ An application for review may not, however, be made in relation to any matter on which AiB has applied to the sheriff for a direction.²⁴⁴ An application for review must be made within 14 days beginning with the day of the declaration.²⁴⁵ Where such an application is made, AiB must without delay send a copy of the application to those persons and advise them of the right to make representations within 21 days beginning with the day on which the application is made.²⁴⁶ AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke the declaration or order within 28 days beginning with the day on which the application is made²⁴⁷; and (ii) notify their decision to the trustee, the commissioners, the debtor and the creditors.²⁴⁸ AiB may refer the case to the sheriff for a direction before undertaking the review.²⁴⁹ If dissatisfied with AiB's decision on review, the trustee, the commissioners, the debtor or any creditor may appeal to the sheriff.²⁵⁰ The appeal must be made within 14 days beginning with the day on which AiB's decision is given.²⁵¹

Where AiB makes a declaration under these provisions, the commissioners or, if there are no commissioners, AiB, must call a meeting of creditors, to be held within 28 days beginning with the day of the declaration, for the purpose of electing a new trustee.²⁵² Where an application for review of AiB's decision has been made in accordance with the provisions discussed above, AiB is required to notify the commissioners accordingly, the period for calling the meeting is extended and AiB is required to notify the commissioners of the review decision.²⁵³ The provisions for the election and appointment of a replacement trustee which apply where there is a trustee vote at the statutory meeting also apply, subject to any necessary modifications, in relation to the election and appointment of a new trustee under these provisions.²⁵⁴ Where no new trustee is elected at the meeting, AiB may appoint as the new trustee any person who applies to AiB within 14 days beginning with the day of the relevant meeting or any other person selected by AiB who consents to the

²⁴³ Bankruptcy (Scotland) Act 2016 s.73(2). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(i).

²⁴⁴ Bankruptcy (Scotland) Act 2016 s.73(7).

²⁴⁵ Bankruptcy (Scotland) Act 2016 s.73(3).

²⁴⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

²⁴⁷ Bankruptcy (Scotland) Act 2016 s.73(4).

²⁴⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

²⁴⁹ Bankruptcy (Scotland) Act 2016 s.73(6)(b).

²⁵⁰ Bankruptcy (Scotland) Act 2016 s.73(5). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(k).

²⁵¹ Bankruptcy (Scotland) Act 2016 s.73(5).

²⁵² Bankruptcy (Scotland) Act 2016 s.73(1).

²⁵³ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.13(7), (8) and (9).

²⁵⁴ Bankruptcy (Scotland) Act 2016 s.74. These provisions are discussed at para.10–61 onwards.

appointment.²⁵⁵ In either case, the new trustee must not be ineligible for election as replacement trustee under s.49(3) of the Bankruptcy (Scotland) Act 2016.²⁵⁶ Where AiB does not make such an appointment, AiB is deemed to be the new trustee.²⁵⁷

These provisions are expressly stated to be without prejudice to the provisions for removal of the trustee following a report to the sheriff by AiB which are discussed further below.²⁵⁸

- (d) The trustee may be removed following a report to the sheriff by AiB under the Bankruptcy (Scotland) Act 2016 s.200(4) that they have failed, without reasonable excuse, to perform any of their duties.²⁵⁹ In such a case, the commissioners or, if there are no commissioners, AiB must call a meeting of creditors, to be held within 28 days after the trustee's removal, for the purpose of electing a new trustee.²⁶⁰ The provisions for the election and appointment of a replacement trustee which apply where there is a trustee vote at the statutory meeting also apply, subject to any necessary modifications, in relation to the election and appointment of a trustee under these provisions.²⁶¹ Where no new trustee is elected at the meeting, AiB may appoint as the new trustee any person who applies to AiB within 14 days beginning with the day of the relevant meeting or any other person selected by AiB who consents to the appointment.²⁶² In either case, the new trustee must not be ineligible for election as replacement trustee under s.49(3) of the Bankruptcy (Scotland) Act 2016.²⁶³ Where AiB does not make such an appointment, AiB is deemed to be the new trustee.²⁶⁴

Handover to new trustee in cases of resignation, death or removal

- 10-88** The new trustee may require the delivery to them of all documents relating to the sequestration in the possession of the former trustee or their representatives with the exception of the former trustee's accounts, of which they are entitled to a copy only.²⁶⁵
- 10-89** The new trustee may also require the former trustee or their representatives to submit the former trustee's accounts for audit to the commissioners or, if there are no commissioners, AiB.²⁶⁶ The commissioners or AiB must issue a determination fixing the amount of the outlays and remuneration payable to the former trustee or their representatives.²⁶⁷ The former trustee or their representatives, the new trustee, the debtor or any creditor may appeal against such

²⁵⁵ Bankruptcy (Scotland) Act 2016 s.69(6) as applied by s.75.

²⁵⁶ Bankruptcy (Scotland) Act 2016 s.69(7) as applied by s.75. The persons who are ineligible to be elected as replacement trustee are discussed at para.10-62.

²⁵⁷ Bankruptcy (Scotland) Act 2016 s.69(8) as applied by s.75.

²⁵⁸ Bankruptcy (Scotland) Act 2016 s.72(5).

²⁵⁹ Bankruptcy (Scotland) Act 2016 s.200(4)(a).

²⁶⁰ Bankruptcy (Scotland) Act 2016 s.71(5)(b) and (6).

²⁶¹ Bankruptcy (Scotland) Act 2016 s.74. These provisions are discussed at para.10-61 onwards.

²⁶² Bankruptcy (Scotland) Act 2016 s.69(6) as applied by s.75.

²⁶³ Bankruptcy (Scotland) Act 2016 s.69(7) as applied by s.75. The persons who are ineligible to be elected as replacement trustee are discussed at para.10-62.

²⁶⁴ Bankruptcy (Scotland) Act 2016 s.69(8) as applied by s.75.

²⁶⁵ Bankruptcy (Scotland) Act 2016 s.69(9)(a) in the case of resignation or death and as applied by s.75 in the case of removal.

²⁶⁶ Bankruptcy (Scotland) Act 2016 s.69(9)(b) in the case of resignation or death and as applied by s.75 in the case of removal.

²⁶⁷ Bankruptcy (Scotland) Act 2016 s.69(10) in the case of resignation or death and as applied by s.75 in the case of removal.

a determination within 14 days after it is issued: in the case of a determination by the commissioners, the appeal is to AiB with a further appeal to the sheriff, and in the case of a determination by AiB, the appeal is to the sheriff.²⁶⁸ In all cases, the decision of the sheriff is final.²⁶⁹

The provisions relating to the discharge of a trustee apply to a trustee who has resigned or been removed, or the executor of a trustee who has died, subject to any necessary modifications.²⁷⁰ **10-90**

Replacement of trustee acting in more than one sequestration

In order to save time and expense where a person acting as trustee in a number of sequestrations requires to be replaced in each of them, the Bankruptcy and Diligence etc. (Scotland) Act 2007 introduced a new procedure for replacing a trustee acting in more than one sequestration in certain cases.²⁷¹ The Bankruptcy and Debt Advice (Scotland) Act 2014 replaced the relevant provisions with new provisions which changed the procedure to be followed and extended the number of cases in which it applied.²⁷² The current provisions are contained in ss.66-68 of the Bankruptcy (Scotland) Act 2016. **10-91**

The current provisions apply where the trustee dies or ceases to be qualified to act as a trustee by virtue of s.49(4) of the Bankruptcy (Scotland) Act 2016 *or* where there is either a conflict of interest or a change in the personal circumstances of the trustee which prevents or makes it impracticable for the trustee to carry out their functions.²⁷³ **10-92**

The original provisions allowed AiB to present a single petition to the Court of Session for the replacement of the trustee in each sequestration.²⁷⁴ In keeping with the policy of removing certain functions from the court which was implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014, however, the current provisions allow the necessary steps to be taken by AiB themselves. Thus, in cases other than those involving the death of the trustee, AiB may determine that the trustee is removed from office in each sequestration in which the trustee has ceased to be qualified,²⁷⁵ and in all cases, AiB may appoint in each sequestration in which the former trustee was acting a new trustee chosen by AiB who has consented to act as trustee.²⁷⁶ The new trustee must not be ineligible for election as replacement trustee under s.49(3) of the Bankruptcy (Scotland) Act 2016.²⁷⁷ Where AiB does not make such an **10-93**

²⁶⁸ Bankruptcy (Scotland) Act 2016 s.69(11) and (12) in the case of resignation or death and as applied by s.75 in the case of removal.

²⁶⁹ Bankruptcy (Scotland) Act 2016 s.69(13) in the case of resignation or death and as applied by s.75 in the case of removal.

²⁷⁰ Bankruptcy (Scotland) Act 2016 s.149(9). The discharge of a trustee is discussed further in Ch.18.

²⁷¹ See Bankruptcy and Diligence etc. (Scotland) Act 2007 s.12 which inserted a new s.28A into the Bankruptcy (Scotland) Act 1985.

²⁷² See Bankruptcy and Debt Advice (Scotland) Act 2014 s.29, which replaced s.28A of the Bankruptcy (Scotland) Act 1985 with new ss.28A and 28B.

²⁷³ Bankruptcy (Scotland) Act 2016 s.66(1), (2). The original provisions applied only where the trustee died or ceased to be qualified to act as trustee: see Bankruptcy (Scotland) Act 1985 s.28A(1). The circumstances in which a trustee ceases to be qualified to act as such are discussed above.

²⁷⁴ See Bankruptcy (Scotland) Act 1985 s.28A(2).

²⁷⁵ Bankruptcy (Scotland) Act 2016 s.66(3).

²⁷⁶ Bankruptcy (Scotland) Act 2016 s.66(4).

²⁷⁷ Bankruptcy (Scotland) Act 2016 s.66(5). The persons who are ineligible to be elected as replacement trustee are discussed at para.10-62.

appointment in any sequestration, AiB is deemed to be the new trustee in that sequestration.²⁷⁸

10-94 A determination or appointment may be made by AiB *ex proprio motu* or on the application of any person having an interest.²⁷⁹ Where there is an application, the applicant must notify all interested persons of the application²⁸⁰; where there is no application, AiB must notify all interested persons of their intention to make a determination or appointment.²⁸¹ In each case, the notice must inform the recipient that they have the right to make representations to AiB within 14 days beginning with the day on which the notice is given²⁸² and AiB must take into account any such representations before making a determination or appointment.²⁸³ AiB must decide whether or not to make a determination or appointment within 14 days following the expiry of the period allowed for representations.²⁸⁴ AiB may, however, refer a case to the court for a direction before making any determination or appointment.²⁸⁵ Such a referral must be made by a single petition to the Court of Session where it relates to sequestrations in different sheriffdoms; in any other case, it is made to the sheriff.²⁸⁶

10-95 Where AiB makes a determination or appointment under these provisions, they must notify the former trustee or their representatives (as the case may be), the debtor, the new trustee and each sheriff who awarded sequestration or to whom the sequestration was transferred.²⁸⁷ The new trustee must in turn notify every creditor known to the trustee.²⁸⁸

10-96 The former trustee or their representatives, the debtor or any creditor may apply to AiB for review of any determination or appointment made by them.²⁸⁹ Any such application must be made within 14 days beginning with the day on which notice of the determination or appointment is given.²⁹⁰ Where such an application is made, AiB must without delay send a copy of the application to those persons and advise them of the right to make representations within 21 days beginning with the day on which the application is made.²⁹¹ AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke the determination or appointment within 28 days beginning with the day on which the application is made²⁹²; and

²⁷⁸ Bankruptcy (Scotland) Act 2016 s.66(6).

²⁷⁹ Bankruptcy (Scotland) Act 2016 s.66(7). An application must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1)(c).

²⁸⁰ Bankruptcy (Scotland) Act 2016 s.66(8). See also the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.6.

²⁸¹ Bankruptcy (Scotland) Act 2016 s.66(9).

²⁸² Bankruptcy (Scotland) Act 2016 s.66(10). Such representations must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 in specified cases: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(2)(a).

²⁸³ Bankruptcy (Scotland) Act 2016 s.67(1).

²⁸⁴ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.12.

²⁸⁵ Bankruptcy (Scotland) Act 2016 s.68(5)(a).

²⁸⁶ Bankruptcy (Scotland) Act 2016 s.68(6).

²⁸⁷ Bankruptcy (Scotland) Act 2016 s.67(2). The transfer of sequestration is discussed in Ch.8.

²⁸⁸ Bankruptcy (Scotland) Act 2016 s.67(3)(a).

²⁸⁹ Bankruptcy (Scotland) Act 2016 s.68(1). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(j).

²⁹⁰ Bankruptcy (Scotland) Act 2016 s.68(2).

²⁹¹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

²⁹² Bankruptcy (Scotland) Act 2016 s.68(3).

(ii) notify their decision to the former trustee or their representatives, the debtor and the creditors.²⁹³ AiB may, however, refer the case to the court for a direction before undertaking the review.²⁹⁴ If dissatisfied with AiB's decision on review, the former trustee or their representatives, the debtor or any creditor may appeal to the sheriff.²⁹⁵ The appeal must be made within 14 days beginning with the day on which AiB's decision is given.²⁹⁶ It must be made by a single petition to the Court of Session where it relates to two or more sequestrations in different sheriffdoms; in any other case, it is made to the sheriff.²⁹⁷

The new trustee may require the delivery to them of all documents relating to each sequestration in which the former trustee was acting which are in the possession of the former trustee or their representatives with the exception of the former trustee's accounts, of which they are entitled to a copy only.²⁹⁸ They may also require the former trustee or their representatives to submit the former trustee's accounts for audit to the commissioners or, if there are no commissioners, AiB,²⁹⁹ and where they do so, the commissioners or AiB must issue a determination fixing the amount of the outlays and remuneration payable to the former trustee or their representatives.³⁰⁰ Where the determination is to be made by AiB, they may refer the case to the court for a direction before issuing it.³⁰¹ 10-97

Appointment of new trustee following revival of sequestration

A new trustee may be appointed where a sequestration has come to an end but has been revived. This is discussed further in Ch.18 in the context of revival of the sequestration. 10-98

Functions of trustee

The main functions of the trustee are set out in s.50 of the Bankruptcy (Scotland) Act 2016. In terms of that section, the general functions of the trustee are: 10-99

- (a) to recover, manage and realise the debtor's estate, whether situated in Scotland or elsewhere.³⁰² These aspects of the trustee's functions are discussed further in the following chapters;
- (b) to distribute the estate among the debtor's creditors according to their respective entitlements.³⁰³ Creditors' claims and the distribution of the estate are discussed further in Ch.16;

²⁹³ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

²⁹⁴ Bankruptcy (Scotland) Act 2016 s.68(5)(c). Such a referral must be made by a single petition to the Court of Session where it relates to sequestrations in different sheriffdoms; in any other case, it is made to the sheriff: Bankruptcy (Scotland) Act 2016 s.68(6).

²⁹⁵ Bankruptcy (Scotland) Act 2016 s.68(4). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(i).

²⁹⁶ Bankruptcy (Scotland) Act 2016 s.68(4).

²⁹⁷ Bankruptcy (Scotland) Act 2016 s.68(6).

²⁹⁸ Bankruptcy (Scotland) Act 2016 s.67(3)(b)(i), (ii).

²⁹⁹ Bankruptcy (Scotland) Act 2016 s.67(3)(b)(iii).

³⁰⁰ Bankruptcy (Scotland) Act 2016 s.67(4).

³⁰¹ Bankruptcy (Scotland) Act 2016 s.68(5)(b). Such a referral must be made by a single petition to the Court of Session where it relates to sequestrations in different sheriffdoms; in any other case, it is made to the sheriff: Bankruptcy (Scotland) Act 2016 s.68(6).

³⁰² Bankruptcy (Scotland) Act 2016 s.50(1)(a).

³⁰³ Bankruptcy (Scotland) Act 2016 s.50(1)(b).

- (c) to ascertain the reasons for the debtor's insolvency and the circumstances surrounding it.³⁰⁴ This is relevant not only for the administration of the estate, but for the purposes of the trustee reporting on suspected offences and/or possible cases justifying bankruptcy restrictions. The trustee's powers to recover documents and information for inter alia this purpose are discussed further in Ch.13; the trustee's obligations to report on suspected offences and possible cases justifying bankruptcy restrictions are discussed further below;
- (d) to ascertain the state of the debtor's liabilities and assets.³⁰⁵ The trustee's powers to recover documents and information for inter alia this purpose are discussed further in Ch.13;
- (e) to maintain a sederunt book during their term of office for the purpose of providing an accurate record of the sequestration process.³⁰⁶ The sederunt book is discussed further in Ch.12;
- (f) to keep regular accounts of their intromissions with the debtor's estate, which they must make available for inspection at all reasonable times by the commissioners (if any), the creditors and the debtor³⁰⁷; and
- (g) in the case of a trustee other than AiB, to supply AiB with such information as AiB considers necessary to enable them to discharge their functions, whether or not the trustee is still acting in the sequestration.³⁰⁸

Qualifications on carrying out trustee's functions

10-100 The trustee is required to carry out the functions set out at (a)–(d) above only in so far as, in their view, to do so would be of financial benefit to the estate of the debtor and in the interests of the creditors.³⁰⁹ This provision was introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 to ensure that the specified functions need not be carried out to the extent that it is uneconomic for the estate and the creditors to do so. This makes sense from the point of view of the administration of the estate, but it may be observed that the function of ascertaining the reasons for the debtor's insolvency and the circumstances surrounding it also has a public interest dimension in so far as it may lead to the trustee discovering matters which might lead to a report on suspected offences and/or possible cases justifying bankruptcy restrictions. The effect of this provision may therefore be that to the extent that it is uneconomic to carry out these functions, conduct which might constitute an offence and/or justify bankruptcy restrictions may remain undiscovered.

10-101 The trustee in performing their functions must have regard to advice offered to them by the commissioners (if any).³¹⁰ Again, however, the trustee is required to do so only in so far as, in their view, to do so would be of financial benefit to the estate of the debtor and in the interests of the creditors.³¹¹ Commissioners are discussed further below.

³⁰⁴ Bankruptcy (Scotland) Act 2016 s.50(1)(c).

³⁰⁵ Bankruptcy (Scotland) Act 2016 s.50(1)(d).

³⁰⁶ Bankruptcy (Scotland) Act 2016 s.50(1)(e).

³⁰⁷ Bankruptcy (Scotland) Act 2016 s.50(1)(f).

³⁰⁸ Bankruptcy (Scotland) Act 2016 s.50(1)(g), (5).

³⁰⁹ Bankruptcy (Scotland) Act 2016 s.50(9).

³¹⁰ Bankruptcy (Scotland) Act 2016 s.50(2).

³¹¹ Bankruptcy (Scotland) Act 2016 s.50(9).

Suspected offences

Where a trustee other than AiB has reasonable grounds to suspect that an offence has been committed in relation to a sequestration by *either* the debtor in respect of their assets, their dealings with them or their conduct in relation to their business or financial affairs *or* by a person other than the debtor in that person's dealings with the debtor, the interim trustee or the trustee in respect of the debtor's assets, business or financial affairs, they must report the matter to AiB.³¹² Any such report is absolutely privileged.³¹³ **10–102**

Bankruptcy restrictions

Where a trustee other than AiB has reasonable grounds to believe that any behaviour on the part of the debtor is of a kind that would result in a sheriff granting an application for a bankruptcy restrictions order, they must report the matter to AiB.³¹⁴ Any such report is absolutely privileged.³¹⁵ Bankruptcy restrictions are discussed in Ch.17. **10–103**

Application for directions by trustee

Provision is made for the trustee to apply for directions in relation to any matter arising in the sequestration. The relevant provisions are discussed in Ch.12. **10–104**

Application in relation to trustee's administration of estate

Provision is made for an application to the sheriff where specified persons are dissatisfied with any act, omission or decision of the trustee. The relevant provisions are discussed in Ch.12. **10–105**

Termination of trustee's functions and discharge of trustee

The termination of the trustee's functions and the discharge of the trustee are discussed in Ch.18. **10–106**

Supervision of trustee

AiB is required to supervise the performance of, and investigate any complaints against, trustees other than themselves.³¹⁶ **10–107**

Where it appears to AiB that a trustee has failed without reasonable excuse to perform any of their duties, they must report the matter to the sheriff who, after hearing the trustee, may remove them from office, censure them or make such other order as the circumstances of the case require.³¹⁷ **10–108**

Where AiB has reasonable grounds to suspect that a trustee has committed an offence in the performance of their functions, they must report the matter to the **10–109**

³¹² Bankruptcy (Scotland) Act 2016 s.50(3)(a), (5). There is no prescribed form for the report, but AiB has produced a suspected offences report form for use by the trustee which is included in the *Notes for Guidance for Trustees*.

³¹³ Bankruptcy (Scotland) Act 2016 s.50(4).

³¹⁴ Bankruptcy (Scotland) Act 2016 s.50(3)(b), (5). There is no prescribed form for the report, but AiB has produced a form of report for the use of trustees which is included in the *Notes for Guidance for Trustees*.

³¹⁵ Bankruptcy (Scotland) Act 2016 s.50(4).

³¹⁶ Bankruptcy (Scotland) Act 2016 s.200(1)(a).

³¹⁷ Bankruptcy (Scotland) Act 2016 s.200(4). The replacement of a trustee who is removed under this provision is discussed at para.10–87.

Lord Advocate.³¹⁸ AiB is also required to report the matter to the Lord Advocate where they have reasonable grounds to suspect that an offence has been committed in relation to a sequestration by a person other than the debtor in relation to that person's dealings with, *inter alia*, the debtor or the interim trustee in respect of the debtor's assets, business or financial affairs.³¹⁹ Such a person could include a trustee.

10-110 AiB also exercises a supervisory role under specific provisions of the Bankruptcy (Scotland) Act 2016.³²⁰

10-111 The trustee is also subject to supervision by the commissioners, if any.³²¹

COMMISSIONERS

Introduction

10-112 Commissioners may be elected to supervise and advise the trustee. In practice, however, commissioners are rare and, as noted above, their role was to some extent reduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007. Where there are no commissioners, their functions are generally carried out by AiB.

Election, resignation and removal of commissioners

Election

10-113 Commissioners may be elected in any sequestration.³²² They may be elected at the statutory meeting, if there is one, or at any subsequent meeting of creditors.³²³ New and additional commissioners may be elected at any subsequent meeting of creditors, but there may be no more than five commissioners at any one time.³²⁴

10-114 Commissioners are elected by the creditors (other than any person who acquires, other than by succession, after the date of sequestration a debt due by the debtor and any creditor to the extent that their debt is postponed).³²⁵ Commissioners are elected from among the creditors or their mandatories.³²⁶ A mandatory is any person authorised in writing by a creditor to represent them at a meeting.³²⁷ The debtor, any person who has an interest opposed to the general interests of the creditors and any person who is an associate of either the debtor or the trustee is ineligible for election as a commissioner³²⁸ and a

³¹⁸ Bankruptcy (Scotland) Act 2016 s.200(5)(a), (6).

³¹⁹ Bankruptcy (Scotland) Act 2016 s.200(5)(c), (6).

³²⁰ This is discussed in the context of the relevant provisions.

³²¹ See further at para.10-118 onwards.

³²² Bankruptcy (Scotland) Act 2016 s.76.

³²³ Bankruptcy (Scotland) Act 2016 s.77 (1).

³²⁴ Bankruptcy (Scotland) Act 2016 s.77(1), (2)

³²⁵ Bankruptcy (Scotland) Act 2016 s.77(1). Creditors whose debts are postponed are discussed in Ch.16.

³²⁶ Bankruptcy (Scotland) Act 2016 s.77(1).

³²⁷ Bankruptcy (Scotland) Act 2016 Sch.6, para.14. The authorisation must be lodged with the trustee before the commencement of the meeting: Bankruptcy (Scotland) Act 2016 Sch.6, para.15.

³²⁸ Bankruptcy (Scotland) Act 2016 s.77(3), (5). Associate is defined in the Bankruptcy (Scotland) Act 2016 ss.228(1) and 229. The definition is discussed in detail in Ch.14.

commissioner who becomes a person who would have been ineligible for election after their election may not continue to act as a commissioner.³²⁹

Resignation

A commissioner may resign at any time.³³⁰

10–115

Removal, etc.

A commissioner may be removed from office in the following ways:

10–116

- (a) where the commissioner is a mandatory, by the creditor whose mandatory they are recalling their mandate and intimating that recall in writing to the trustee³³¹;
- (b) by the creditors (other than any person who acquires, other than by succession, after the date of sequestration a debt due by the debtor and any creditor to the extent that his debt is postponed) at a meeting called for that purpose³³²; and
- (c) by order of the sheriff where the sheriff is satisfied that the commissioner is no longer acting in the interests of the efficient conduct of the sequestration.³³³ This provision was introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014.³³⁴ An order under this provision may be made on the application of AiB, a person representing not less than one quarter in value of the creditors or the trustee.³³⁵ The application must be served on the commissioner and intimated to every creditor who has given the commissioner a mandate³³⁶ and the commissioner must be given the opportunity to make representations.³³⁷ In deciding the application, the sheriff may make such other order as they think fit instead of removing the commissioner.³³⁸ Where the sheriff removes the commissioner, they may also make such further order as they think fit.³³⁹ AiB, the trustee, the commissioner or any creditor may appeal the sheriff's decision within 14 days.³⁴⁰

A commissioner may also be removed from office or censured or made subject to such other order as the circumstances require by the sheriff following a report by AiB that they have failed without reasonable excuse to perform any of their duties.³⁴¹

10–117

³²⁹ Bankruptcy (Scotland) Act 2016 s.77(4).

³³⁰ Bankruptcy (Scotland) Act 2016 s.77(6).

³³¹ Bankruptcy (Scotland) Act 2016 s.77(7)(a).

³³² Bankruptcy (Scotland) Act 2016 s.77(7)(b). Creditors whose debts are postponed are discussed in Ch.16.

³³³ Bankruptcy (Scotland) Act 2016 s.77(7)(c).

³³⁴ See Bankruptcy and Debt Advice (Scotland) Act 2014 s.31(a).

³³⁵ Bankruptcy (Scotland) Act 2016 s.77(8).

³³⁶ Bankruptcy (Scotland) Act 2016 s.77(9)(a), (b).

³³⁷ Bankruptcy (Scotland) Act 2016 s.77(9)(c).

³³⁸ Bankruptcy (Scotland) Act 2016 s.77(10)(b).

³³⁹ Bankruptcy (Scotland) Act 2016 s.77(10)(a).

³⁴⁰ Bankruptcy (Scotland) Act 2016 s.77(11). The appeal would be to the Sheriff Appeal Court: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.10.

³⁴¹ Bankruptcy (Scotland) Act 2016 s.200(4). It is specifically provided that the other provisions for removal discussed above are without prejudice to these provisions: see Bankruptcy (Scotland) Act 2016 s.77(12).

Functions of commissioners

- 10–118** The general functions of the commissioners are to supervise the trustee's intromissions with the sequestrated estate and to advise them.³⁴²
- 10–119** As noted above, the trustee is required to have regard to any advice given to them by the commissioners in performing their functions, but only in so far as, in the trustee's view, to do so would be of financial benefit to the debtor's estate and in the interests of the creditors.³⁴³ Originally, the Bankruptcy (Scotland) Act 1985 required the trustee to consult the commissioners, if they existed, about the recovery, management and realisation of the debtor's estate,³⁴⁴ but this requirement was removed by the Bankruptcy and Diligence etc. (Scotland) Act 2007, which replaced it with a requirement for the trustee to consult AiB about these matters in all cases, not only in those cases where there are no commissioners.³⁴⁵ The trustee is required, however, to comply with any general or specific directions about these matters given to them by the sheriff on the application of the commissioners.³⁴⁶ This provision does not apply, however, where the trustee is AiB,³⁴⁷ with what appears to be the somewhat surprising result that in such a case the trustee is not subject to such direction. It is also subject to the proviso, introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, that the trustee must comply with the statutory provisions on the sale of any of the debtor's heritable estate subject to a security, and may do anything else permitted by the section, only in so far as it would, in their view, be of financial benefit to the estate and in the interests of creditors.³⁴⁸ On the face of it, this would appear to allow the trustee to ignore the directions of the sheriff on an application by the commissioners if, in their view, compliance would not be of financial benefit to the estate and in the interests of creditors. Again, this seems a somewhat surprising result. The provision may be contrasted with the provision which allows the trustee to sell any perishable goods without complying with any directions given to them by the creditors or AiB if they consider that compliance with any such directions would adversely affect the sale but make no corresponding provision in relation to directions given by the sheriff on an application by the commissioners.³⁴⁹ It is not clear whether the apparent results of the other provisos are intended or inadvertent.
- 10–120** The consent of the commissioners is required for certain matters. Originally, the Bankruptcy (Scotland) Act 1985 provided that where there were commissioners, the consent of the commissioners, the creditors or the court was required where the trustee wished to: (a) carry on any business of the debtor; (b) bring, defend or continue any legal proceedings relating to the debtor's estate; (c) create a security over any part of the estate; or (d) make payments or incur liabilities with a view to obtaining for the benefit of the creditors property under any right, option or power forming part of the estate, but this requirement was removed by the Bankruptcy and Diligence etc. (Scotland) Act

³⁴² Bankruptcy (Scotland) Act 2016 s.76.

³⁴³ Bankruptcy (Scotland) Act 2016 s.50(2), (9).

³⁴⁴ See Bankruptcy (Scotland) Act 1985 s.39(1) as enacted.

³⁴⁵ See Bankruptcy (Scotland) Act 1985 s.39(1) as amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007, now Bankruptcy (Scotland) Act 2016 s.109(1).

³⁴⁶ Bankruptcy (Scotland) Act 2016 s.109(2)(b).

³⁴⁷ Bankruptcy (Scotland) Act 2016 s.109(3), (4).

³⁴⁸ See Bankruptcy (Scotland) Act 2016 s.109(3), (12).

³⁴⁹ See Bankruptcy (Scotland) Act 2016 s.109(3), (9).

2007.³⁵⁰ However, where there are commissioners, the trustee must still obtain the consent of the commissioners, the creditors or, since the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, the sheriff, where they wish to refer to arbitration any claim or question of whatever nature arising in the sequestration or to compromise any claim of whatever nature made by or against the sequestrated estate.³⁵¹ The consent of the commissioners is also required where the trustee wishes to dispense with the formal requirements for submitting a claim,³⁵² to alter the length of accounting periods,³⁵³ to pay preferred debts at any time,³⁵⁴ to postpone the payment of a dividend³⁵⁵ or to dispense with the taxation of a legal account.³⁵⁶

Commissioners also have a variety of other functions. As noted above, in specified circumstances they may apply for the trustee's removal, have certain rights in cases involving the removal of the trustee and are required to call a meeting of creditors to replace a trustee who has resigned, died or been removed.³⁵⁷ They also have certain functions in relation to the auditing of the trustee's accounts and the issuing of a determination fixing the amount of the trustee's outlays and remuneration.³⁵⁸ They previously had certain functions in relation to discharge on composition prior to the abolition of that process by the Bankruptcy and Debt Advice (Scotland) Act 2014.³⁵⁹ 10-121

Commissioners also have a number of other rights and powers. They have a right to inspect the trustee's accounts³⁶⁰ and to see confidential documents held by the trustee.³⁶¹ They also have the power to require the trustee to apply for a public examination under s.119 of the Bankruptcy (Scotland) Act 2016³⁶² and to call or require the trustee to call a meeting of the creditors or commissioners in specified circumstances.³⁶³ 10-122

The commissioners may apply to the sheriff if they are dissatisfied with any act, omission or decision of the trustee, and the sheriff may confirm, revoke or modify the relevant decision, confirm or annul the relevant act, give the trustee directions or make any other order he thinks fit.³⁶⁴ 10-123

Meetings of commissioners

The trustee may call a meeting of commissioners at any time, and must call one on being required to do so by an order of the sheriff or on being requested 10-124

³⁵⁰ See Bankruptcy (Scotland) Act 1985 s.39(2) as originally enacted, amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

³⁵¹ Bankruptcy (Scotland) Act 2016 s.216(1).

³⁵² Bankruptcy (Scotland) Act 2016 s.122(10).

³⁵³ Bankruptcy (Scotland) Act 2016 s.130(3). This does not apply, however, where the trustee is AiB.

³⁵⁴ Bankruptcy (Scotland) Act 2016 s.131(3)(b).

³⁵⁵ Bankruptcy (Scotland) Act 2016 s.131(4).

³⁵⁶ Bankruptcy (Scotland) Act 2016 s.132(5).

³⁵⁷ The removal of trustees is discussed above.

³⁵⁸ See Bankruptcy (Scotland) Act 2016 ss.69(10) and 133(1).

³⁵⁹ Discharge on composition, now abolished, is discussed in Ch.17.

³⁶⁰ Bankruptcy (Scotland) Act 2016 s.50(1)(f).

³⁶¹ Bankruptcy (Scotland) Act 2016 s.210(7).

³⁶² Bankruptcy (Scotland) Act 2016 s.119(1)(b). For a discussion of public examinations, see Ch.13.

³⁶³ Bankruptcy (Scotland) Act 2016 Sch.6.

³⁶⁴ Bankruptcy (Scotland) Act 2016 s.50(7), (8). The provisions allow "the debtor, a creditor or any other person having an interest" to make such an application: this would include the commissioners.

to do so by AiB or any commissioner.³⁶⁵ If the trustee fails to call such a meeting within 14 days of being so required or requested, any commissioner may do so.³⁶⁶

- 10-125** There is no provision for a meeting to be called by anyone other than the trustee except in those cases where they have failed to call a meeting having been required or requested to do. This may be problematic in some cases. It has been observed that one of the most common situations in which the commissioners may wish to meet is where the trustee has resigned, died or been removed: in such a case, as noted above, the commissioners are required to call a meeting of creditors to replace the trustee, and may wish to discuss the arrangements for that meeting, but in the absence of a trustee, there is no mechanism for calling a meeting of commissioners to do so.³⁶⁷ The provisions for the commissioners to agree matters without a meeting may, however, provide a solution where the requirements of those provisions are satisfied: these provisions are discussed further below.
- 10-126** The trustee must give the commissioners at least seven days notice of a meeting unless they decide that they do not require such notice.³⁶⁸
- 10-127** The quorum at a meeting of commissioners is one commissioner and the commissioners may act by a majority of the commissioners present at the meeting.³⁶⁹ The trustee must act as clerk at the meeting³⁷⁰ and must insert a record of the deliberations of the commissioners in the sederunt book.³⁷¹ However, if the commissioners are considering the performance of the trustee's functions, the trustee must withdraw from the meeting where requested to do so by the commissioners, and in such a case, a commissioner must act as clerk and transmit a record of the deliberations of the commissioners to the trustee.³⁷² The trustee must then insert the record in the sederunt book and the commissioner must authenticate the insertion when made.³⁷³
- 10-128** Any matter may be agreed by the commissioners without a meeting provided their agreement is unanimous and is subsequently recorded in a minute signed by them.³⁷⁴ The trustee must insert the minute in the sederunt book.³⁷⁵ As noted above, this provision may provide a solution where a meeting cannot be called because there is no trustee in office to call it, provided that the commissioners are unanimous.

Nature of office

- 10-129** Commissioners act gratuitously: there is no provision for their remuneration or even payment of their expenses.

³⁶⁵ Bankruptcy (Scotland) Act 2016 Sch.6, para.26.

³⁶⁶ Bankruptcy (Scotland) Act 2016 Sch.6, para.27.

³⁶⁷ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.14-11.

³⁶⁸ Bankruptcy (Scotland) Act 2016 Sch.6, para.28.

³⁶⁹ Bankruptcy (Scotland) Act 2016 Sch.6, para.31. Cf the provisions for voting at creditors' meetings, where questions are determined by a majority in value of the creditors voting on the question: see para.10-148.

³⁷⁰ Bankruptcy (Scotland) Act 2016 Sch.6, para.29.

³⁷¹ Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.38(a).

³⁷² Bankruptcy (Scotland) Act 2016 Sch.6, para.30.

³⁷³ Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.38(b).

³⁷⁴ Bankruptcy (Scotland) Act 2016 Sch.6, para.32.

³⁷⁵ Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.38(c).

Commissioners have a fiduciary duty to the creditors and the debtor.³⁷⁶ They are specifically prohibited from purchasing any of the debtor's estate.³⁷⁷ **10-130**

Supervision of commissioners

AiB is required to supervise the performance of, and investigate any complaints against, commissioners in sequestration.³⁷⁸ **10-131**

Where it appears to AiB that a commissioner has failed without reasonable excuse to perform any of their duties, they must report the matter to the sheriff who, after hearing the commissioner, may remove them from office, censure them or make such other order as the circumstances of the case require.³⁷⁹ **10-132**

Where AiB has reasonable grounds to suspect that a commissioner has committed an offence in the performance of their functions, they must report the matter to the Lord Advocate.³⁸⁰ AiB must also report the matter to the Lord Advocate where they have reasonable grounds to suspect that an offence has been committed in relation to a sequestration by a person other than the debtor in relation to that person's dealings with the debtor, interim trustee or trustee in respect of the debtor's assets, business or financial affairs.³⁸¹ Such a person could include a commissioner. **10-133**

CREDITORS

Introduction

The creditors as a body have various functions and duties under the Bankruptcy (Scotland) Act 2016. They elect the replacement trustee (if any)³⁸²; in certain cases, they elect a new trustee where one is required³⁸³; and they may give the trustee directions regarding the exercise of their functions.³⁸⁴ In addition, a specified percentage of the creditors may request the trustee to apply for the public examination of the debtor.³⁸⁵ **10-134**

Any reference in the Bankruptcy (Scotland) Act 2016 to "the creditors" in the context of their giving consent or doing any other thing is, unless the context otherwise requires, to be construed as a reference to the majority in value of such creditors as vote in that context at a meeting of creditors³⁸⁶ and any reference to the value of the creditors is, in relation to any matter, a reference to the value of their claims as accepted for the purposes of that matter.³⁸⁷ **10-135**

³⁷⁶ See *Campbell v Cullen*, 1911 1 S.L.T. 258. That case involved members of an advisory committee appointed by the general body of creditors to advise in and supervise the realisation and distribution of the debtor's estate under a trust deed for creditors, but the same principle would apply. AiB's *Notes for Guidance for Trustees* also refer to an unreported case, *Geddes' Trustee* unreported 6 April 1985, in which it was held that the professional charges of a solicitor incurred during the period where he also acted as a commissioner were disallowed.

³⁷⁷ Bankruptcy (Scotland) Act 2016 s.109(11).

³⁷⁸ Bankruptcy (Scotland) Act 2016 s.200(1)(a).

³⁷⁹ Bankruptcy (Scotland) Act 2016 s.200(4).

³⁸⁰ Bankruptcy (Scotland) Act 2016 s.200(5)(a), (6).

³⁸¹ Bankruptcy (Scotland) Act 2016 s.200(5)(c), (6).

³⁸² See Ch.8.

³⁸³ See above.

³⁸⁴ See Ch.12.

³⁸⁵ See Ch.13.

³⁸⁶ Bankruptcy (Scotland) Act 2016 s.228(1).

³⁸⁷ Bankruptcy (Scotland) Act 2016 s.228(1).

- 10-136** A creditor includes a Member State insolvency practitioner deemed to be a creditor under s.207 of the Bankruptcy (Scotland) Act 2016.³⁸⁸

Meetings of creditors

- 10-137** The statutory meeting is discussed in Ch.8. Schedule 6 of the Bankruptcy (Scotland) Act 2016 contains provisions relating to meetings of creditors other than the statutory meeting and provisions relating to all meetings of creditors.

Meetings of creditors other than the statutory meeting

- 10-138** The trustee must call a meeting of creditors if required to do so by order of the sheriff, by 1/10th in number or 1/3rd in value of the creditors, by a commissioner or by AiB.³⁸⁹ Any such meeting must be held not later than 28 days after the issuing of the order of the sheriff or the receipt by the trustee of the relevant requirement (as the case may be).³⁹⁰
- 10-139** The trustee, or a commissioner who has given notice to the trustee, may call a meeting of creditors at any time.³⁹¹
- 10-140** The trustee or commissioner must give at least seven days' notice of the date, time and place of the meeting and the meeting's purpose to every creditor known to them and to AiB.³⁹² It is not, however, necessary to notify any creditor whose accepted claim is less than £50 (or such other sum as may be prescribed) unless the creditor has in writing requested such notification.³⁹³
- 10-141** If the trustee has not called a meeting when required to do so, AiB may, on the application of any creditor or *ex proprio motu*, call a meeting of creditors.³⁹⁴ AiB must, at least seven days before the date of the meeting, take reasonable steps to notify the creditors of the date, time and place of the meeting and the meeting's purpose.³⁹⁵ Again, it is not necessary to notify any creditor whose accepted claim is less than £50 (or such other sum as may be prescribed) unless the creditor has in writing requested such notification.³⁹⁶
- 10-142** At the commencement of a meeting, the trustee must act as chair, and after accepting or rejecting the creditors' claims, they must invite the creditors to elect one of their number to chair the meeting in the trustee's place and preside over the election.³⁹⁷ If no one is so elected, the trustee must chair the meeting throughout.³⁹⁸ The trustee must arrange for a record to be made of the proceedings at the meeting.³⁹⁹
- 10-143** The trustee, a creditor or any other person having an interest may, within 14 days after the date of the meeting, appeal to the sheriff against a resolution of the creditors at the meeting.⁴⁰⁰

³⁸⁸ Bankruptcy (Scotland) Act 2016 s.228(1).

³⁸⁹ Bankruptcy (Scotland) Act 2016 Sch.6, para.1.

³⁹⁰ Bankruptcy (Scotland) Act 2016 Sch.6, para.2.

³⁹¹ Bankruptcy (Scotland) Act 2016 Sch.6, para.3.

³⁹² Bankruptcy (Scotland) Act 2016 Sch.6, para.4.

³⁹³ Bankruptcy (Scotland) Act 2016 Sch.6, para.7.

³⁹⁴ Bankruptcy (Scotland) Act 2016 Sch.6, para.5.

³⁹⁵ Bankruptcy (Scotland) Act 2016 Sch.6, para.6.

³⁹⁶ Bankruptcy (Scotland) Act 2016 Sch.6, para.7.

³⁹⁷ Bankruptcy (Scotland) Act 2016 Sch.6, para.8.

³⁹⁸ Bankruptcy (Scotland) Act 2016 Sch.6, para.9.

³⁹⁹ Bankruptcy (Scotland) Act 2016 Sch.6, para.10.

⁴⁰⁰ Bankruptcy (Scotland) Act 2016 Sch.6, para.11.

All meetings of creditors

No proceedings at a meeting are invalidated only because a notice or other document relating to the calling of the meeting which was required to be sent or given under the Bankruptcy (Scotland) Act 2016 has not been received by, or come to the attention of, any creditor before the meeting.⁴⁰¹ **10-144**

All meetings must be held in a place which is, in the opinion of the person calling the meeting, the most convenient for the majority of the creditors, whether or not in the sheriffdom.⁴⁰² **10-145**

A creditor may authorise in writing a person, referred to as a mandatory, to represent the creditor at a meeting.⁴⁰³ Any such authorisation must be lodged by the creditor with the trustee before the commencement of the meeting.⁴⁰⁴ Any reference to a creditor is taken to include a reference to such a mandatory.⁴⁰⁵ **10-146**

The quorum at any meeting is one creditor.⁴⁰⁶ **10-147**

Any question at a meeting is determined by a majority in value of the creditors who vote on that question.⁴⁰⁷ **10-148**

The chair of the meeting may allow or disallow any objection by a creditor, other than an objection relating to a creditor's claim (unless the chair is the trustee).⁴⁰⁸ A person aggrieved by the chair's determination of an objection may appeal to the sheriff against that determination.⁴⁰⁹ If the chair of the meeting is in doubt as to whether to allow or disallow an objection, the meeting must proceed as if no objection had been made, but the objection is to be deemed to have been disallowed for the purposes of any appeal.⁴¹⁰ **10-149**

If no creditor has appeared at a meeting by half an hour after the time appointed for its commencement, the chair of the meeting may adjourn it to such other day as they may appoint, being a day at least seven but no more than 21 days after that on which the meeting is adjourned.⁴¹¹ The chair of a meeting may adjourn the meeting with the consent of a majority in value of the creditors who vote on a resolution to do so.⁴¹² Any adjourned meeting must be held at the same time and in the same place as the original meeting, unless another time or place is specified in the resolution.⁴¹³ There does not appear to be any time limit within which the adjourned meeting must be held. **10-150**

The minutes of every meeting must be signed by the chair of the meeting and must be sent to AiB within 14 days after the meeting.⁴¹⁴ **10-151**

⁴⁰¹ Bankruptcy (Scotland) Act 2016 Sch.6, para.12.

⁴⁰² Bankruptcy (Scotland) Act 2016 Sch.6, para.13.

⁴⁰³ Bankruptcy (Scotland) Act 2016 Sch.6, para.14.

⁴⁰⁴ Bankruptcy (Scotland) Act 2016 Sch.6, para.15.

⁴⁰⁵ Bankruptcy (Scotland) Act 2016 Sch.6, para.16.

⁴⁰⁶ Bankruptcy (Scotland) Act 2016 Sch.6, para.17.

⁴⁰⁷ Bankruptcy (Scotland) Act 2016 Sch.6, para.18.

⁴⁰⁸ Bankruptcy (Scotland) Act 2016 Sch.6, para.19.

⁴⁰⁹ Bankruptcy (Scotland) Act 2016 Sch.6, para.20.

⁴¹⁰ Bankruptcy (Scotland) Act 2016 Sch.6, para.21.

⁴¹¹ Bankruptcy (Scotland) Act 2016 Sch.6, para.22.

⁴¹² Bankruptcy (Scotland) Act 2016 Sch.6, para.23.

⁴¹³ Bankruptcy (Scotland) Act 2016 Sch.6, para.24.

⁴¹⁴ Bankruptcy (Scotland) Act 2016 Sch.6, para.25.

CHAPTER 11

VESTING OF THE DEBTOR'S ESTATE ON SEQUESTRATION AND RELATED MATTERS

INTRODUCTION

The whole estate of the debtor as defined by the Bankruptcy (Scotland) Act 2016 vests in the trustee in sequestration for the benefit of the creditors as at the date of sequestration, subject to certain limitations.¹ In addition, any estate which is acquired by the debtor within the period of four years after the date of sequestration and which would have vested in the trustee if it had been part of the debtor's estate on the date of sequestration, generally referred to as *acquirenda*, vests in the trustee for the benefit of the creditors from the date of its acquisition.² The debtor's estate does not vest in any interim trustee who may have been appointed.³ **11-01**

Prior to the changes brought about by the Bankruptcy and Diligence etc. (Scotland) Act 2007, the vesting of the debtor's estate as at the date of sequestration took place by virtue of the act and warrant issued on confirmation of the appointment of the permanent trustee.⁴ Following the changes to the provisions on the appointment of the trustee in sequestration brought about by that Act, however, there is no longer any act and warrant and the vesting of the debtor's estate as at the date of sequestration takes place by virtue of the trustee's appointment.⁵ **11-02**

This chapter considers the estate which vests in the trustee in sequestration, the limitations on vesting, the effect of vesting, disputes about vesting, post-sequestration dealings with estate by the debtor, offences and the re-vesting of certain estate in the debtor. **11-03**

ESTATE WHICH VESTS IN THE TRUSTEE IN SEQUESTRATION

This section outlines the estate which vests in the trustee in sequestration, including *acquirenda*, and the limitations on vesting. Particular types of estate are discussed separately in later sections. **11-04**

Estate as at date of sequestration

The Bankruptcy (Scotland) Act 2016 vests the whole estate of the debtor in the trustee in sequestration for the benefit of creditors as at the date of sequestration, subject to certain limitations.⁶ **11-05**

¹ Bankruptcy (Scotland) Act 2016 s.78(1), (2). The date of sequestration is discussed in Ch.8.

² Bankruptcy (Scotland) Act 2016 s.86(4), (5).

³ Interim trustees are discussed in Ch.10.

⁴ See Bankruptcy (Scotland) Act 1985 s.31(1)(a) as enacted.

⁵ Bankruptcy (Scotland) Act 2016 s.78(1). The appointment of the trustee is discussed in Ch.10.

⁶ Bankruptcy (Scotland) Act 2016 s.78(1), (2).

11-06 The whole estate of the debtor is defined in s.79(1) of the Bankruptcy Scotland Act 2016 as:

“the debtor’s whole estate at the date of sequestration (wherever situated) including—

- (a) any income or estate vesting in the debtor on the date of sequestration
- (b) any property of the debtor title to which has not been completed by another person deriving right from the debtor and
- (c) the capacity to exercise and to take proceedings for exercising all such powers in, over or in respect of any property as—
 - (i) might have been exercised by the debtor for the debtor’s own benefit as at, or on, the date of sequestration, or
 - (ii) might be exercised on a relevant date.”⁷

11-07 It does not, however, include any interest of the debtor as tenant under specified types of tenancy,⁸ although the trustee may subsequently serve a notice on the debtor causing the debtor’s interest in such a tenancy to form part of the debtor’s estate and to vest in the trustee as if it had vested in them as *aquirenda*.⁹ In most cases there will be no incentive for the trustee to do so, however, because the tenancy would have little or no value to the estate. The specified types of tenancy are a tenancy which is an assured tenancy within the meaning of Pt 2 of the Housing (Scotland) Act 1988, a protected tenancy within the meaning of the Rent (Scotland) Act 1984 in respect of which no premium can lawfully be required as a condition of assignment and a Scottish secure tenancy within the meaning of the Housing (Scotland) Act 2001.¹⁰ Any interest of the debtor as tenant under any other type of tenancy will vest in the trustee,¹¹ although adoption of the lease by the trustee is a separate matter.¹²

11-08 The definition of the debtor’s whole estate encompasses the debtor’s heritable and moveable property, both corporeal and incorporeal. Heritable and moveable property generally, as well as particular types of property, are discussed separately below. The definition is not, however, restricted to the debtor’s property and encompasses other interests of the debtor: for example, it has been held that the debtor’s interest in a fishing licence, notwithstanding that the debtor had no right of property in the licence, was part of the debtor’s estate.¹³

11-09 The definition encompasses the debtor’s estate *wherever situated*. Estate situated outwith Scotland is discussed separately below.

⁷ Bankruptcy (Scotland) Act 2016 s.79(1). A relevant date is a date after the date of sequestration and before the date which is four years after the date of sequestration: s.79(5).

⁸ Bankruptcy (Scotland) Act 2016 s.79(3).

⁹ Bankruptcy (Scotland) Act 2016 s.79(4).

¹⁰ Bankruptcy (Scotland) Act 2016 s.79(3).

¹¹ *Dobie v Marquis of Lothian* (1864) 2 M. 788, a decision of the whole court. In that case, it was held that the tenant’s interest in a lease excluding assignees vested in the tenant’s trustee in sequestration, but subject to the right of the landlord to withhold his consent, no person but the landlord having the right to object to the title of the trustee. It is thought, however, that the exclusion of assignees would not prevent vesting under the current statutory provisions even if the landlord did not consent, since they no longer require that the debtor’s estate be capable of alienation as was the case prior to the Bankruptcy (Scotland) Act 1985. See also *MacDonald’s Trustee v Cunningham*, 1997 S.C.L.R. 987 where it appeared to be accepted that a debtor was divested of any rights of property accruing to her under the lease by the sequestration.

¹² Adoption of contracts is discussed in Ch.12.

¹³ *Cay’s Trustee v Cay* unreported January 1995 Peterhead Sheriff Court.

The reference to property of the debtor title to which has not been completed by another person deriving right from the debtor was introduced by the Bankruptcy and Diligence (Scotland) Act 2007 as a result of issues which had arisen following developments in case law regarding the respective rights of the trustee and a purchaser of heritage from the debtor where the purchaser had not recorded a title to the heritage. The provision is not, however, restricted to heritage. The issues and background are discussed further below in the context of the discussions of heritable and moveable property. 11-10

With regard to limitations on vesting, it is specifically provided that the following property does not vest in the trustee in the sequestration: 11-11

- (a) Any property which is: (i) kept outside a dwelling-house and in respect of which attachment is incompetent by virtue of s.11(2) of the Debt Arrangement and Attachment (Scotland) Act 2002; or (ii) kept inside a dwelling-house and is not a non-essential asset for the purposes of Pt 3 of that Act.¹⁴ This is discussed further below.
- (b) Any property which the debtor holds in trust for another.¹⁵ This is discussed further below.

Certain other types of property or rights of the debtor are excluded from the debtor's estate or do not vest in the trustee by virtue of other legislation or the common law. In particular, certain property is excluded from the debtor's estate by the Proceeds of Crime Act 2002; a debtor's rights under an approved pension scheme are excluded from the debtor's estate by the Welfare Reform and Pensions Act 1999; an award of compensation under the Criminal Injuries Compensation Scheme does not pass to a trustee in sequestration by virtue of the Criminal Injuries Compensation Act 1995; certain student loans do not vest in the trustee in sequestration by virtue of the legislation relating to student loans; in certain cases, the debtor's rights under an insurance policy do not vest in the trustee in sequestration but are transferred to a third party by the Third Parties (Rights Against Insurers) Act 2010; property subject to a valid retention of title does not form part of the debtor's estate; and sums consigned in court to await the outcome of a pending litigation and certain other sums held pending the resolution of a dispute do not form part of the debtor's estate. All of these are discussed further below. 11-12

Finally, it is specifically provided that the vesting of the debtor's estate in the trustee in sequestration does not affect a landlord's right of hypothec¹⁶ and is without prejudice to the right of any secured creditor which is preferable to the rights of the trustee.¹⁷ These provisions are in effect specific statutory expressions of the wider common law principle that the trustee takes the debtor's property *tantum et tale*, discussed further below in the context of the effect of vesting. Both the landlord's right of hypothec and property subject to a security are also discussed further below. 11-13

Acquirenda

Any estate, wherever situated, which is acquired by the debtor on a relevant date and which would have vested in the trustee if it had been part of the 11-14

¹⁴ Bankruptcy (Scotland) Act 2016 s.88(1)(a) and (b).

¹⁵ Bankruptcy (Scotland) Act 2016 s.88(1)(c).

¹⁶ Bankruptcy (Scotland) Act 2016 s.88(2).

¹⁷ Bankruptcy (Scotland) Act 2016 s.88(3).

debtor's estate on the date of sequestration, vests in the trustee for the benefit of creditors as at the date of its acquisition.¹⁸ Such estate is generally referred to as *acquirenda*. A relevant date is a date after the date of sequestration and before the date which is four years after the date of sequestration.¹⁹ The period during which *acquirenda* become part of the sequestrated estate has changed over time. Prior to changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014, *acquirenda* became part of the sequestrated estate where acquired by the debtor on a date after the date of sequestration and before the date on which the debtor's discharge became effective.²⁰ As a result of the introduction by the Bankruptcy (Scotland) Act 1985 of provisions for the automatic discharge of the debtor on the expiry of three years from the date of sequestration, subject to the possibility of deferral, the period during which *acquirenda* became part of the sequestrated estate would normally therefore have been three years (or longer if discharge was deferred).²¹ The Bankruptcy and Diligence etc. (Scotland) Act 2007, however, altered the provisions for the automatic discharge of the debtor to provide for automatic discharge of the debtor on the expiry of one year from the date of sequestration, subject to the possibility of deferral.²² The provisions relating to the period during which *acquirenda* became part of the sequestrated estate remained unaltered, however, with the consequence that the period during which *acquirenda* became part of the sequestrated estate became, normally, one year (or longer if discharge was deferred). The potential effect of the reduction in the period for the debtor's automatic discharge on *acquirenda* was brought to the attention of the Scottish Executive prior to its enactment, but no provision to extend the period during which *acquirenda* became part of the sequestrated estate beyond discharge so that *acquirenda* could continue to be captured for a longer period was made, although the period for making debtor contributions from income, also hitherto linked to the debtor's discharge, was extended beyond discharge to allow the period for debtor contributions from income to remain at up to three years.²³ However, in pursuance of the "can pay, should pay" policy which underlay the Bankruptcy and Debt Advice (Scotland) Act 2014, that Act subsequently amended the provisions on *acquirenda* to provide that *acquirenda* become part of the sequestrated estate where acquired by the debtor on a date after the date of sequestration and before the date which is four years after the date of sequestration²⁴ which, as noted above, is the current position. This change had not previously been consulted on, but the policy memorandum accompanying the Bankruptcy and Debt Advice (Scotland) Bill as introduced noted that stakeholders had been given the opportunity to discuss it at post-consultation stakeholder events.²⁵ At the same time, the period for making debtor contributions from income was also standardised at four years, thus realigning the period for

¹⁸ Bankruptcy (Scotland) Act 2016 s.86(4), (5).

¹⁹ Bankruptcy (Scotland) Act 2016 s.79(5).

²⁰ See latterly Bankruptcy (Scotland) Act 1985 s.32(6) and (10) prior to its amendment by the Bankruptcy and Debt Advice (Scotland) Act 2014. Earlier bankruptcy legislation was to the same effect although the trustee was required to obtain a declarator that the estate vested in them.

²¹ See Bankruptcy (Scotland) Act 1985 s.54 as enacted. The Bankruptcy (Scotland) Act 1985 also retained the possibility of discharge on composition, which might result in the earlier discharge of the debtor. Discharge of the debtor is discussed fully in Ch.17.

²² See Bankruptcy (Scotland) Act 1985 s.54 as amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007 s.1.

²³ Debtor contributions from income are discussed further at para.11–126 onwards.

²⁴ See Bankruptcy (Scotland) Act 1985 s.32(6) and (10) as amended by the Bankruptcy and Debt Advice (Scotland) Act 2014 s.16(2).

²⁵ See Bankruptcy and Debt Advice (Scotland) Bill Policy Memorandum, SP Bill 34-PM, Session 4 (2013), paras 132–137.

debtor contributions from income and *acquirenda*.²⁶ These changes gave rise to concerns that the legislation was not compatible with the European Commission's recommendation of 12.3.2014 on a new approach to business failure and insolvency which contained, inter alia, recommendations relating to second chance and the maximum period for discharge of entrepreneurs following bankruptcy. The European Commission has since issued a proposal for a Directive on preventative restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU which includes provisions relating to second chance and the maximum period for discharge of entrepreneurs. In terms of the current legislation, a debtor will still, in most cases, receive a discharge after a year, but it is debatable whether the debtor can be said to have received a fresh start if, irrespective of that discharge, *acquirenda* becomes part of the sequestrated estate, and the debtor is required to make contributions from income, for a period of four years. Whether any changes to the current legislation would therefore be considered necessary in order to comply with the Directive if and when enacted remains to be seen: the question of whether there will in any event be any need for compliance with the Directive if and when enacted will, of course, depend on the timing, and the terms, of "Brexite".

Acquirenda have been held to include damages awarded to a debtor for defamation in relation to a slander uttered after the date of sequestration,²⁷ an inheritance to which a debtor became entitled after the date of sequestration,²⁸ a non-vested contingent interest in payment of commission arising during the sequestration,²⁹ shares to which a debtor became entitled after the date of sequestration³⁰ and heritable property purchased by a debtor after the date of sequestration.³¹ *Acquirenda* in the form of heritable property purchased by the debtor after the date of sequestration where some or all of the purchase price of the property consists of funds lent to the debtor after the date of sequestration by a creditor in favour of whom the debtor has granted a standard security over the property have given rise to difficult issues.³² These are discussed further below in the context of the discussions of *tantum et tale* and post-sequestration dealings with estate. 11-15

It is a moot point whether savings accumulated by the debtor from income which does not vest in the trustee,³³ or any property acquired with such savings or income, constitutes *acquirenda*. It is suggested that the better view is that they do not, on the basis that income which does not vest in the trustee should not be regarded as transforming into something which does vest in the trustee simply because it has been accumulated or changed into a different form, although if the debtor is in a position to save or acquire property with income which does not vest in the trustee, it may raise issues about the correctness or otherwise of the level of contributions from income which a debtor is required to make.³⁴ In the case of savings, there would also be practical difficulties in 11-16

²⁶ See Bankruptcy and Debt Advice (Scotland) Bill Policy Memorandum, SP Bill 34-PM, Session 4 (2013), paras 47–51. On debtor contributions from income, see further at para. 11–126 onwards.

²⁷ *Jackson v McKechnie* (1875) 3 R. 130.

²⁸ *Rankin's Trustee v Somerville and Russell*, 1999 S.L.T. 625.

²⁹ *Stuart's Trustee v HJ Banks & Co Ltd*, 1998 S.C.L.R. 1109.

³⁰ *Accountant of Court v Halifax Plc*, 1999 S.C.L.R. 1135.

³¹ See *Alliance & Leicester Building Society v Murray's Trustee*, 1994 S.C.L.R. 19; *Royal Bank of Scotland Plc v Lamb's Trustee*, 1998 S.C.L.R. 923; *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

³² See the cases referred to in the preceding note.

³³ See further para. 11–21.

³⁴ Income contributions are discussed further at para. 11–126 onwards.

determining when the income which did not vest in the trustee had transformed into estate which constituted *acquirenda*. It has been noted, however, that

“it is so far part of the common mythology of insolvency that the win on the football pools or a national lottery is ‘*acquirenda*’ that the idea that the money might belong to the debtor would be bound to be resisted if the sum were substantial”.³⁵

In such a case, it might be possible to argue that it is possible to distinguish between savings accumulated from income which does not vest in the trustee on the one hand and property acquired with such savings or income on the other, on the basis that the former is still clearly identifiable as property which does not vest in the trustee while the latter has been transformed into something else which could be described as having been acquired by the debtor and which would have vested in the trustee if it had formed part of the debtor’s estate on the date of sequestration, irrespective of the source of funds used for its acquisition. A definitive answer will, however, have to await a decision by a competent court.

11–17 Prior to the Bankruptcy (Scotland) Act 1985, although the legislation provided for the vesting in the trustee of a right to *acquirenda*, it was necessary for the trustee to obtain a declarator in order to make that right effectual.³⁶ Following the recommendations of the Scottish Law Commission,³⁷ however, no such requirement was included in the Bankruptcy (Scotland) Act 1985. As a result, *acquirenda* vest in the trustee at the date of acquisition provided they are acquired by the debtor on a relevant date and would have vested in the trustee if they had been part of the debtor’s estate on the date of sequestration, without any further procedure.³⁸

11–18 Any person who holds estate which has vested in the trustee as *acquirenda* is required to convey or deliver that estate to the trustee on production of a copy of the order appointing the trustee certified by the sheriff clerk or Accountant in Bankruptcy (AiB) as the case may be.³⁹ The production of the copy order allows the holder to be satisfied of the trustee’s entitlement to the *acquirenda* but is not necessary to constitute the trustee’s right to the *acquirenda*.⁴⁰ Where the holder has already conveyed the estate to the debtor or any other person on the debtor’s instructions, they will not incur any liability to the trustee other than a liability to account for any proceeds of the conveyance in their hands if the conveyance was carried out in good faith and without knowledge of the sequestration.⁴¹ In addition, in the case of a banking transaction relating to *acquirenda*, it is provided that the trustee is not entitled to any remedy against an appropriate bank or institution (“a bank”) in respect of a banking transaction relating to *acquirenda* entered into by the bank before its receipt of the notice which must be served by the trustee under s.86(9) of the Bankruptcy (Scotland) Act 2016, whether or not the bank is aware of the

³⁵ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.9–173.

³⁶ See *Grant v Green’s Trustee* (1901) 3 F. 1016 per Lord Kinnear at 1019–20.

³⁷ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 11.18–11.21.

³⁸ See *Rankin’s Trustee v Somerville and Russell*, 1999 S.L.T. 625; *Halifax Plc v Gorman’s Trustee*, 2000 S.L.T. 1409. The effect of vesting is discussed further at para.11–23 onwards.

³⁹ Bankruptcy (Scotland) Act 2016 s.86(6).

⁴⁰ *Rankin’s Trustee v Somerville and Russell*, 1999 S.L.T. 625.

⁴¹ Bankruptcy (Scotland) Act 2016 s.86(7).

sequestration.⁴² This provision, together with the provision requiring service of a notice by the trustee referred to and a related provision in relation to post-sequestration dealings with the debtor's estate, was introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 to give additional protection to banks in relation to post-sequestration transactions on a debtor's bank account.⁴³

The provisions on *acquirenda* discussed above are expressly stated to be without prejudice: to (a) the provisions relating to the vesting of post-sequestration income in the debtor discussed below; and (b) any right acquired in the estate in good faith and for value.⁴⁴ The latter provision is problematic in the light of the current provisions relating to post-sequestration dealings with the estate: this is discussed further below in that context. 11-19

The debtor is required to notify the trustee immediately of any assets acquired on a relevant date and failure to do so is an offence.⁴⁵ The position where the debtor seeks to deal with *acquirenda* is discussed further below in the context of post-sequestration dealings with the estate. 11-20

Any income of whatever nature received by the debtor on a relevant date, other than income deriving from the estate vested in the trustee, vests in the debtor.⁴⁶ A relevant date is a date after the date of sequestration and before the date which is four years after the date of sequestration.⁴⁷ The most common example of such income would be a debtor's earnings from employment or self-employment, but the debtor may also receive income from any estate which is not vested in the trustee or from other sources, including state benefits. There is, however, specific provision to the effect that specified state benefits and tax credits do not pass to a trustee in sequestration.⁴⁸ The provision that post-sequestration income vests in the debtor is, however, subject to the provisions for the making of a contribution from income by the debtor,⁴⁹ which are discussed further at para.11-126 onwards below. It is specifically provided that it is not competent to carry out diligence against post-sequestration income vesting in the debtor in respect of any pre-sequestration debt or obligation which is dischargeable in sequestration,⁵⁰ and for this purpose, diligence includes the making of a deduction from earnings order under the Child Support Act 1991.⁵¹ It would 11-21

⁴² Bankruptcy (Scotland) Act 2016 s.86(8). This provision was introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014; see Bankruptcy and Debt Advice (Scotland) Act 2014 s.13(b).

⁴³ See Bankruptcy and Debt Advice (Scotland) Act 2014 s.13. The provisions did not form part of the Bankruptcy and Debt Advice (Scotland) Bill as introduced but were added by amendment at Stage 2: see *Official Report of the Economy, Energy and Tourism Committee* (22 January 2014), col.3827-3830. The provisions are discussed further below in the context of estate comprising funds held by a bank and post-sequestration dealings with the debtor's estate.

⁴⁴ Bankruptcy (Scotland) Act 2016 s.86(11). As to the latter provision, see further *Alliance & Leicester Building Society v Murray's Trustee*, 1994 S.C.L.R. 19; *Royal Bank of Scotland Plc v Lamb's Trustee*, 1998 S.C.L.R. 923; *Rankin's Trustee v Somerville and Russell*, 1999 S.L.T. 625; *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

⁴⁵ Bankruptcy (Scotland) Act 2016 s.87(1)(a), (2). For the penalties, see Bankruptcy (Scotland) Act 2016 s.87(3).

⁴⁶ Bankruptcy (Scotland) Act 2016 s.85(1).

⁴⁷ Bankruptcy (Scotland) Act 2016 s.79(5).

⁴⁸ See Social Security Administration Act 1992 s.187, Tax Credits Act 2002 s.45. These provisions also apply where a judicial factor is appointed under s.41 of the Solicitors (Scotland) Act 1980. Judicial factors are discussed further in Ch.23.

⁴⁹ Bankruptcy (Scotland) Act 2016 ss.90-97: see Bankruptcy (Scotland) Act 2016 s.85(2).

⁵⁰ Bankruptcy (Scotland) Act 2016 s.86(1), (2).

⁵¹ Bankruptcy (Scotland) Act 2016 s.86(3).

appear, however, that where the debtor is entitled to benefits, deductions from these benefits may be made in respect of pre-sequestration debts in accordance with the statutory scheme governing those benefits.⁵² Diligence against post-sequestration income vesting in the debtor will, however, be competent in respect of post-sequestration debts or obligations and debts or obligations which are not dischargeable in the sequestration.

Estate of deceased debtor

- 11–22** Where any successor of a deceased debtor whose estate has been sequestrated has made up title to, or is in possession of, any part of that estate, the sheriff may, on the application of the trustee, order the successor to convey such estate to the trustee.⁵³

THE EFFECT OF VESTING AND THE NATURE OF THE TRUSTEE'S RIGHT TO THE DEBTOR'S PROPERTY

- 11–23** In broad terms, the effect of the statutory provisions is that the trustee is vested in the debtor's estate and the debtor is divested. The nature of the right which the trustee acquires, however, depends on the type of property and the circumstances. This section considers the effect of vesting in relation to heritable and moveable property and non-vested contingent interests generally and the doctrine of *tantum et tale*. Particular types of estate are discussed separately thereafter.

Heritable property

- 11–24** Prior to the changes made by the Bankruptcy and Diligence etc. (Scotland) Act 2007, it was provided in relation to the debtor's estate as at the date of sequestration that the permanent trustee's act and warrant had, in relation to the debtor's heritable estate in Scotland, the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the permanent trustee.⁵⁴
- 11–25** The effect of that "complex provision" was to give the trustee a personal, rather than a real, right to the debtor's heritage where registration was required to complete title to the heritage (although the trustee obtained a real right in any case where such registration was not required).⁵⁵ If the trustee wished to obtain a real right to the debtor's heritage where registration was required, therefore, they had to take the appropriate steps to complete their title. The trustee did not have to complete title to the debtor's heritage in order to be able to deal with it, however,⁵⁶ and the decision as to whether or not to complete title would therefore depend on the circumstances. Relevant factors in that decision might include the expense involved in completing title; any potential liabilities which might be incurred as a result of doing so; if the debtor is a co-owner, whether

⁵² *Mulvey v Secretary of State for Social Security*, 1997 S.C.L.R. 348, which concerned deductions designed to recover pre-sequestration loans made to the debtor from the Social Fund.

⁵³ Bankruptcy (Scotland) Act 2016 s.78(13).

⁵⁴ See Bankruptcy (Scotland) Act 1985 s.31(1)(b) as originally enacted: this was also the position under earlier bankruptcy legislation.

⁵⁵ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.11.7; see also McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 9.30–9.33.

⁵⁶ See further at Ch.12.

there is a special destination in the title⁵⁷; the necessity of completing title for any other purpose, for example, to allow the trustee to bring proceedings for repossession of heritable property where the requirements for removing rather than ejection require to be satisfied⁵⁸; whether there are any competing claims to the heritage⁵⁹; and the fact that it is one of the methods of avoiding the re-vesting of the debtor's right or interest in a family home.⁶⁰

The Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation*⁶¹ in 1982 noted that the reasons for importing adjudication into the statutory scheme were historical and recommended that the legislation should provide for a straightforward transfer of the debtor's heritable estate to the trustee by force of the act and warrant without anything more.⁶² That recommendation was not implemented in the Bankruptcy (Scotland) Act 1985 as enacted, but the references to adjudication were subsequently repealed by the Bankruptcy and Diligence etc. (Scotland) Act 2007 as a consequence of the abolition of adjudication by that Act (although the provisions abolishing adjudication have still not been brought into force). As explained above, therefore, the vesting provisions now provide simply for the vesting of the whole estate of the debtor in the trustee by virtue of their appointment. 11-26

The fact that the trustee had only a personal right to the debtor's heritage meant that it was possible for someone else who also had a personal right to heritage vesting in the trustee obtained prior to the sequestration to complete title to the heritage and obtain a real right which would, if their title was completed before that of the trustee, prevail over the right of the trustee, thus giving rise to a "race to the register".⁶³ What had long been regarded as well-settled law in this respect was thrown into doubt, however, by the decision of the House of Lords in the case of *Sharp v Thomson*.⁶⁴ In that case, a brother and sister purchased a flat from a company. On settlement of the transaction, they paid the price and took entry, but did not receive a disposition until some 14 months later. Before the disposition was registered, a receiver was appointed under a floating charge granted by the company, causing the floating charge to crystallise. This raised the question of whether, at the time the floating charge crystallised, the flat was part of the company's property with the result that it was caught by the crystallised floating charge. The House of Lords ultimately held that it was not because, at that time, the company had no beneficial interest in the property. 11-27

⁵⁷ See further at para.11-39 onwards.

⁵⁸ See, for example, *Cowie's Trustee v Cowie* [2008] CSIH 30.

⁵⁹ See further at para.11-27.

⁶⁰ See further at para.11-192 onwards.

⁶¹ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

⁶² See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.11.8 and cl.30(1) of the draft Bill appended to the report. The historical reasons are discussed further in McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.9.32.

⁶³ See, for example, *Mitchell v Ferguson* (1781) Mor 10296 (right of adjudging creditor who was infest preferred to right of assignee of dispone of the debtor, neither disponee nor assignee having been infest); *Gordon's Trustee v Farquharson* (1797) Mor 2905; *Cormack v Anderson* (1829) 7 S. 868; *Melville v Paterson* (1842) 4 D. 131; *Tod's Trustees v Wilson* (1869) 7 M. 1100. It may be noted that, in the case of heritage, the race is inevitably a race to the register, but the same issues may arise in relation to moveable property, in which case the race may, but will not necessarily, be a race to a register as such. The position in respect of moveable property is discussed at para.11-42 onwards.

⁶⁴ *Sharp v Thomson*, 1997 S.C. (HL) 66.

The case gave rise to considerable debate at every stage, including debate as to its implications for sequestration (as well as other corporate insolvency procedures),⁶⁵ and resulted in a reference to the Scottish Law Commission, which published its *Discussion Paper on Sharp v Thomson*⁶⁶ in July 2001. By the time it published its *Report on Sharp v Thomson*⁶⁷ in December 2007, however, so far as sequestration was concerned, the House of Lords had clarified the position with respect to the trustee's right to heritable property and the race to the register in a further decision in the case of *Burnett's Trustee v Grainger*,⁶⁸ also the subject of considerable debate,⁶⁹ and amendments to the Bankruptcy (Scotland) Act 1985 designed to deal with some of the concerns raised by those cases in the context of sequestration had been enacted by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (although they came into force only on 1 April 2008).

11–28 In *Burnett's Trustee v Grainger*,⁷⁰ a husband and wife had purchased a flat from its seller, an individual. On settlement of the transaction, they paid the price and received a disposition. They took entry to the property but the disposition was not registered until some considerable time later. In the interim, the seller had granted a trust deed for creditors, her estate had then been sequestrated on the petition of the trustee under the trust deed and the trustee in sequestration had recorded a notice of title to the flat. This raised the question of whether the flat was part of the whole estate of the debtor which vested in the trustee at the date of sequestration. The House of Lords held that it was, the decision in *Sharp v Thomson*⁷¹ being distinguishable, and that since the trustee had won the ensuing race to the register, the trustee's title prevailed.⁷² It was acknowledged, however, that this result might be considered shocking when judged by the criteria applied in other cases⁷³ and that the question of whether the existing law was satisfactory involved fundamental issues of legal policy which were, however, matters for the legislature and not the courts.⁷⁴

11–29 The Scottish Parliament duly took heed and, as noted above, the Bankruptcy and Diligence etc. (Scotland) Act 2007 made a number of amendments to the Bankruptcy (Scotland) Act 1985 designed to deal with some of the concerns regarding sequestration. The amending provisions, which were added to the Bankruptcy and Diligence etc. (Scotland) Bill at Stage 3, took account of, and largely implemented, the proposals set out in Scottish Law Commission's *Discussion Paper on Sharp v Thomson*⁷⁵ in so far as they remained relevant in

⁶⁵ The extensive literature on the case, and the later case of *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19, referred to further below, is listed in Appendix B of the Scottish Law Commission's *Report on Sharp v Thomson* (Scot. Law Com. No.208), December 2007.

⁶⁶ Scottish Law Commission, *Discussion Paper on Sharp v Thomson* (Discussion Paper No.114, July 2001).

⁶⁷ Scottish Law Commission, *Report on Sharp v Thomson* (Scot. Law Com. No.208, December 2007).

⁶⁸ *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19.

⁶⁹ See the literature listed in Appendix B of the Scottish Law Commission's *Report on Sharp v Thomson* (Scot. Law Com. No.208, December 2007).

⁷⁰ *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19.

⁷¹ *Sharp v Thomson*, 1997 S.C. (HL) 66.

⁷² For a detailed analysis of the decision, see McKenzie Skene, DW, "The shock of the old: Burnett's Tr v Grainger", 2004 S.L.T. 65 and other literature cited in Appendix B of the Scottish Law Commission's *Report on Sharp v Thomson* (Scot. Law Com. No.208, December 2007).

⁷³ *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19 at [67] per Lord Rodger.

⁷⁴ *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19 at [145] per Lord Rodger.

⁷⁵ Scottish Law Commission, *Discussion Paper on Sharp v Thomson* (Discussion Paper No.114, July 2001).

the light of the developments referred to. They were designed to preserve the race to the register but handicap the trustee in that race so that a prudent purchaser in good faith would always win.⁷⁶ They also altered the provisions on post-sequestration dealings of the debtor by extending the protections for certain post-sequestration dealings of the debtor to include certain dealings involving the transfer of incorporeal moveable property or the creation, transfer, variation or extinguishing of a real right in heritable property requiring the delivery of a deed. At the same time, they also altered the provisions on post-sequestration dealings of the debtor to make clear that post-sequestration dealings by a debtor with *acquirenda* would be of no effect in a question with the trustee in the same way as post-sequestration dealings with estate vesting in the trustee as at the date of sequestration. The changes to the provisions on post-sequestration dealings of the debtor are discussed further in the context of the discussion of post-sequestration dealings generally below.

The current statutory provisions therefore provide, echoing the Scottish Law Commission's original recommendation in 1982, for a straightforward transfer of the debtor's heritable estate at the date of sequestration to the trustee by virtue of their appointment.⁷⁷ The whole estate of the debtor is defined as including any property of the debtor title to which has not been completed by another person deriving right from the debtor⁷⁸ in order to make clear that such property vests in the trustee and so preserve the race to the register. The trustee is, however, handicapped in the race to the register, because it is not competent for the trustee or any person deriving title from the trustee to complete title to any heritable property in Scotland which has vested in the trustee by virtue of their appointment before the expiry of the period of 28 days (or such other period as may be prescribed) beginning with the day on which the certified copy of the sheriff's first warrant to cite or the certified copy of the determination of AiB awarding sequestration, as the case may be, is recorded in the register of inhibitions.⁷⁹ On the face of it, once that period has expired, the trustee or a person deriving title from them may proceed to complete title and so win the race to the register if the party deriving right from the debtor has not already done so. It may be noted, however, that in *Burnett's Trustee v Grainger*,⁸⁰ it was an integral part of the decision that the trustee was able to take part in the race notwithstanding that they were aware of the prior right of the purchasers because an adjudging creditor, with whom a trustee in sequestration was at that time equated, does not need to be in good faith, in contrast to a purchaser, who is disqualified from the race by the offside goals rule where they are aware of another's prior right.⁸¹ Since the link with adjudication has now been broken, it might be asked whether a trustee can still take part in a race to the register if, as will generally be the case, they are not in good faith because they are aware of the prior right of another person deriving right from the debtor. In response, it might be said that it is also clear from *Burnett's Trustee v Grainger*⁸² that the trustee represents the creditors and is not in the same position as a purchaser. It might have been useful, however, if the trustee's ability to compete in the race to the register notwithstanding their being

⁷⁶ See Scottish Parliament, *Official Report* (30 November 2006).

⁷⁷ See para. 11–26.

⁷⁸ See paras 11–06 and 11–10.

⁷⁹ Bankruptcy (Scotland) Act 2016 s.78(3), (4).

⁸⁰ *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19.

⁸¹ See *Rodger (Builders) v Fawdry*, 1950 S.C. 483.

⁸² *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19.

aware of the prior right of another person deriving right from the debtor had been made clear on the face of the legislation.

- 11-31 With regard to *acquirenda*, it was held in the case of *Halifax Plc v Gorman's Trustee*⁸³ that the statutory provisions relating to the vesting of *acquirenda* in the trustee do not have any wider effect than the statutory provisions relating to the vesting of the debtor's estate as at the date of sequestration in the trustee and so give the trustee only a personal right to property which the trustee must take the appropriate steps to make real in situations where the creation of a real right is necessary, for example, by obtaining delivery of corporeal property or, as in that case, by registering a notice of title to heritable property. It was also held in that case that the cases on the race to the register relating to estate held as at the date of sequestration are not directly pertinent to *acquirenda*, the vesting of the debtor's estate as at the date of sequestration not being subject to the proviso which applies in the case of *acquirenda* that the vesting of *acquirenda* is without prejudice to any right or interest acquired in good faith and for value, with the result that the trustee would be required to honour and give effect to any rights or interests in the *acquirenda* which may have been conferred by the debtor. At the time of that decision, however, the preponderance of authority accepted that the debtor had the ability to deal with *acquirenda*,⁸⁴ a situation which has now changed. This is discussed further below in the context of post-sequestration dealings with the debtor's estate.

The debtor's home

- 11-32 At present, there is no "homestead" exemption in Scots law. Any right or interest of the debtor in their home vests in the trustee in sequestration in the same way as their right or interest in any other heritable property, with the result that they are no longer entitled to occupy the home and the trustee is entitled to bring proceedings for their ejection.⁸⁵ There are, however, statutory provisions restricting the trustee's powers to deal with any right or interest of the debtor in a family home as defined by the Bankruptcy (Scotland) Act 2016, including the trustee's power to bring proceedings for ejection, which are designed to protect the debtor's family.⁸⁶ These provisions are discussed in detail in Ch.12.
- 11-33 The issue of whether there should be a homestead exemption has been the subject of debate. In 1980, the Scottish Law Commission in its *First Memorandum on Diligence: General Issues and Introduction*⁸⁷ noted that although an exemption from enforcement for the debtor's residence or family home existed in some jurisdictions, there had been no pressure to introduce such an exemption in the UK.⁸⁸ The position with respect to home ownership at that time was, of course, rather different from the present: it was observed that most debtors in Scotland lived in private or public rented housing which was not adjudgeable for debt, with the result that an exemption for rented

⁸³ *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

⁸⁴ See *Royal Bank of Scotland Plc v MacGregor*, 1998 S.C.L.R. 923 and *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409. Cf *Alliance and Leicester Building Society v MacGregor*, 1994 S.C.L.R. 19.

⁸⁵ *White v Stevenson*, 1956 S.C. 84.

⁸⁶ Bankruptcy (Scotland) Act 2016 s.113.

⁸⁷ Scottish Law Commission, *First Memorandum on Diligence: General Issues and Introduction* (Scot. Law Com. Memorandum No.47, 1980).

⁸⁸ Scottish Law Commission, *First Memorandum on Diligence: General Issues and Introduction* (Scot. Law Com. Memorandum No.47, 1980), para.3.6.

homes would be of little practical value.⁸⁹ The Scottish Law Commission considered, however, that there was no case for introducing exemptions for owner-occupied property in any event, and the policy of encouraging home-ownership should not be promoted by making very substantial assets exempt from the claims of creditors; it thought that it was, however, for consideration whether a debtor whose home was adjudged ought to be given time to seek alternative accommodation.⁹⁰ Two years later, in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation*,⁹¹ it dealt with the family home only very briefly, noting that a debtor's home vested in the debtor's trustee and that it proposed no alteration of the law in this respect, since a debtor's house might well be the most valuable asset in the estate and it would be unjustifiable to allow the debtor to retain it at the expense of the creditors.⁹²

In the same year, the Cork Committee in England and Wales⁹³ took a similar 11-34 attitude to the ultimate fate of debtor's home, but also had concerns that considerable personal hardship could be caused to a debtor's family by a sudden or premature eviction. It therefore proposed not to cancel, but to delay, enforcement of the creditors' rights.⁹⁴ This was duly implemented in England and Wales by the Insolvency Act 1986 and a similar approach was adopted in Scotland by the Bankruptcy (Scotland) Act 1985, which introduced provisions restricting the trustee's powers to deal with any right or interest of the debtor in a family home which are the precursor of the current provisions referred to above. It may be noted that the underlying policy was the protection of the debtor's *family*, not the debtor, although in practice the provisions might also have the effect of protecting the debtor.

The issue of a homestead exemption was raised again when the Insolvency 11-35 Service issued a consultation paper entitled *Bankruptcy—A Fresh Start* in March 2000 containing a proposal to introduce a limited type of homestead exemption for business debtors in England and Wales.⁹⁵ There was little support for the proposal, however, and it was not taken forward.⁹⁶

In Scotland, the consultations which preceded the enactment of the Bankruptcy 11-36 and Diligence etc. (Scotland) Act 2007 continued to take the view that it remained appropriate for the equity in a debtor's home to be realised for the benefit of creditors, but proposed the introduction of provisions for reversion of the debtor's right or interest in their home to the debtor if the trustee had not dealt with it within a period of three years in order to ensure that the issue

⁸⁹ Scottish Law Commission, *First Memorandum on Diligence: General Issues and Introduction* (Scot. Law Com. Memorandum No.47, 1980). As noted at para.11-07, however, under the current law the "whole estate of the debtor" does not include the interest of the debtor as tenant under specified types of tenancy, although the trustee can in certain circumstances serve a notice on the debtor which has the effect of vesting the tenancy in the trustee.

⁹⁰ Scottish Law Commission, *First Memorandum on Diligence: General Issues and Introduction* (Scot. Law Com. Memorandum No.47, 1980).

⁹¹ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

⁹² Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.11.31.

⁹³ *Report of the Review Committee on Insolvency Law and Practice* (chaired by Sir Kenneth Cork) (Cmnd 8558, 1982).

⁹⁴ *Report of the Review Committee on Insolvency Law and Practice* (chaired by Sir Kenneth Cork) (Cmnd 8558, 1982), para.1118.

⁹⁵ See Insolvency Service, *Bankruptcy—A Fresh Start* (March 2000), paras 8.1–8.8.

⁹⁶ See *Productivity and Enterprise: Insolvency—A Second Chance* (Cm 5234, 31 July 2001), para.1.5.

of the debtor's home was dealt with within a reasonable timescale.⁹⁷ The re-vesting provisions which were subsequently introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 are discussed further at para.11–192 onwards.

11–37 Following the financial crisis of 2008, which gave rise to fears of homelessness and repossession, the Home Owner and Debtor Protection (Scotland) Act 2010 introduced the possibility of excluding the debtor's right or interest in their family home from a protected trust deed, and a wider consultation and further legislation on the treatment of the family home in the context of diligence and bankruptcy was promised. This was subsequently put on hold, however, pending wider consultation on the reform of bankruptcy law as a whole. The Scottish Government's consultation paper *Consultation on Bankruptcy Law Reform* issued in February 2012 did not, however, deal with the family home, notwithstanding that this might have been regarded as fundamental to wider bankruptcy law reform: it indicated that this was intended to be the subject of a separate consultation at a later stage. At the time of writing, however, no such consultation has taken place. The position therefore remains that the debtor's right or interest in their home vests in the trustee, but subject to the restrictions on its realisation in the case of a family home and the provisions on re-vesting.

11–38 Where the debtor's home is a matrimonial home as defined by the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or a family home as defined by the Civil Partnership Act 2004, the trustee is required to supply any non-entitled spouse or civil partner of the debtor with certain information and the non-entitled spouse or civil partner may petition for recall of the sequestration where the purpose of the sequestration was wholly or mainly to defeat the occupancy rights of the non-entitled spouse or civil partner.⁹⁸ These provisions are discussed in detail in Ch.9. The rationale for these provisions was to ensure that one spouse or civil partner could not effectively defeat the occupancy rights of the other spouse or civil partner by means of a contrived sequestration.⁹⁹ This assumes that occupancy rights are in fact defeated by a sequestration: if this were not the case, the provisions would be unnecessary. The validity of that assumption was previously the subject of debate.¹⁰⁰ The debate now seems to have been resolved, however, in favour of the view that the rights of

⁹⁷ Scottish Executive Consultation Paper, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 7.1–7.5; Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), paras 5.29–5.31.

⁹⁸ Bankruptcy (Scotland) Act 2016 ss.114 and 115.

⁹⁹ See Scottish Law Commission, *Report on Occupancy Rights in the Matrimonial Home and Domestic Violence* (Scot. Law Com. No.60, 1980), para.2.90, which refers to the husband contriving to defeat the wife's occupancy rights, although the position could just as well be the other way round. The report gave rise to the enactment of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which gave certain occupancy rights to non-entitled spouses and cohabitants and, for the reason referred to, inserted provisions equivalent to the current provisions into the Bankruptcy (Scotland) Act 1913. When the Bankruptcy (Scotland) Act 1913 was replaced by the Bankruptcy (Scotland) Act 1985, these provisions were re-enacted in s.41 of that Act. When civil partnerships were created by the Civil Partnership Act 2004, that Act also gave certain occupancy rights to non-entitled civil partners and, for the same reason, inserted provisions equivalent to those which applied in the case of non-entitled spouses into the Bankruptcy (Scotland) Act 1985. The current provisions re-enact the relevant provisions of the Bankruptcy (Scotland) Act 1985.

¹⁰⁰ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 9–80–9–91, where it is questioned whether occupancy rights can be regarded as being defeated by a sequestration because of the principle that the trustee takes the debtor's estate *tantum et tale* and Gretton, GL, "Matrimonial Homes Act Conveyancing" (1990) 35 JLSS 412, where the view is taken that occupancy rights are not in general enforceable against a trustee in sequestration.

the trustee are not affected by any occupancy rights. In *Blackburn v Cowie*,¹⁰¹ a case in which the trustee had brought proceedings for repossession of heritable property against a former spouse of the debtor in occupation of the matrimonial home, the court said:

"In *White v Stevenson*¹⁰² it was held that the effect of earlier bankruptcy legislation was to vest in the trustee the whole rights of the bankrupt in the sequestrated estate. That remains the case under the present legislation. The court decided that, while the sequestration was in operation and the trustee undischarged, the bankrupt had no right of any kind to occupy or possess or deal in any way with the subjects, which, in that case were a mansion house occupied by the bankrupt. Thus, it was held that his occupation of the mansion house was purely precarious and that an action of ejection was accordingly competent. If that case reflects the correct view of the effect of sequestration on a bankrupt, then plainly it has implications so far as s 1(1) of the [Matrimonial Homes (Family Protection) (Scotland) Act 1981] is concerned. In terms of that provision, the non-entitled spouse is given certain rights in the circumstances defined in the opening words of s 1(1). The rights are conferred upon a non-entitled spouse where one spouse is entitled, or permitted by a third party, to occupy a matrimonial home, the entitled spouse. Upon the basis of the decision in *White v Stevenson*, following his sequestration, the bankrupt in this case plainly ceased to be an entitled spouse, his whole right in the property concerned having been vested in the permanent trustee. If he ceased to be an entitled spouse then it necessarily follows that the operative provisions of s 1(1), could not take effect. Thus the spouse concerned would possess no rights under the section. If an action of ejection was competent against the bankrupt, as was decided in *White v Stevenson*, then an action of ejection must be seen as competent against the spouse of the bankrupt."

Special destinations

It is not uncommon for the title to heritable property to be taken in the names of two parties equally between them and to the survivor of them. A special destination of this kind is common in the case of spouses but is not restricted to such cases.¹⁰³ It does not prevent the debtor's *pro indiviso* share in the property from vesting in the debtor's trustee in sequestration, but the trustee takes the debtor's title subject to the special destination.¹⁰⁴ 11–39

A special destination may be evacuated by either party inter vivos or, with certain exceptions, mortis causa.¹⁰⁵ In the case of an evacuation inter vivos, it has been held that in order to be effective, it must be recorded in the register: the vesting of the debtor's *pro indiviso* share of the property in the trustee in sequestration is not in itself sufficient to evacuate the special destination: without more, the special destination will take effect on the death of the debtor and the debtor's *pro indiviso* share of the property will vest in the owner of the other *pro indiviso* share (the substitute).¹⁰⁶ If a trustee wishes to protect their position against this possibility, they can do so by registering their title to the 11–40

¹⁰¹ *Blackburn v Cowie* [2008] CSIH 30.

¹⁰² *White v Stevenson*, 1956 S.C. 84.

¹⁰³ See *Machin's Trustee v Machin*, 2017 S.C. GLA 29 at para. 19.

¹⁰⁴ See *Fleming's Trustee v Fleming*, 2000 S.C. 206; *Machin's Trustee v Machin*, 2017 S.C. GLA 29.

¹⁰⁵ *Fleming's Trustee v Fleming*, 2000 S.C. 206.

¹⁰⁶ *Fleming's Trustee v Fleming*, 2000 S.C. 206.

debtor's *pro indiviso* share of the property thereby obtaining a real right in the property and preventing the special destination taking effect.¹⁰⁷ As noted above, therefore, the existence or otherwise of such a destination will be a consideration for a trustee in deciding whether to complete title in their own name. The disposal of the debtor's *pro indiviso* share by the trustee where the trustee has not registered their title will also result in the evacuation of the special destination if and when the disponee completes title.¹⁰⁸

- 11-41** Where a special destination takes effect on the death of the debtor, the debtor's *pro indiviso* share of the property passes to the substitute, known as the heir of provision, subject to liability for the debts of the debtor at the date of their death up to the value of the debtor's *pro indiviso* share.¹⁰⁹ The result of this is that where the special destination has not been evacuated and takes effect during the sequestration, irrespective of whether or not the debtor was discharged at the date of their death, the trustee may seek payment from the substitute of such amount up to the value of the debtor's *pro indiviso* share of the property as is necessary to pay the debtor's debts at the date of death, the creditors' claims against the heir of provision being given effect to through their claims in the sequestration.¹¹⁰ It has also been held that a trustee in sequestration may seek payment from the substitute of such amount up to the value of the debtor's *pro indiviso* share of the property as is necessary to pay the debtor's debts at the date of death even where the award of sequestration was made after the debtor's death and the debtor's *pro indiviso* share of the property had accordingly never formed part of the debtor's estate in the sequestration, the supervening sequestration having superimposed on the relevant creditors a statutory process for the enforcement and collection of their debts.¹¹¹ In that case, there was a dispute as to the amount of the debtor's debts as at the date of death with the result that a proof on that issue was required. There was also an issue in that case as to whether any of the debtor's debts had subsequently been extinguished by the operation of prescription and, if so, whether the substitute's liability was reduced accordingly. The sheriff's preliminary view was that if some or all of the debtor's debts subsisting at the date of death no longer subsisted for whatever reason, the substitute's liability would be reduced accordingly.

Moveable property

- 11-42** In relation to moveable property as at the date of sequestration, it is provided that moveable property in respect of which delivery or possession *or* intimation of assignation would otherwise be required in order to complete title to the property vests in the trustee by virtue of their appointment as if they had taken delivery or possession of the property or had made intimation of its assignation to them at the date of sequestration.¹¹²
- 11-43** The effect of these provisions is that the trustee generally acquires a real, rather than personal, right to the debtor's moveable property. However, in some cases, further steps are required to complete the trustee's title and give them a real right to the property in the same way as in the case of heritable property where registration is required, with the result that there may also be a "race to

¹⁰⁷ *Fleming's Trustee v Fleming*, 2000 S.C. 206.

¹⁰⁸ *Fleming's Trustee v Fleming*, 2000 S.C. 206.

¹⁰⁹ See *Fleming's Trustee v Fleming*, 2000 S.C. 206; *Machin's Trustee v Machin*, 2017 S.C. GLA 29.

¹¹⁰ *Fleming's Trustee v Fleming*, 2000 S.C. 206.

¹¹¹ *Machin's Trustee v Machin*, 2017 S.C. GLA 29.

¹¹² Bankruptcy (Scotland) Act 2016 s.78(8).

the register" or its equivalent in relation to moveable property where the trustee has obtained only a personal right to the property.¹¹³ As noted above, following the amendments made to the Bankruptcy (Scotland) Act 1985 as a result of the difficulties arising out of the cases of *Sharp v Thomson*¹¹⁴ and *Burnett's Trustee v Grainger*,¹¹⁵ the whole estate of the debtor is now defined as including any property of the debtor title to which has not been completed by another person deriving right from the debtor,¹¹⁶ and this is not confined to heritable property. The amendments to the provisions on post-sequestration dealings of the debtor implemented as part of that package of amendments also apply wholly or partly to moveable property.

The paradigm example of moveable property where further steps are required to complete the trustee's title and give them a real right is shares in a company. In *Morrison v Harrison*,¹¹⁷ the debtor had transferred certain shares a year before the sequestration. The transferee registered the transfer a year after the sequestration. The trustee had never completed title to the shares by registration. It was held that the transferee's title was to be preferred. Where shares remain registered in the name of the debtor and the trustee has not completed title to them, the shares may be treated as the debtor's for certain purposes: in the case of *Arthur v Secretary of State for Social Security*,¹¹⁸ shares which had vested in the trustee in sequestration but to which he had not completed title and in respect of which the debtor had retained the beneficial enjoyment were regarded as part of debtor's capital for purposes of the legislation relating to social security benefits. It is not necessary, however, for the trustee to have completed title to the shares in order to be able to deal with them¹¹⁹ or to exercise the debtor's powers in relation to them, including the power to vote and to present a petition for liquidation of the company.¹²⁰ As in the case of heritage, therefore, the decision as to whether or not to complete title to shares or any other moveable property to which the trustee has obtained only a personal right would depend on the circumstances in each case.

With regard to *acquirenda*, the approach to *acquirenda* set out in *Halifax Plc v Gorman's Trustee*,¹²¹ discussed above in relation to heritable property, was regarded in that case as applying equally to moveable property. As noted above, however, the position in relation to aspects of that decision has changed and this is discussed further below in relation to post-sequestration dealings with the estate.

Non-vested contingent interests

Any non-vested contingent interest which the debtor has vests in the trustee as if an assignation of the interest had been executed by the debtor, and intimation of the assignation made, at the date of sequestration.¹²²

¹¹³ *Morrison v Harrison* (1876) 3 R. 406. As noted at para.11–27, in the case of moveable property, the race may or may not be a race to a register as such, depending on the type of property involved.

¹¹⁴ *Sharp v Thomson*, 1997 S.C. (HL) 66.

¹¹⁵ *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19.

¹¹⁶ See paras 11–06 and 11–10.

¹¹⁷ *Morrison v Harrison* (1876) 3 R. 406.

¹¹⁸ *Arthur v Secretary of State for Social Security*, 1995 S.L.T. 1399.

¹¹⁹ See further Ch.12.

¹²⁰ *Cumming's Trustee v Glenrinnies Farms Ltd*, 1993 S.L.T. 904. The position is the same in England and Wales: see *Hamilton v Brown* [2016] EWHC 191.

¹²¹ *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

¹²² Bankruptcy (Scotland) Act 2016 s.78(9).

- 11-47 The term non-vested contingent interest is not defined and different views have been expressed as to what it encompasses.¹²³ The main focus of the debate has been on the non-vested contingent rights or interests which a debtor may have on succession, which have been classified as rights arising *ex lege* (such as legitim), rights arising under a revocable deed (such as the will of a person who is still alive), or rights arising under an irrevocable deed (such as an established trust).¹²⁴ Under earlier bankruptcy legislation, none of these forms of right vested in the trustee, although if such a right became vested in the debtor before their discharge, it then vested in the trustee as *acquirenda*.¹²⁵ However, following the recommendations of the Cullen Committee,¹²⁶ the law was changed by the Bankruptcy (Scotland) Act 1913, which provided that any

“nonvested contingent right of succession or interest in property conceived in favour of the bankrupt under the will or settlement of any person deceased, or under marriage contract, or under any other deed, instrument or writing of an irrevocable nature”

vested in the trustee in sequestration.¹²⁷ As a consequence, although it remained the case that rights arising *ex lege* and rights arising under a revocable deed did not vest in the trustee, unless such rights became vested in the debtor before their discharge and so vested in the trustee as *acquirenda*, rights arising under an irrevocable deed did vest in the trustee. When the Bankruptcy (Scotland) Act 1985 was enacted, however, it made no reference to rights of succession or interests in property arising under particular deeds, but provided only for the vesting in the trustee of “any non-vested contingent interest” of the debtor.¹²⁸ This raised the question of whether rights arising *ex lege* and rights arising under a revocable deed then fell to be regarded as vesting in the trustee in the same way as rights arising under an irrevocable deed, as well as the question of what other rights or interests beyond the rights or interests which a debtor may have on succession fell to be regarded as vesting in the trustee. Professor McBryde has argued that the different wording in the Bankruptcy (Scotland) Act 1985, which is replicated in the current provisions, means that rights arising *ex lege* and rights arising under a revocable deed should now be regarded as vesting in the trustee in the same way as rights arising under an irrevocable deed, while Professor Gretton has argued the opposite.¹²⁹ The author inclines to the view of Professor McBryde, but the matter currently remains unresolved. In so far as what other rights or interests beyond the rights or interests which a debtor may have on succession are to be regarded as vesting in the trustee under this provision, this also remains uncertain, although

¹²³ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 9-150-9.151, Gretton, GL, “The assignation of contingent rights”, 1993 J.R. 23 and McBryde, WW and Gretton, GL, “Sequestration and the *Spes Successionis*” (2000) 4 Edin. L.R. 129.

¹²⁴ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 9-150-9.151, Gretton, GL, “The assignation of contingent rights”, 1993 J.R. 23 and McBryde, WW and Gretton, GL, “Sequestration and the *Spes Successionis*” (2000) 4 Edin. L.R. 129.

¹²⁵ See the cases cited in McBryde, WW and Gretton, GL, “Sequestration and the *Spes Successionis*” (2000) 4 Edin. L.R. 129.

¹²⁶ *Report of the Committee on Bankruptcy Law of Scotland and its Administration* (Cd 5201, 1910), Brit Sess Papers, IX 607.

¹²⁷ See Bankruptcy (Scotland) Act 1913 s.97(4).

¹²⁸ Bankruptcy (Scotland) Act 2016 s.78(9).

¹²⁹ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 9-150-9.151, Gretton, GL, “The assignation of contingent rights”, 1993 J.R. 23 and McBryde, WW and Gretton, GL, “Sequestration and the *Spes Successionis*” (2000) 4 Edin. L.R. 129.

it has been held that they include a non-vested contingent interest in payment of commission arising during the sequestration.¹³⁰

The vesting of non-vested contingent interests in the trustee can give rise to practical difficulties where such interests are not realised until a considerable period, perhaps many years, after the date of sequestration. It also gives rise to difficult policy issues in terms of striking an appropriate balance between the rights of the debtor and the creditors. It has been said there is "no self-evidently correct approach, in policy terms, to issues of this sort" but that an approach which allowed legitim to vest in the trustee would be unacceptable.¹³¹ A solution intended to address these difficulties has now been adopted in the form of provisions for the re-vesting in the debtor of any non-vested contingent interests which remain vested in the trustee after a specified period: the relevant provisions are discussed further at para.11–189 onwards. The opportunity has not been taken, however, to clarify precisely what such non-vested contingent interests actually are.¹³²

Tantum et tale

The trustee does not generally acquire any better right to the estate which has vested in them than the debtor had and their title is generally subject to the same limitations as would have affected the debtor's title. The trustee is said to take the estate *tantum et tale*. In *Inglis v Mansfield*,¹³³ Lord Brougham said:

"He takes the estate *tantum et tale*, and what does that mean? *Tantum et tale*, of such kind as it was in the hands of the bankrupt. What was that? *Quantum et quale* as it was in the bankrupt."

Thus, it has been held that where a debtor had only a personal right to land, the trustee could only acquire the same personal right to the land as the debtor had,¹³⁴ that a trustee could not use arrestments to found jurisdiction where the debtor could not have done so¹³⁵ and that a trustee could not claim a debtor's right to legitim where the debtor had by their actings discharged that right.¹³⁶ Furthermore, where the debtor has acquired property or a right in property by fraud, the trustee cannot take advantage of that fraud in a question with those defrauded.¹³⁷ The operation of the principle is not, however, confined to cases of fraud.¹³⁸

¹³⁰ *Stuart's Trustee v HJ Banks & Co Ltd*, 1998 S.C.L.R. 1109. McBryde and Gretton in the article referred to above also regard *Cay's Trustee v Cay* unreported January 1995 Peterhead Sheriff Court, referred to at para.11–08, which concerned the debtor's interest in a fishing licence, as an example of a case involving non-vested contingent interests, although it is not so described in the sheriff's opinion.

¹³¹ McBryde and Gretton, "Sequestration and the *Spes Successionis*" (2000) 4 Edin. L.R. 129, p.143.

¹³² See further the discussion of the re-vesting provisions at para.11–182 onwards.

¹³³ *Inglis v Mansfield* (1835) III Clark & Fennelly 362.

¹³⁴ See *Edmond v Gordon* (1858) 20 D. (HL) 5.

¹³⁵ See *Graeme's Trustee v Giersberg* (1888) 15 R. 691.

¹³⁶ See *Bell's Trustee v Bell*, 1907 S.C. 872.

¹³⁷ See *Watt v Findlay* (1846) 8 D. 529; *Scott v Scales* (1873) 10 S.L.R. 315; *Colquhoun's Trustee v Campbell's Trustee* (1902) 4 F. 739; *Royal Bank of Scotland Plc v MacGregor*, 1988 S.C.L.R. 923; *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

¹³⁸ See *Littlejohn v Black* (1855) 18 D. 207, where it was held that the trustee took the estate subject to the rights of catholic and secondary security holders; *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

- 11-51 The trustee is affected only by a real right in the property,¹³⁹ not by a personal obligation of the debtor,¹⁴⁰ including an obligation to convey heritable property, even where a disposition of that property has been delivered.¹⁴¹
- 11-52 The principle has been held to apply to estate vesting in the trustee as *acquirenda* as well as to estate vesting in the trustee at the date of sequestration.¹⁴²
- 11-53 The principle remains part of the common law. The Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* in 1982 considered that it would be unwise to put the adaptability of the principle at risk by attempting to make it the subject of express statutory statement¹⁴³ and so it has never been expressly embodied in the bankruptcy legislation. It may be noted, however, that s.88(3) of the Bankruptcy (Scotland) Act 2016, referred to above, which provides that the vesting of the debtor's estate in the trustee is without prejudice to the rights of secured creditors which are preferable to the right of the trustee is in effect a statutory example of the principle.¹⁴⁴
- 11-54 Notwithstanding the *tantum et tale* principle, there are some circumstances in which the trustee may be said to be in a better position than the debtor in relation to property vesting in them. For example, the trustee may deal with the debtor's heritable property despite any prior inhibition against the debtor¹⁴⁵ and in certain circumstances diligence will be ineffective to secure a preference over the trustee.¹⁴⁶ Furthermore, the trustee may challenge certain transactions of the debtor which the debtor would not have been in a position to reverse.¹⁴⁷

PROPERTY EXEMPT FROM ATTACHMENT/EXCEPTIONAL ATTACHMENT

- 11-55 As noted above, any property kept outwith a dwelling-house in respect of which attachment is incompetent by virtue of s.11(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 and any property kept within a dwelling-house which is not a non-essential asset for the purposes of Pt 3 of that Act (exceptional attachment) does not vest in the trustee in sequestration.¹⁴⁸
- 11-56 These provisions continue a long tradition of aligning exemptions in diligence and sequestration. Under earlier legislation, moveable property of the debtor vested in the trustee in sequestration only "so far as attachable for debt, or capable

¹³⁹ See *Souter v Kennedy* 23 July 1999, a decision of the Sheriff Principal of Tayside, Central and Fife at Perth, where it was held that the trustee in a sequestration under the Bankruptcy (Scotland) Act 1985 took the debtor's heritable property subject to the right of the trustee in an earlier sequestration under the Bankruptcy (Scotland) Act 1913, the right of the trustee in the earlier sequestration being a real right.

¹⁴⁰ See *Forbes' Trustee v Ogilvy* (1904) 6 F. 548.

¹⁴¹ See *Wylie v Duncan* (1803) M. 10269; *Laurie v Laurie* (1854) 16 D. 860; *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19.

¹⁴² See *Royal Bank of Scotland Plc v MacGregor*, 1988 S.C.L.R. 923; *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

¹⁴³ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.11.22.

¹⁴⁴ Property subject to security is discussed separately at para.11-79 onwards. See also s.129(9) and Ch.16 in relation to the effect of this principle on the ranking of creditors' claims.

¹⁴⁵ Bankruptcy (Scotland) Act 2016 s.78(5).

¹⁴⁶ See Ch.15.

¹⁴⁷ The challenge of prior transactions dealt with in Ch.14.

¹⁴⁸ Bankruptcy (Scotland) Act 2016 s.88(1)(a) and (b).

of voluntary alienation".¹⁴⁹ The Scottish Law Commission, however, considered that the reference to voluntary alienation was inappropriate, since certain goods and earnings were and should be excluded from sequestration because they were not attachable for debt yet were capable of voluntary alienation, and that while the concept of attachability for debt was appropriate as a general principle, it presented certain problems in practice.¹⁵⁰ In accordance with its recommendations, therefore, the Bankruptcy (Scotland) Act 1985 provided that property exempt from pouncing for the purpose of protecting the debtor and their family did not vest in the trustee in sequestration.¹⁵¹ Following the abolition of pouncing and warrant sale and its replacement with the new diligence of attachment by the Debt Arrangement and Attachment (Scotland) Act 2002, the provision was amended to reflect the new diligence, resulting in the current provisions described above. It may be noted that the current provisions no longer refer to property exempt from diligence for the purpose of protecting the debtor and their family: the relevant property is simply defined by reference to the relevant provisions of the Debt Arrangement and Attachment (Scotland) Act 2002. It seems clear, however, that the protection of an individual debtor and the debtor's family remains the underlying policy reason for exempting such assets from sequestration.

The categories of property kept outwith a dwelling-house in respect of which attachment is incompetent by virtue of s.11(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 are: 11-57

- (a) any implements, tools of trade, books or other equipment reasonably required for the use of the debtor in the practice of the debtor's profession, trade or business not exceeding an aggregate value of, currently, £1,000.¹⁵² There do not appear to be any reported cases as to what items might qualify for exemption under these provisions, and although there are some older authorities, these require to be treated with some caution as a result of the different wording of earlier statutory provisions¹⁵³;
- (b) any vehicle, the use of which is reasonably required by the debtor in the practice of the debtor's profession, trade or business, not exceeding a value of, currently, £3,000¹⁵⁴;
- (c) a mobile home which is the debtor's only or principal residence¹⁵⁵;
- (d) any tools or other equipment reasonably required for the purpose of keeping in good order and condition any garden or yard adjacent to, or associated with, a dwelling-house in which the debtor resides¹⁵⁶; and
- (e) any money.¹⁵⁷

¹⁴⁹ See latterly Bankruptcy (Scotland) Act 1913 s.97(1).

¹⁵⁰ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.11.3.

¹⁵¹ Bankruptcy (Scotland) Act 1985 s.33(1)(a) as enacted.

¹⁵² Debt Arrangement and Attachment (Scotland) Act 2002 s.11(1)(a).

¹⁵³ See, for example, *Morgan v Browns*, 1924 S.L.T. (Sh Ct) 12, in which it was held that a patching machine and a finishing machine were "working tools" of a boot repairer, and *Pennell v Elgin*, 1926 S.C. 9, in which it was held that the majority of his professional library were not "working tools" of a solicitor.

¹⁵⁴ Debt Arrangement and Attachment (Scotland) Act 2002 s.11(1)(b) and Bankruptcy (Scotland) Amendment Regulations 2010 (SSI 2010/367) reg.4 and see *Hoblyn v Hoblyn's Trustee* unreported 8 June 2006 Paisley Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=ad9087a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

¹⁵⁵ Debt Arrangement and Attachment (Scotland) Act 2002 s.11(1)(c).

¹⁵⁶ Debt Arrangement and Attachment (Scotland) Act 2002 s.11(1)(d).

¹⁵⁷ Debt Arrangement and Attachment (Scotland) Act 2002 s.11(1)(e). For this purpose, "money" has the same meaning as in s.175 of the Bankruptcy and Diligence etc. (Scotland) Act 2007: Debt

11–58 The categories may be modified by regulations made by the Scottish Ministers.¹⁵⁸

11–59 In a case in which it was argued by the debtor that a vehicle did not vest in the trustee in sequestration as a result of these provisions, since it did not exceed the then specified value, it was held that the appropriate date for assessing the value of the vehicle was the date of sequestration and that the onus was on the debtor to establish the value of the vehicle in order to demonstrate that it did not vest in the trustee.¹⁵⁹ It is thought that the same approach would apply in any case in which the property must not exceed a specified value in order to be exempt.

11–60 The categories of property kept within a dwelling-house which are not non-essential assets for the purposes of Pt 3 of the Debt Arrangement and Attachment (Scotland) Act 2002 are:

- (a) clothing reasonably required for the use of the debtor or any member of the debtor's household¹⁶⁰;
- (b) implements, tools of trade, books or other equipment reasonably required for the use of any member of the debtor's household in the practice of such member's profession, trade or business, not exceeding an aggregate value of, currently, £1,000¹⁶¹;
- (c) medical aids or medical equipment reasonably required for the use of the debtor or any member of the debtor's household¹⁶²;
- (d) books or other articles reasonably required for the education or training of the debtor or any member of the debtor's household, not exceeding an aggregate value of, currently, £1,000¹⁶³;
- (e) articles reasonably required for the care or upbringing of a child who is a member of the debtor's household¹⁶⁴;
- (f) toys for the use of any child who is a member of the debtor's household¹⁶⁵;
- (g) the following articles so far as reasonably required for the use of the debtor or a member of the debtor's household: beds or bedding; household linen; chairs or settees; tables; food; lights or light fittings; heating appliances; curtains; floor coverings; furniture, equipment or utensils used for storing, cooking or eating food; refrigerators; articles used for cleaning, drying, mending, or pressing clothes; articles used for cleaning the dwelling-house; furniture used for storing clothing, bedding, household linen, articles used for cleaning the dwelling-house and utensils used for cooking or eating food; articles used for safety in the dwelling-house; tools used for maintenance or repair of the dwelling-house or of household articles; computers and accessory equipment; microwave ovens; radios; telephones; and televisions¹⁶⁶; and

Arrangement and Attachment (Scotland) Act 2002 s.11(3) as inserted by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

¹⁵⁸ Debt Arrangement and Attachment (Scotland) Act 2002 s.11(2).

¹⁵⁹ *Hoblyn v Hoblyn's Trustee* unreported 8 June 2006 Paisley Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=ad9087a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

¹⁶⁰ Debt Arrangement and Attachment (Scotland) Act 2002 Sch.2(a) and para.3(a).

¹⁶¹ Debt Arrangement and Attachment (Scotland) Act 2002 Sch.2(a) and para.3(b).

¹⁶² Debt Arrangement and Attachment (Scotland) Act 2002 Sch.2(a) and para.3(c).

¹⁶³ Debt Arrangement and Attachment (Scotland) Act 2002 Sch.2(a) and para.3(d).

¹⁶⁴ Debt Arrangement and Attachment (Scotland) Act 2002 Sch.2(a) and para.3(e).

¹⁶⁵ Debt Arrangement and Attachment (Scotland) Act 2002 Sch.2(a) and para.3(f).

¹⁶⁶ Debt Arrangement and Attachment (Scotland) Act 2002 Sch.2(b) and para.4.

- (h) any article the attachment of which is incompetent by virtue of s.11(1) of the Debt Arrangement and Attachment (Scotland) Act 2002, discussed at para.11–57, or otherwise.¹⁶⁷

It may be noted that the categories of property which are exempt from diligence and thus sequestration under these provisions have expanded considerably over time. The categories of property in the Debt Arrangement and Attachment (Scotland) Act 2002 discussed above are much more extensive than those which were exempt from poinding under the Debtors' (Scotland) Act 1987, which were more extensive than those under the previous law. Furthermore, the qualification which is almost universally applied to the items within those categories in order for them to qualify as exempt has changed from a very strict requirement that they be "necessary"¹⁶⁸ through a slightly less strict requirement that they be "reasonably necessary" to avoid "undue hardship"¹⁶⁹ to the still less strict requirement that they be "reasonably required".¹⁷⁰ This reflects changing views of the minimum standard of living which debtors and their families should be allowed to maintain notwithstanding the debtor's financial difficulties. Thus the Scottish Law Commission in 1999 noted that "[s]tandards change over time and articles once considered as luxury goods can come to be regarded as essential to a basic, if frugal, standard of living"¹⁷¹ and in 2000 it said:

11–61

"We now prefer to base exemptions on the principle that articles should be exempt if they are reasonably required, having regard to current social standards, to allow debtors and their families a modest standard of living . . . [i]n addition we think that some other items ought to be exempt as they enable people to keep in touch with society and prevent social exclusion."¹⁷²

In what appears to be the only reported decision on the meaning of "reasonably required" in this context, a decision on the provisions of the Debtors (Scotland) Act 1987, it was held that a single debtor living alone did not reasonably require more than one of the chairs forming part of a three-piece suite.¹⁷³ The sheriff referred in his judgment to an unreported decision which had been brought to his attention in which it had been decided that all the constituent elements of a three piece suite *were* reasonably required by a debtor, but as there was no written judgement in that case and no details available as to the precise facts or the reasons for the decision, he was not able to derive any assistance from it. The decision appears to have applied a rather strict interpretation of "reasonably required" and it may be regarded as doubtful whether it would now be followed.

11–62

¹⁶⁷ Debt Arrangement and Attachment (Scotland) Act 2002 Sch.2(c).

¹⁶⁸ As in the case of the exemption for the clothing of the debtor and the debtor's wife and family at common law and under the Bankruptcy (Scotland) Act 1913: see Scottish Law Commission, *Second Memorandum on Diligence: Poindings and Warrant Sales* (Scot. Law Com. Memorandum No.48, 1980), para.4.14 and references there cited.

¹⁶⁹ The test employed by the Law Reform (Diligence) (Scotland) Act 1973.

¹⁷⁰ The test employed by the Debtors (Scotland) Act 1987 and retained by the Debt Arrangement and Attachment (Scotland) Act 2002.

¹⁷¹ See Scottish Law Commission Discussion Paper, *Poinding and Sale: Effective Enforcement and Debtor Protection* (Scot. Law Com. Discussion Paper No.110, 1999), para.4.22.

¹⁷² See Scottish Law Commission, *Report on Poinding and Warrant Sale* (Scot. Law Com. No.177, 2000), para.3.47.

¹⁷³ *Irvine v Strathclyde Regional Council*, 1995 S.L.T. (Sh Ct) 28.

PROPERTY HELD IN TRUST

11-63 As noted above, any property which the debtor holds in trust for another does not vest in the trustee.¹⁷⁴ Although previously well-established law,¹⁷⁵ this rule was expressly stated in statute for the first time by the Bankruptcy (Scotland) Act 1985¹⁷⁶ following the recommendation of the Scottish Law Commission.¹⁷⁷

11-64 The traditional explanation for the rule is that property held by the debtor in trust for another cannot be regarded as the debtor's property for the purposes of sequestration. Thus in *Heritable Reversionary Co Ltd v Millar*,¹⁷⁸ Lord Watson said¹⁷⁹:

"That which, in legal as in conventional language, is described as a man's property is estate, whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of. It does not include estate in which he has no beneficial interest, and which he cannot dispose of without committing a fraud."

11-65 More recently, the rule, as well as other characteristics and effects of trusts, has been explained with reference to the concept of patrimonies as developed by Professors Gretton and Reid.¹⁸⁰ The essence of this explanation is that each person has a general or private patrimony comprised of the totality of that person's rights and liabilities, but may also have a special patrimony in the form of a trust patrimony which comes into being when that person holds property in trust for another person.¹⁸¹ A person's general or private patrimony is distinct in law from any special or trust patrimony with the consequence, inter alia, that a person's creditors in respect of liabilities incurred by them in their private capacity (private creditors) may seek to have their claims satisfied only from the general or private patrimony, while a person's creditors in respect of liabilities incurred by them in their administration of the trust (trust creditors) may seek to have their claims satisfied only from the trust patrimony. A person's trustee in sequestration is therefore concerned only with their general or private patrimony and not their separate trust patrimony or patrimonies. The dual patrimony theory has been accepted by other academics¹⁸² and the Scottish

¹⁷⁴ Bankruptcy (Scotland) Act 2016 s.88(1)(c).

¹⁷⁵ See *Heritable Reversionary Co Ltd v Millar* (1892) 19 R. (HL) 43 and earlier authorities there cited.

¹⁷⁶ Bankruptcy (Scotland) Act 1985 s.33(1)(b) as enacted.

¹⁷⁷ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.11.25.

¹⁷⁸ See *Heritable Reversionary Co Ltd v Millar* (1892) 19 R. (HL) 43.

¹⁷⁹ *Heritable Reversionary Co Ltd v Millar* (1892) 19 R. (HL) 43 at 49–50.

¹⁸⁰ See, in particular, Gretton, GL, "Trust and Patrimony" in MacQueen, HL (ed), *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (Edinburgh: 1996); Reid, KGC, "National Report for Scotland" in Hayton, DJ, Kortmann, SCJJ and Verhagen, HLE (eds), *Principles of European Trust Law* (Kluwer Law International, 1999); Gretton, GL, "Trusts without Equity" (2000) 49 ICLQ 599; Reid, KGC, "Patrimony not equity: The trust in Scotland" (2000) ERPL 427; Gretton, GL, "Trust without Equity" in Valsan, R (ed), *Trusts and Patrimonies* (Edinburgh: Edinburgh University Press, 2015); Reid, KGC, "Patrimony not equity: The trust in Scotland" in Valsan, R (ed), *Trusts and Patrimonies* (Edinburgh: Edinburgh University Press, 2015).

¹⁸¹ A person may in fact have more than one such special or trust patrimony if they are a trustee in more than one trust.

¹⁸² See, for example, Anderson, RG, "Words and Concepts: Trust and Patrimony" in Burrows, A, Johnston, D and Zimmermann, R (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford: OUP, 2013); Smith, LD, "Scottish Trusts in the Common Law" in Valsan, R (ed), *Trusts and Patrimonies* (Edinburgh: Edinburgh University Press, 2015).

Law Commission,¹⁸³ which considered that it could in fact be regarded as implicit in the statement of Lord Watson quoted above, and has been referred to with approval in case law.¹⁸⁴

The rule has resulted in an increasing use of trusts as functional securities in a commercial setting. As the Scottish Law Commission has noted,¹⁸⁵ this is not a new phenomenon, the case of *Heritable Reversionary Co Ltd v Millar*¹⁸⁶ itself being an example, but it is an increasing one, and the Scottish Law Commission considers that it will, if anything, continue to increase in the future.¹⁸⁷ Instances of the use of trusts for these purposes will tend to occur less frequently in the context of sequestration than in the context of corporate insolvency, since most debtors are individuals who are consumers, but they may occur where the debtor is an individual who is a trader or is an entity such as a partnership which is engaged in commercial activity. The Scottish Law Commission gives a useful list of examples of the use of trusts in a commercial context in its *Report on Trust Law*,¹⁸⁸ although not all of these will, or will often, be relevant in the context of sequestration¹⁸⁹; some of the examples given which might, or might more often, be found in the context of sequestration are the use of trusts for the purposes of debt factoring and invoice discounting arrangements¹⁹⁰; to hold property for a partnership; to isolate a fund for a specific purpose¹⁹¹; and as a general means of providing security for the performance of commercial contracts.¹⁹²

The rule will apply only where the trust has been properly constituted. The traditional form of inter vivos trust involves a trustor conveying property to a trustee or trustees to be administered for the benefit of a beneficiary or beneficiaries, but a trust may also be created where a trustor declares themselves to be the trustee of their property which is thereafter to be administered for the

¹⁸³ See Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (Discussion Paper No.133, 2006) and Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No.239, 2014).

¹⁸⁴ See *Ted Jacob Engineering Group Inc v Robert Matthew Johnston-Marshall and Partners* [2014] CSIH 18 per Lord Drummond Young at [90]; *Glasgow City Council v The Board of Managers of Springhoig St John's School* [2014] CSOH 76 at [16] and [17] (a decision of Lord Malcolm).

¹⁸⁵ See Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No.239, 2014), para.3.14.

¹⁸⁶ See *Heritable Reversionary Co Ltd v Millar* (1892) 19 R. (HL) 43.

¹⁸⁷ Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No.239, 2014), para.3.17.

¹⁸⁸ Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No.239, 2014).

¹⁸⁹ See Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No.239, 2014), para.3.16. See also Gretton, GL and Steven, AJM, *Property, Trusts and Succession*, 2nd edn (Haywards Heath: Bloomsbury Professional, 2013), Ch.22; St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland*, 4th edn (Edinburgh: W. Green, 2011), Ch.12.

¹⁹⁰ See *Tay Valley Joinery Ltd v CF Financial Services Ltd*, 1987 S.C.L.R. 117, where a trust for the purpose of such an arrangement was held to have been created in the particular circumstances of the case.

¹⁹¹ The examples given by the Scottish Law Commission are a trust set up by the parties to a commercial development to ensure that funds are available to complete the development in the event of any of the parties encountering financial difficulties and a trust set up to provide funds to meet possible future environmental developments.

¹⁹² The example given by the Scottish Law Commission is a contract for the sale of goods or the performance of services where it is desired to provide security for payment in advance of delivery of the goods or performance of the services: the price can be transferred into a trust to make payment to the supplier once it has provided the relevant goods or services. A further example would be the use of a trust in the context of retention (or reservation) of title, discussed further at para.11-87.

benefit of a beneficiary or beneficiaries.¹⁹³ The latter type of trust, generally referred to as a trustee-as-trustee trust, is often used in a commercial setting. A detailed discussion of the requirements for the constitution of a trust is, however, beyond the scope of this work, and reference should be made to relevant specialist texts.¹⁹⁴ It may be noted that the Scottish Law Commission, as part of its recent examination of the law of trusts in Scotland, considered the law relating to the constitution of trusts,¹⁹⁵ including trustee-as-trustee trusts, which it recognised raised particular difficulties.¹⁹⁶ It noted that the current law was “uncertain and underdeveloped”¹⁹⁷ and sought views on a number of questions relating to the constitution of, *inter alia*, traditional *inter vivos* trusts and trustee-as-trustee trusts. Ultimately, however, it made no recommendations for the reform of the law in relation to these matters.¹⁹⁸

- 11–68 The rule has attracted criticism in so far as it applies to latent trusts, particularly latent trusts of heritage where it can be seen to breach the long-standing principle that rights in heritage must be registered in order to have effect against third parties (the publicity principle).¹⁹⁹ The issues arising from the operation of the rule in the case of latent trusts of both moveable and heritable property were considered in detail by the Scottish Law Commission in its *Discussion Paper on the Nature and Constitution of Trusts*.²⁰⁰ It sought views on the introduction of an exception to the rule for latent trusts of moveable property in certain cases involving trustee-as-trustee trusts and on the abolition of the rule in *Heritable Reversionary Co Ltd v Millar* in relation to the recognition of latent trusts of heritage or the introduction of a rule that heritable property should not be regarded as trust property for the purposes of diligence or insolvency proceedings including sequestration until its registration as such, including the circumstances in which such a rule might apply. In its subsequent *Report on Trust Law*,²⁰¹ however, having reconsidered the matter in the light of the responses to the Discussion Paper, the Scottish Law Commission recommended no change to the existing law in relation to latent trusts of moveable or heritable

¹⁹³ See *Allan's Trustees v Lord Advocate*, 1971 S.C. (HL) 45; *Clark's Trustees v Lord Advocate*, 1972 S.C. 177; *Kerr's Trustees v Lord Advocate*, 1974 S.C. 115; *Export Credits Guarantee Department v Turner*, 1979 S.C. 286; *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd*, 1981 S.C. 111; *Tay Valley Joinery Ltd v CF Financial Services Ltd*, 1987 S.C.L.R. 117.

¹⁹⁴ See, in particular, Wilson, WA and Duncan, AGM, *Trusts, Trustees and Executors*, 2nd edn (London: Sweet and Maxwell, 1995); Stair Memorial Encyclopaedia, *Trusts, Trustees and Judicial Factors (Reissue)*. See also St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland*, 4th edn (Edinburgh: W. Green, 2011), Ch.12 and Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (Discussion Paper No.133, 2006) and *Report on Trust Law* (Scot. Law Com. No.239, 2014).

¹⁹⁵ See Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (Discussion Paper No.133, 2006) and *Report on Trust Law* (Scot. Law Com. No.239, 2014).

¹⁹⁶ See Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (Discussion Paper No.133, 2006), para.2.2 and Pt 3.

¹⁹⁷ Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (Discussion Paper No.133, 2006), para.3.10.

¹⁹⁸ See Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No.239, 2014), Ch.3.

¹⁹⁹ See, in particular, Gretton, GL, “Ownership and Insolvency: *Burnett's Trustee v Grainger*” (2004) 4 Edin. L.R. 389. The case of *Heritable Reversionary Co Ltd v Millar* (1892) 19 R. (HL) 43 was concerned with a latent trust of heritage and altered the law in this respect in so far as it upheld the validity of such a trust. For a case involving a latent trust of moveable property, see *Gordon v Sander's Trustee* (1824) 2 S. 675, which involved a latent trust of shares.

²⁰⁰ Scottish Law Commission, *Discussion Paper on the Nature and Constitution of Trusts* (Discussion Paper No.133, 2006), paras 4.22–4.42.

²⁰¹ Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No.239, 2014).

property.²⁰² The position therefore remains, and is likely to remain, that the rule continues to apply to latent trusts of both moveable and heritable property.

It may not always be easy in practice to identify trust property which does not vest in the trustee, for example, where trust funds have been inmixed with the debtor's own funds. However, the court will, where possible, disentangle the funds held in an account which is in credit if the trust funds can be identified.²⁰³ Funds held in a solicitor's client account are held in trust and do not vest in their trustee in sequestration, and a judicial factor appointed on the solicitor's estate under the Solicitors (Scotland) Act 1980 is not required to hand over such funds to the their trustee in sequestration.²⁰⁴

PROPERTY SUBJECT TO ORDERS MADE UNDER THE PROCEEDS OF CRIME ACT 2002

Property which is subject to specified orders made under the Proceeds of Crime Act 2002, or detained under or by virtue of specified provisions of that Act, is excluded from the debtor's estate for the purposes of the Bankruptcy (Scotland) Act 2016.²⁰⁵ The property so excluded will, however, subsequently vest in the trustee in sequestration as part of the debtor's estate in specified circumstances.²⁰⁶ It may be noted, however, that there may be considerable delay before any such vesting takes place, and the trustee may therefore have to consider whether to delay completing their administration of the estate and seeking their discharge in anticipation of any such vesting. If the trustee decides not to do so, it may be possible to have a new trustee appointed if and when the excluded property subsequently vests: the circumstances in which a trustee may be appointed after the end of the sequestration are discussed further in Ch.18.

The property which is excluded from the debtor's estate comprises:

- (a) property subject to a restraint order made under specified sections of the Proceeds of Crime Act 2002 in Scotland, England, Wales or Northern Ireland before the award of sequestration,²⁰⁷ subject to the proviso that heritable property in Scotland is so excluded only if the restraint order was recorded in the General Register of Sasines or registered in the Land Register before the award of sequestration.²⁰⁸ The property so excluded will subsequently vest in the trustee in sequestration as part of the debtor's estate where no enforcement receiver in England, Wales or Northern Ireland or enforcement administrator in Scotland has been appointed under specified provisions of the Proceeds of Crime Act 2002, no order for the realisation of property has been made under specified provisions of the Proceeds of Crime Act 2002 and the restraint order is discharged.²⁰⁹ This does

²⁰² Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No.239, 2014), paras 3.12 and 3.13.

²⁰³ See discussion on disputes about vesting at para.11–166 onwards and cases there cited.

²⁰⁴ *Council of the Law Society of Scotland v McKinnie*, 1993 S.L.T. 238, referred to with approval in *Re Lehman Brothers International (Europe) in administration* [2012] UKSC 6.

²⁰⁵ Proceeds of Crime Act 2002 s.420(1), (2).

²⁰⁶ Bankruptcy (Scotland) Act 2016 ss.80–84.

²⁰⁷ Proceeds of Crime Act 2002 s.420(2)(a).

²⁰⁸ Proceeds of Crime Act 2002 s.420(3).

²⁰⁹ Bankruptcy (Scotland) Act 2016 s.80(1), (2).

not, however, apply to the proceeds of property realised by a management receiver in England, Wales or Northern Ireland under specified sections of the Proceeds of Crime Act 2002 relating to the realisation of property to meet the receiver's outlays and remuneration, which will not vest in the trustee under this provision²¹⁰;

- (b) property detained under or by virtue of specified sections of the Proceeds of Crime Act 2002 in Scotland, England, Wales or Northern Ireland.²¹¹ The property so excluded will subsequently vest in the trustee in sequestration as part of the debtor's estate where no restraint order under the provisions referred to above and no order appointing an enforcement receiver in England, Wales or Northern Ireland or an enforcement administrator in Scotland under the provisions referred to above is in force and the property is released²¹²;
- (c) property in respect of which an order has been made under specified sections of the Proceeds of Crime Act 2002 appointing an enforcement receiver in England, Wales or Northern Ireland or an enforcement administrator in Scotland.²¹³ The property so excluded will subsequently vest in the trustee in sequestration as part of the debtor's estate where a confiscation order is made under specified sections of the Proceeds of Crime Act 2002 in Scotland, England, Wales or Northern Ireland, the amount payable under the confiscation order is fully paid and any of the property remains in the hands of the receiver or administrator as the case may be²¹⁴; and
- (d) property in respect of which an order has been made under specified sections of the Proceeds of Crime Act 2002 for realisation of property by an appropriate officer in Scotland, England, Wales or Northern Ireland.²¹⁵ The property so excluded will subsequently vest in the trustee in sequestration as part of the debtor's estate where a confiscation order is made under specified sections of the Proceeds of Crime Act 2002 in Scotland, England, Wales or Northern Ireland, the amount payable under the confiscation order is fully paid and any of the property remains in the hands of the appropriate officer.²¹⁶

11-72 In addition, any property excluded from the debtor's estate will subsequently vest in the trustee in sequestration as part of the debtor's estate where a confiscation order made under specified sections of the Proceeds of Crime Act 2002 in Scotland, England, Wales or Northern Ireland is subsequently discharged under specified sections of that Act or quashed and the property remains in the hands of a receiver, administrator or appropriate person appointed under specified provisions of the Act.²¹⁷ This does not, however, apply to the proceeds of property realised by a management receiver in England, Wales or Northern Ireland under specified sections of the Proceeds of Crime Act 2002 relating to the realisation of property to meet the receiver's outlays and remuneration, which will not vest in the trustee under this provision.²¹⁸

²¹⁰ Bankruptcy (Scotland) Act 2016 s.80(3).

²¹¹ Proceeds of Crime Act 2002 s.420(2)(b).

²¹² Bankruptcy (Scotland) Act 2016 s.81(1), (2).

²¹³ Proceeds of Crime Act 2002 s.420(2)(c).

²¹⁴ Bankruptcy (Scotland) Act 2016 s.82(1), (2).

²¹⁵ Proceeds of Crime Act 2002 s.420(2)(d).

²¹⁶ Bankruptcy (Scotland) Act 2016 s.83(1), (2).

²¹⁷ Bankruptcy (Scotland) Act 2016 s.84(1), (2).

²¹⁸ Bankruptcy (Scotland) Act 2016 s.84(3).

The corollary of these provisions is that where sequestration has been awarded, specified powers under the Proceeds of Crime Act 2002 must not be exercised in relation to certain specified property.²¹⁹ The specified property is:

11-73

- (a) property which is comprised in the whole estate of the debtor as defined in s.79 of the Bankruptcy (Scotland) Act 2016²²⁰;
- (b) any income of the debtor which has been ordered to be paid to the trustee by virtue of the provisions on debtor contributions²²¹;
- (c) any estate which vests in the trustee as *acquirenda* or as a result of the trustee serving a notice causing the debtor's interest in a tenancy not included in the whole estate of the debtor to form part of the debtor's estate and to vest in the trustee²²²; and
- (d) any sums remaining in the hands of an enforcement receiver appointed in England, Wales or Northern Ireland, an enforcement administrator appointed in Scotland or an appropriate person appointed to realise property after the amount to be paid under a confiscation order has been fully paid.²²³

The powers which may not be exercised in relation to such property are:

11-74

- (a) the powers conferred on a court under specified provisions of the Proceeds of Crime Act 2002 relating to restraint orders in England and Wales²²⁴;
- (b) the powers conferred on an appropriate officer to seize property under specified provisions of the Proceeds of Crime Act 2002 in England and Wales²²⁵;
- (c) the powers conferred on a management receiver or an enforcement receiver appointed under specified provisions of the Proceeds of Crime Act 2002 in England and Wales²²⁶;
- (d) the powers conferred on a court under specified provisions of the Proceeds of Crime Act 2002 relating to restraint orders in Scotland²²⁷;
- (e) the powers conferred on an appropriate officer to seize property under specified provisions of the Proceeds of Crime Act 2002 in Scotland²²⁸;
- (f) the powers conferred on a management administrator or an enforcement administrator appointed under specified provisions of the Proceeds of Crime Act 2002 in Scotland²²⁹;
- (g) the powers conferred on a court under specified provisions of the Proceeds of Crime Act 2002 relating to restraint orders in Northern Ireland²³⁰;
- (h) the powers conferred on an appropriate officer to seize property under specified provisions of the Proceeds of Crime Act 2002 in Northern Ireland²³¹; and

²¹⁹ Proceeds of Crime Act 2002 s.421(1).

²²⁰ Proceeds of Crime Act 2002 s.421(3)(a).

²²¹ Proceeds of Crime Act 2002 s.421(3)(b).

²²² Proceeds of Crime Act 2002 s.421(3)(c).

²²³ Proceeds of Crime Act 2002 s.421(3)(d), (e) and (f).

²²⁴ Proceeds of Crime Act 2002 s.421(2)(a).

²²⁵ Proceeds of Crime Act 2002 s.421(2)(a).

²²⁶ Proceeds of Crime Act 2002 s.421(2)(a).

²²⁷ Proceeds of Crime Act 2002 s.421(2)(b).

²²⁸ Proceeds of Crime Act 2002 s.421(2)(b).

²²⁹ Proceeds of Crime Act 2002 s.421(2)(b).

²³⁰ Proceeds of Crime Act 2002 s.421(2)(c).

²³¹ Proceeds of Crime Act 2002 s.421(2)(c).

- (i) the powers conferred on a management receiver or an enforcement receiver appointed under specified provisions of the Proceeds of Crime Act 2002 in Northern Ireland.²³²

11-75 It is specifically provided, however, that nothing in the Bankruptcy (Scotland) Act 2016 itself must be taken to restrict, or enable the restriction of, the specified powers.²³³

11-76 It may be noted that similar provisions apply in the case of certain corporate insolvency procedures, although these are not relevant for discussion here. The general policy underlying the exclusion of property subject to specified provisions of the Proceeds of Crime Act 2002 from a subsequent sequestration or relevant corporate insolvency procedure is “to prevent defendants [*sic*] from attempting to use the insolvency legislation to defeat the purpose of the confiscation legislation”.²³⁴ The provisions, therefore, effectively give priority to the proceeds of crime regime over the insolvency regime, in this case sequestration.

PROPERTY SUBJECT TO LANDLORD’S HYPOTHEC

11-77 As noted above, the vesting of the debtor’s estate in the trustee in sequestration does not affect a landlord’s right of hypothec.²³⁵

11-78 The scope of the landlord’s right of hypothec was considerably restricted by the Bankruptcy and Diligence etc. (Scotland) Act 2007,²³⁶ which also abolished the diligence of sequestration for rent as a mechanism for enforcing the right²³⁷ but preserved the landlord’s right to rank in the debtor’s sequestration in respect of it.²³⁸ The question of how the right of hypothec is to be enforced in the context of sequestration as well as outwith it has, however, given rise to debate.²³⁹ Steven argues that prior to the changes, sequestration for rent was required to make good the landlord’s right in a question with the trustee and that the abolition of sequestration for rent therefore leaves some uncertainty as to how the landlord’s right may be made good in sequestration.²⁴⁰ If the matter is approached from first principles, however, it is clear that the property which is subject to the hypothec vests in the trustee subject to the hypothec. The hypothec is a security²⁴¹ and for the purposes of the Bankruptcy (Scotland) Act 2016, the landlord is a secured creditor.²⁴² Even if there is now no mechanism for them to enforce that security outwith sequestration, which as a secured creditor they

²³² Proceeds of Crime Act 2002 s.421(2)(c).

²³³ Proceeds of Crime Act 2002 s.421(4).

²³⁴ See the Explanatory Notes accompanying the Proceeds of Crime Bill when introduced.

²³⁵ Bankruptcy (Scotland) Act 2016 s.88(2).

²³⁶ See Bankruptcy and Diligence etc. (Scotland) Act 2007 s.208(2)(a) and (3)–(9).

²³⁷ Bankruptcy and Diligence etc. (Scotland) Act 2007 s.208(1).

²³⁸ See Bankruptcy and Diligence etc. (Scotland) Act 2007 s.208(2)(b)(i). The ranking of creditors is discussed further in Ch.15.

²³⁹ See in particular, Roxburgh, R, “Landlord’s hypothec in formal insolvencies”, 2009 S.L.T. (News) 227; Burrow, A, “Uncertain security” 2010 JLSS 47; McAllister, A, “The Landlord’s Hypothec: Down But Is It Out?” 2010 J.R. 65; Steven, A.J., “The landlord’s hypothec: difficulties in practice”, 2010 S.L.T. 120.

²⁴⁰ Steven, A.J., “The landlord’s hypothec: difficulties in practice”, 2010 S.L.T. 120.

²⁴¹ See *Grampian Regional Council v Drill Stem (Inspection Services) Ltd*, 1994 S.C.L.R. 36. Cf *Cumbernauld Development Corporation v Mustone*, 1983 S.L.T. (Sh Ct) 55.

²⁴² See para.11-79 onwards with regard to secured creditors.

would otherwise be entitled to do notwithstanding the sequestration, the trustee will require to rank them accordingly on the net proceeds of sale of the property subject to the hypothec up to the value of their secured claim.

PROPERTY SUBJECT TO A SECURITY

As noted above, the vesting of the debtor's estate in the trustee in sequestration is without prejudice to the right of any secured creditor which is preferable to the rights of the trustee.²⁴³ **11-79**

A secured creditor is defined as "a creditor who holds a security for a debt over any part of the debtor's estate".²⁴⁴ It does not, therefore, include a creditor who holds a security which is not over part of the debtor's estate, such as a security over property of a third party or a security in the form of a cautionary obligation. **11-80**

"Security" is defined as "any security, heritable or moveable, or any right of lien, retention or preference".²⁴⁵ The definition is very wide. **11-81**

The effect of the provision that the vesting of the estate in the trustee is without prejudice to the right of any secured creditor which is preferable to the rights of the trustee is that the trustee's ability to deal with the estate subject to the security is constrained by the rights of the secured creditor. The legislation does, however, contain certain provisions regulating the respective rights of the trustee and a secured creditor in the context of the sequestration. In particular, there are provisions regulating the respective rights of the trustee and a secured creditor in relation to the sale of the debtor's heritage²⁴⁶; provisions relating to the valuation of a secured creditor's claim²⁴⁷; provisions giving the trustee the right to require a secured creditor to discharge a security or convey or assign it to them in specified circumstances²⁴⁸; and provisions allowing the trustee to require delivery of any title deed or other document of the debtor even where a right of lien is claimed over it, such delivery being without prejudice to any preference of the holder of the lien.²⁴⁹ As noted, these provisions are discussed in detail in later chapters. **11-82**

PROPERTY SUBJECT TO DILIGENCE

The debtor's estate may have been subject to diligence carried out by creditors prior to the sequestration. Whether and to what extent the trustee's right to the debtor's estate is affected by prior diligence depends on the rules which regulate diligence on sequestration and outwith sequestration. These rules and their effect are discussed in detail in Ch.15. **11-83**

²⁴³ Bankruptcy (Scotland) Act 2016 s.88(3).

²⁴⁴ Bankruptcy (Scotland) Act 2016 s.228(1).

²⁴⁵ Bankruptcy (Scotland) Act 2016 s.228(1).

²⁴⁶ Bankruptcy (Scotland) Act 2016 s.109(7). These provisions are discussed in detail in Ch.12.

²⁴⁷ Bankruptcy (Scotland) Act 2016 s.125(4) and Sch.2. These provisions are discussed in detail in Ch.16.

²⁴⁸ Bankruptcy (Scotland) Act 2016 s.125(4) and Sch.2.

²⁴⁹ Bankruptcy (Scotland) Act 2016 s.108(5), (6). These provisions are discussed in detail in Ch.13.

PROPERTY SUBJECT TO RETENTION (OR RESERVATION) OF TITLE

- 11–84** Where moveable property has been purchased by a debtor subject to a valid retention (or reservation) of title, that property will continue to belong to the seller unless and until the conditions on which title is to pass, in most cases conditions relating to payment, are satisfied. It will not therefore form part of the debtor's estate for the purposes of sequestration and so will not vest in the trustee in sequestration, although the trustee may go on to adopt the contract and fulfil the conditions on which property is to pass.²⁵⁰ Retention (or reservation) of title clauses are very common in commercial contracts, but may also be found in consumer contracts, and raise a variety of issues in the context of sequestration.²⁵¹

Forms of retention of title clauses

- 11–85** Retention of title clauses may take a number of forms. "Simple" retention of title clauses provide for title to goods to be retained by the seller only until the price for those particular goods has been paid. Such clauses are relatively uncontroversial and are valid because they are an expression of the intention of the parties as to when property in the goods should pass.²⁵² "All sums" retention of title clauses provide for title to goods to be retained by the seller until all sums due to the seller are paid. Such clauses are more controversial because they can be seen to operate as functional securities and were initially held by the Scottish courts to be invalid as an attempt to create security over moveables without possession.²⁵³ In the case of *Armour v Thyssen Edelstahlwerke AG*,²⁵⁴ however, the House of Lords held that such clauses are valid for the same reason that simple retention title clauses are valid, namely that they are an

²⁵⁰ Adoption of contracts by the trustee is discussed in Ch.12.

²⁵¹ The discussion which follows outlines some of the most important issues: for a detailed analysis, see Carey Miller, DL, *Corporeal Moveables in Scots Law*, 2nd edn (Edinburgh: W. Green, 2005), Ch.12. Retention of title clauses have generated an extensive academic literature as the law developed: see, in particular, Cusine, DJ, "The Romalpa Family Visits Scotland", 1982 JLS 147, 221; Reid, KGC and Gretton, GL, "Retention of Title and Romalpa Clauses", 1983 S.L.T. (News) 77; Smith, T, "Retention of Title: Lord Watson's Legacy", 1983 S.L.T. (News) 106; Gretton, GL and Reid, KGC, "Retention of Title for All Sums: A Reply", 1983 S.L.T. (News) 165; Gretton, GL and Reid, KGC, "Romalpa Clauses: The Current Position", 1985 S.L.T. (News) 329; Reid "Constitution of trusts", 1986 S.L.T. (News) 177; Gretton, GL and Reid, KGC, "All Sums Retention of Title", 1989 S.L.T. (News) 185; Kenneedy, JN, "Significant changes in the law of retention of title", 1990 JLS 529; Stewart, WJ, "A Debate Concluded!", 1991 J.R. 256; Clark, A, "All Sums Retention of Title: A Comment", 1991 S.L.T. (News) 155; Bradgate, R, "Retention of Title in the House of Lords: Unanswered Questions" 1991 M.L.R. 726; Mance, J, "The operation of an 'all debts' reservation of title clause" 1992 LMCLQ 35. See also Carey Miller, DL, *Corporeal Moveables in Scots Law*, 2nd edn (Edinburgh: W. Green, 2005), Ch.12; St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland*, 4th edn (Edinburgh: W. Green, 2011), Ch.14.

²⁵² See Sale of Goods Act 1979 ss.17 and 19, which apply to both commercial and consumer contracts for the sale of goods: as to the latter, see Sale of Goods Act 1979 s.1 and Consumer Rights Act 2015 ss.3, 4. See also *Archivent Sales and Development Ltd v Strathclyde Regional Council*, 1985 S.L.T. 154; *Glen v Gilbey Vinners Ltd*, 1986 S.L.T. 553; *Armour v Thyssen Edelstahlwerke AG*, 1990 S.L.T. 891.

²⁵³ See *Emerald Stainless Steel Ltd v South Side Distribution Ltd*, 1982 S.C. 61; *Deutz Engines Ltd v Terex Ltd*, 1984 S.L.T. 273; *Armour v Thyssen Edelstahlwerke AG*, 1986 S.L.T. 94 (at first instance) and 1989 S.L.T. 182 (on appeal in the Inner House). The Sale of Goods Act 1979 s.62(4) provides that the provisions of the Act relating to contracts of sale do not apply to a transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security; see also Consumer Rights Act 2015 s.3(3)(c) which provides that the provisions of that Act relating to consumer contracts for the sale of goods do not apply to a contract intended to operate as a mortgage, pledge, charge or other security.

²⁵⁴ *Armour v Thyssen Edelstahlwerke AG*, 1990 S.L.T. 891.

expression of the intention of the parties as to when property in the goods should pass. It was noted that²⁵⁵:

"Such a provisions does in a sense give the seller security for the unpaid debts of the buyer. But it does so by way of a legitimate reservation of title, not by virtue of any right over his own property conferred by the buyer."

Other provisions in retention of title clauses

Retention of title clauses often contain other provisions designed to deal with the situation where the goods to which title is retained are sold on or used in a manufacturing process by the buyer. Such provisions give rise to difficult issues. 11-86

With regard to the sale of the goods by the buyer, the problem for the seller is that a purchaser from the buyer who is in good faith and without notice of the rights of the seller will generally obtain a good title to the goods which the seller will be unable to challenge on the basis of the retention of title.²⁵⁶ A common device employed to deal with this situation is to provide for the creation of a trust in terms of which the buyer holds the proceeds of sale in trust for the seller because, as noted above, property held by a debtor in trust does not form part of the debtor's estate on sequestration.²⁵⁷ An attempt to create such a trust was not, however, given effect to in the leading Scottish case, *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd*,²⁵⁸ where it was held that the clause in question merely created an obligation to set up a trust and could not of itself create it because it failed to comply with the requirements of Scots law in relation to the creation of trusts.²⁵⁹ Another device which may be employed to address the problem of sale of the goods by the buyer is to make the buyer agent of the seller. In such a case, the proceeds of sale would be held by the buyer on trust for the seller as principal and thus would not form part of the buyer's estate on sequestration. The courts will examine the terms of the contract carefully, however, to determine whether the contract is genuinely an agency or in reality a sale.²⁶⁰ 11-87

With regard to the use of the goods by the buyer in a manufacturing process, the problem for the seller is that the seller's rights may be extinguished as a result of a change of ownership of the goods brought about by the operation of the doctrines of accession or specification.²⁶¹ One device which may be 11-88

²⁵⁵ *Armour v Thyssen Edelstahlwerke AG*, 1990 S.L.T. 891 per Lord Keith at 895.

²⁵⁶ See *Sale of Goods Act 1979 s.25(1)*, which applies to both commercial and consumer contracts for the sale of goods: see *Sale of Goods Act 1979 s.1*. The same would apply if the debtor had express or implied authority to re-sell the goods.

²⁵⁷ See para. 11-63.

²⁵⁸ *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd*, 1981 S.C. 111.

²⁵⁹ That decision was followed in subsequent cases: see *Emerald Stainless Steel Ltd v South Side Distribution Ltd*, 1982 S.C. 61; *Deutz Engines Ltd v Terex Ltd*, 1984 S.L.T. 273.

²⁶⁰ See *Michelin Tyre Co Ltd v Macfarlane (Glasgow) Ltd (in liquidation)*, 1917 2 S.L.T. 205.

²⁶¹ For a detailed account of the operation of the doctrines of accession and specification, see Carey Miller, DL, *Corporeal Moveables in Scots Law*, 2nd edn (Edinburgh: W. Green, 2005), Chs 3 and 4 respectively. For present purposes, it is sufficient to note that in broad terms, the doctrine of accession operates where one article is attached to or incorporated into another in such a way that it becomes part of it and cannot be removed without damage, with the result that ownership of the attached or incorporated article passes to the owner of the other article and the original owner's right is lost, while the doctrine of specification operates where a number of components are combined so as to create a totally new article which cannot be reduced again to its component parts, with the result that the new article is owned by the manufacturer and the rights of the original

employed to address this problem is to provide for a different outcome to that which would otherwise follow as a result of the operation of these doctrines, for example, the common ownership of any new articles manufactured using the goods. Differing views have been expressed both in the case law and by commentators as to the effectiveness of such a provision, including the view that it is arguable that such a provision could be held to be effective in the case of specification but not accession.²⁶² The trust and agency devices already discussed in relation to sale of the goods by the buyer may also be employed in this context and the points already made in relation to these devices apply *mutatis mutandis*.

- 11–89 Where a retention of title clause contains some provisions which are valid and others which are not, the valid parts of the clause may be given effect to if it is possible to sever the invalid parts of the clause without destroying the sense of the valid parts.²⁶³ In practice, most clauses which contain multiple provisions have an express provision relating to severability.²⁶⁴

Practical issues relating to retention of title

- 11–90 One practical problem for the trustee is finding out if any goods in the debtor's possession are subject to a retention of title. The existence of a retention of title may be drawn to their attention by the debtor or the seller or they may find reference to it in contractual or other documents, but there may be some delay in finding out the relevant information. If a retention of title is drawn to, or otherwise comes to, their attention, they will have to take a view on its validity and effect.
- 11–91 Another practical problem might be identifying goods subject to a retention of title, although the onus will be on the seller to establish which goods are subject to the retention of title and therefore excluded from vesting in the trustee.²⁶⁵ Usually, the retention of title clause will require the buyer to keep the goods separate and clearly labelled so that they can be identified as the seller's goods. Such a requirement may not be applicable in all cases, however, or it may not have been complied with in practice. One issue which requires particular mention in this context is where the goods have been mixed with other goods of the same nature and cannot be separated out again, for example, in the case of grain.²⁶⁶ The general rule is that the owners of the goods which have been mixed together become owners of the whole in the appropriate proportions,²⁶⁷ so that where 100 tons of grain in a store containing 1,000 tons of grain came

owners of the separate components is lost. For examples of the issues arising in the context of retention of title, see *Zahnrad Fabrik Passau GmbH v Terex Ltd*, 1986 S.L.T. 84 (whether ownership of axles and transmissions incorporated into earth-moving equipment lost by accession) and *Armour v Thyssen Edelstahlwerke AG*, 1990 S.L.T. 891 (whether ownership of coils of steel which had been cut into strips lost as a result of specification).

²⁶² See *Zahnrad Fabrik Passau GmbH v Terex Ltd*, 1986 S.L.T. 84; *Deutz Engines Ltd v Terex Ltd*, 1984 S.L.T. 273; *Kinloch Damph Ltd v Nordvik Salmon Farms Ltd* unreported 30 June 1999, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=7f2087a6-8980-69d2-b500-f9000d74aa7> [Accessed 18 September 2017]. See also St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland*, 4th edn (Edinburgh: W. Green, 2011) and Carey Miller, DL, *Corporeal Moveables in Scots Law*, 2nd edn (Edinburgh: W. Green, 2005), paras 12.14–12.15.

²⁶³ See *Glen v Gilbey Vintners*, 1986 S.L.T. 553; cf *Emerald Stainless Steel Ltd v South Side Distribution Ltd*, 1982 S.C. 61.

²⁶⁴ See, for example, the clause in *Glen v Gilbey Vintners*, 1986 S.L.T. 553.

²⁶⁵ See discussion of disputes about vesting at para. 11–166 onwards.

²⁶⁶ This is known as commixtion in the case of solids, confusion in the case of liquids.

²⁶⁷ Erskine, *Inst*, II, i, 17.

from one seller, they would own one tenth of the grain. Where there has been a series of additions to and removals from the bulk, however, the relative proportions may be difficult to establish in practice.

Identification of the goods is also important in the context of payments or part payments by the debtor. In the case of a simple retention of title, it will be necessary to identify which goods have been paid for and which have not, because the seller will only retain ownership of goods which have not been paid for. No problem will arise if it is possible to identify precisely which goods have been paid for, for example, by means of serial numbers on specific invoices, but depending on the circumstances, this may be difficult in practice. Where it is possible to identify the seller's goods but not exactly which ones have been paid for, the normal rules concerning ascription of payments will apply to part payments made by the debtor.²⁶⁸ In the case of an all sums retention of title, it will be important to check whether there was any time at which there was no outstanding balance due to the seller, because in such a case, title to all goods supplied up to that time will have passed to the debtor in terms of the clause.²⁶⁹ 11-92

Other practical problems might include identifying the proceeds of sale of any of the goods where the seller has a valid claim to those proceeds²⁷⁰ and determining whether accession or specification has taken place in any given case.²⁷¹ 11-93

A trustee should investigate carefully any claim that there is a valid retention of title, otherwise they might find themselves liable to the seller if they dispose of the goods and a valid retention of title is subsequently established.²⁷² 11-94

If the seller is unable to establish a valid retention of title or related claim, or if it is not possible to identify the goods which are subject to the retention of title or the proceeds of sale to which the seller is entitled or to determine whether accession or specification has taken place, the seller will simply be left with a claim in the sequestration for any sums due by the buyer.²⁷³ 11-95

PROPERTY SITUATED OUTWITH SCOTLAND

As noted above, the estate which vests in the trustee is estate *wherever situated*, and thus as a matter of Scots law includes estate situated outwith Scotland. However, this is currently subject to the proviso that in the case of a sequestration to which the EU insolvency proceedings regulation applies, a reference 11-96

²⁶⁸ For a detailed account of these rules, see the major texts on contract, such as *McBryde on Contract* at paras 22–26–22–29. For present purposes, it is sufficient to note that in broad terms, the debtor may ascribe payments to any debt they choose; if they fail to do so, the seller may so ascribe them; where there is an account current and no ascription has taken place, the rule in *Clayton's Case* (1816) 1 Mor 572, to the effect that payments made extinguish the earliest debts, will apply.

²⁶⁹ Although if goods supplied after that were also subject to a retention of title, title to those goods will not have passed so long as any new balance remained outstanding.

²⁷⁰ See further discussion of disputes about vesting at para.11–166 onwards.

²⁷¹ See *Kinloch Dampf Ltd v Nordvik Salmon Farms Ltd* unreported 30 June 1999 OH, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=7f2087a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

²⁷² See *Vale Sewing Machines Ltd v Robb*, 1997 S.C.L.R. 797. The case involved a liquidator, but it is suggested that the same principle would apply to a trustee in sequestration.

²⁷³ Claims are discussed in Ch.16.

to “estate” is a reference to the estate which may be dealt with in these proceedings,²⁷⁴ which in some cases is estate situated in Scotland only. This is discussed further in Ch.25.

- 11-97** Whether the trustee will be able to vindicate their right to any estate situated outwith Scotland which has vested in them and recover and/or realise it for the benefit of the creditors will depend in practice on whether and to what extent their right is recognised by the legal system of the country where the estate is situated. This is discussed further in Chs 24 and 25.

FUNDS HELD BY A BANK

- 11-98** Where the trustee knows or becomes aware that any estate vesting in them either as at the date of sequestration or as *acquirenda* comprises funds held by an appropriate bank or institution (“a bank”), the trustee is required to serve a notice on the bank informing it of the sequestration and giving reasonable detail to allow the bank to identify the debtor and the funds held.²⁷⁵ The notice must be in writing and may be sent *either* by first class post or by a registered or recorded delivery postal service *or* in some other manner, including electronically, which the trustee reasonably considers to be likely to cause it to be delivered to the bank on the same or the next day.²⁷⁶ The notice is deemed to have been received by the bank the day after it is sent.²⁷⁷
- 11-99** As noted above, the trustee is not entitled to any remedy against the bank in respect of a banking transaction in relation to *acquirenda* entered into before receipt of the notice, whether or not the bank is aware of the sequestration.²⁷⁸ The notice is also relevant in the context of post-sequestration dealings with the estate which are discussed further below.

CONSIGNED SUMS

- 11-100** Sums consigned in court to await the outcome of a pending litigation do not form part of the consignor’s estate on sequestration.²⁷⁹ The effect of the consignment is to divest the consignor of the sums consigned and place them in the hands of the court to be dealt with as the court might order.²⁸⁰ Where a debtor is found to be entitled to consigned sums, these sums form part of the debtor’s estate and the trustee may apply to uplift them.²⁸¹
- 11-101** Where sums have been placed on deposit receipt pending the outcome of a dispute rather than consigned in court, it has been held that whether the legal consequences will be the same as consignment in court depends on the circumstances, the crucial question being whether the debtor has been completely

²⁷⁴ Bankruptcy (Scotland) Act 2016 ss.79(2) and 231.

²⁷⁵ Bankruptcy (Scotland) Act 2016 s.86(9). “Appropriate bank or institution” is defined in s.228(1) of the Bankruptcy (Scotland) Act 2016.

²⁷⁶ Bankruptcy (Scotland) Act 2016 s.86(10)(a).

²⁷⁷ Bankruptcy (Scotland) Act 2016 s.86(10)(b).

²⁷⁸ Bankruptcy (Scotland) Act 2016 s.86(8).

²⁷⁹ *Gordon v Brock* (1838) 1 D. 1.

²⁸⁰ *Stiven v Reynolds & Co* (1891) 18 R. 422.

²⁸¹ *Thomson, Petitioner* unreported 19 December 2001 OH, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=3d3487a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

divested of the sums and any power and control over them: where the debtor has been so divested, the effect will be the same as consignment in court.²⁸² It has also been held that where sums had been lent to a debtor but were meantime being held by a third party pending the outcome of a dispute, the sums could not be claimed by the debtor's trustee in sequestration as part of the debtor's estate.²⁸³

CLAIMS FOR DAMAGES FOR PERSONAL INJURY

A debtor may have a claim for damages as a result of personal injury sustained prior to the sequestration. In such a case, the debtor's claim for any resultant patrimonial loss vests in the trustee as part of the debtor's estate as at the date of sequestration, and the trustee may sist themselves in any action the debtor has already raised to recover that loss or raise such an action if the debtor has not already done so.²⁸⁴ In the case of a claim for *solatium*, however, if the debtor has not already raised an action prior to the sequestration, the claim for *solatium* does not vest in the trustee as part of the debtor's estate as at the date of sequestration and the trustee may not raise an action to recover it, the right to raise an action for *solatium* being regarded as personal to the debtor.²⁸⁵ Where the debtor raises an action to recover *solatium* after the date of sequestration and within the period during which *acquirenda* vests in the trustee, however, the claim vests in the trustee as *acquirenda* at that time and the trustee may, but does not have to, sist themselves in the action.²⁸⁶ It is thought that the position with respect to damages for defamation is the same as the position with respect to damages for *solatium* for the same reasons.²⁸⁷

It has been argued that it is illogical that whether or not *solatium* vests in the trustee depends on whether or not the debtor raises an action²⁸⁸ and the equity of the law relating to claims for *solatium* and future wage loss generally has been questioned. In 1982, the Scottish Law Commission recommended no change to the law in this area²⁸⁹ but in 1994, following a request by the Faculty of Advocates to consider the issue because the equity of the law had been questioned by some of its members, it issued a consultation paper seeking views on whether claims or awards representing *solatium* for personal injury or future wage loss should vest in a trustee in sequestration for the benefit of creditors.²⁹⁰ It subsequently reported to consultees that the scale of the problem was unclear and that although it could be argued that there was a substantial point of principle in relation to future wage loss at least, there was no demand for reform in respect of either *solatium* or future wage loss and a substantial

²⁸² See *Craiglaw Developments v Wilson*, 1997 S.C.L.R. 1157.

²⁸³ *Dixon & Wilson v McIntyre* (1898) 6 S.L.T. 188.

²⁸⁴ *Muir's Trustee v Braidwood*, 1958 S.C. 169.

²⁸⁵ *Muir's Trustee v Braidwood*, 1958 S.C. 169.

²⁸⁶ *Watson v Thomson*, 1992 S.C.L.R. 78; *Coutt's Trustee v Coutts*, 1998 S.C. 798. Cf comments of Lord Prosser in the latter case that there appears, however, to be no reason in principle why a claim for *solatium* should not be regarded as part of the debtor's estate which vests in the trustee at the date of sequestration albeit subject to restrictions on the trustee's right to raise an action for its recovery.

²⁸⁷ See *Muir's Trustee v Braidwood*, 1958 S.C. 169.

²⁸⁸ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.10-87.

²⁸⁹ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.11.12.

²⁹⁰ Scottish Law Commission, *Consultation Paper on The Law of Bankruptcy: Solatium for Personal Injury/Future Wage Loss* (February 1994). The consultation paper was issued to a limited number of consultees and did not form part of the Scottish Law Commission's numbered series of consultative memoranda/discussion papers.

body of opinion against significant change.²⁹¹ The law therefore remained unchanged. It is arguable, however, that reform in relation to future wage loss at least should be considered further in so far as it replaces income of the debtor which would not vest in the trustee post-sequestration (although subject to an income contribution order).

CRIMINAL INJURIES COMPENSATION

- 11-104** An award of compensation made under the criminal injuries compensation scheme does not pass to the debtor's trustee in sequestration.²⁹²

PENSION RIGHTS

- 11-105** Prior to changes brought about by the Welfare Reform and Pensions Act 1999, the effect of sequestration on a debtor's pension depended on the type of pension. A debtor's rights under an occupational pension scheme were generally regarded as not vesting in the trustee on the basis that the pension fund would not normally be property of the debtor, although any income deriving from the pension was relevant for the purpose of assessing the debtor's liability to make contributions from income.²⁹³ In contrast, a retirement annuity contract or personal pension was generally regarded as vesting in the trustee with the result that all monies payable under the pension, whenever paid, became payable to the trustee.²⁹⁴
- 11-106** In 1993, following a review of occupational pensions, the Pension Law Review Committee²⁹⁵ recommended inter alia that pension rights, as opposed to pension payments, should not be treated as an asset in bankruptcy.²⁹⁶ It said²⁹⁷:

"It may be thought unfair to creditors that the asset represented by future pension rights should not be attachable. But it has to be remembered that employers do not establish schemes in order to benefit creditors of scheme members, nor is substantial tax relief given for that purpose. To allow future pension entitlements to be attached by execution creditors or made a bankruptcy asset would be to frustrate that fundamental purpose."

- 11-107** It went on to say, however, that there was

"no reason why pension payments made or due to a scheme member should be treated differently from other income in the scheme member's hands or enjoy any special immunity".²⁹⁸

²⁹¹ Letter from Scottish Law Commission dated 1 February 1995.

²⁹² Criminal Injuries Compensation Act 1995 s.7(2).

²⁹³ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.9-129. For a contrary view, however, see Gordon, I, "The Effect of Bankruptcy on Personal Pensions", 1997 42 JLS 329.

²⁹⁴ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.9-131.

²⁹⁵ See Pension Law Review Committee under the chairmanship of Professor Goode whose report, *Pension Law Reform: The Report of the Pension Law Review Committee* (Cmd 2342) was published in September 1993.

²⁹⁶ *Pension Law Reform: The Report of the Pension Law Review Committee* (Cmd 2342), para.4.14.21.

²⁹⁷ *Pension Law Reform: The Report of the Pension Law Review Committee* (Cmd 2342), para.4.14.34.

²⁹⁸ *Pension Law Reform: The Report of the Pension Law Review Committee* (Cmd 2342), para.4.14.35.

The Committee's recommendations were accepted by the Government,²⁹⁹ and s.91(3) of the Pensions Act 1995 duly made provision to the effect that an occupational pension was not to be regarded as part of the debtor's estate for the purpose of inter alia sequestration, although as noted above, this was generally regarded as being the law in relation to occupational pensions in Scotland already. Section 91(3) never came into force, however, and was ultimately repealed by the Welfare Reform and Pensions Act 1999. The Explanatory Notes accompanying that Act noted that the provisions in the Pensions Act 1995 applied only to occupational pension schemes, that no equivalent protection for other types of pension, for example, personal pensions, was included in the Pensions Act 1995, and that the measures in the Welfare Reform and Pensions Act 1999 therefore provided statutory protection on bankruptcy for pension rights in approved schemes as defined.³⁰⁰ The rationale for extending the same protection afforded to occupational pension schemes to other pension schemes seems to have been simply that all approved pensions whether occupational or otherwise should be treated equally.

The Welfare Reform and Pensions Act 1999 now provides that a debtor's rights under an approved pension scheme as defined are excluded from the debtor's estate for the purposes of sequestration,³⁰¹ and a debtor's rights under an unapproved pension scheme as defined may be excluded from the debtor's estate for the purposes of sequestration where the debtor either obtains an exclusion order from the court or enters into a qualifying agreement with the trustee.³⁰² An exclusion order must be applied for within specified time limits, which may be extended by the court on cause shown, and the court must have regard to specified factors in deciding whether and to what extent to make an exclusion order.³⁰³ "Court" is defined as the sheriff before whom the sequestration is depending or to whom it has been transferred or remitted³⁰⁴; this does not take account of the fact that the award of sequestration may have been made by the Accountant in Bankruptcy (AiB) and indeed the Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 have not been updated to take account of amendments to the bankruptcy legislation including the introduction of the Bankruptcy (Scotland) Act 2016. A qualifying agreement must be entered into within specified time limits and must be in writing, incorporate all the terms agreed and be subscribed by the debtor and the trustee in accordance with s.3(1) of the Requirements of Writing (Scotland) Act 1995.³⁰⁵ Such an agreement may be revoked by the trustee giving notice of revocation to the debtor where the debtor has failed to make full disclosure of

²⁹⁹ Department of Social Security, *Security, Equality, Choice: The Future for Pensions* (Cmd 2594, 1994).

³⁰⁰ Explanatory Notes to the Welfare Reform and Pensions Act 1999 s.11.

³⁰¹ See Welfare Reform and Pensions Act 1999 s.11 as applied to Scotland by s.13 and the Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 (SI 2002/836) reg.2 as applied to Scotland by reg. 11. The same applies where a judicial factor has been appointed under s.41 of the Solicitors (Scotland) Act 1980: Welfare Reform and Pensions Act 1999 s.13(2) (a). Judicial factors are discussed in Ch.23.

³⁰² See Welfare Reform and Pensions Act 1999 s.12 as applied to Scotland by s.13 and the Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regs 12, 13. The same applies where a judicial factor has been appointed under s.41 of the Solicitors (Scotland) Act 1980: Welfare Reform and Pensions Act 1999 s.13(2)(a). Judicial factors are discussed in Ch.23.

³⁰³ Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.14.

³⁰⁴ Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.1(4)(c).

³⁰⁵ Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.15(1), (2).

all material facts relating to the pension scheme for the purpose of enabling their rights under the scheme to be excluded where they would not otherwise be.³⁰⁶ The debtor may, however, apply for an exclusion order following revocation.³⁰⁷ The trustee must give notice of the making and, where applicable, revocation of a qualifying agreement to the person responsible for the pension arrangement.³⁰⁸

- 11-110** In addition, the Welfare Reform and Pensions Act 1999 introduced provisions preventing the forfeiture of a debtor's pension rights on inter alia sequestration.³⁰⁹ Forfeiture had sometimes been used, albeit with uncertain results, as a device to try to prevent a debtor's rights under a pension scheme which would otherwise have vested in the debtor's trustee in sequestration from doing so.³¹⁰
- 11-111** The Welfare Reform and Pensions Act 1999 also introduced provisions allowing a trustee in sequestration to recover for the benefit of the estate excessive or unfair contributions to a pension scheme in order to prevent abuse of the new protections afforded to pension rights. These provisions are discussed further in Ch.14.
- 11-112** Notwithstanding the provisions discussed above, any income received by the debtor from a pension will be taken into account as part of their income for the purpose of assessing their liability to make contributions from income, subject to certain provisos.³¹¹ It is a moot point whether the tax-free lump sum which a debtor may elect to take from their pension counts as income for this purpose. It has been held by the Court of Appeal in England that where a debtor has a present right to elect to draw down payment under their pension, having reached the age where they have a right to do so, but has chosen not to exercise that right, the sums which they would have received if they had exercised the right cannot be taken into account as part of their income for the purpose of assessing their liability to make a contribution from income and the debtor's trustee in bankruptcy cannot compel the debtor to exercise their right so as to make the income available for this purpose.³¹² Although the wording of the statutory provisions in the Insolvency Act 1986 under consideration in that case differs from the corresponding provisions in Scotland, it is notable that the Court of Appeal took the view that a different result would drive "a coach and horses" through the protections afforded to pensions on bankruptcy by the pensions legislation discussed above, the terms of and rationale for which it considered in some detail, which would apply equally in Scotland. It therefore seems likely that the same result would be reached in Scotland.

³⁰⁶ Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.15(3), (4).

³⁰⁷ Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.14(1).

³⁰⁸ Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.15(5).

³⁰⁹ Welfare Reform and Pensions Act 1999 s.14 inserting a new s.159A into the Pensions Act 1995 in relation to personal pensions and amending s.92(2) of the Pension Schemes Act 1993 in relation to occupational pensions.

³¹⁰ For a more detailed discussion, see Talman, Iain JS, "Individual insolvency and pension rights", 2000 S.L.T. 103.

³¹¹ See further at para.11-126 onwards.

³¹² See *Horton v Henry* [2016] EWCA 989.

The Court of Appeal considered that Parliament had decided to draw the balance between the interests of the state in encouraging people to save through the medium of pensions so that in old age or infirmity they would not be a burden on the state and the interests of creditors in receiving payment of their debts by the mechanisms provided for recovery of excessive pension contributions referred to at para.11–111 (although it accepted that these had been the subject of criticism). Given the recent introduction of pension reforms which allow the drawdown of the whole funds invested in the pension, however, it may be wondered whether the rationale for the protection of pensions on the debtor's insolvency holds good, or at least holds good to the same extent as previously, since these provisions would allow a debtor to draw down the whole of the pension funds, spend them without restriction and thereafter revert to being a burden on the state. It is therefore suggested that there might be some merit in revisiting the extent of the protection afforded to pensions on the debtor's insolvency in the light of these changes. 11–113

There are special rules relating to certain types of pensions: it is specifically provided that benefits payable under the teachers' superannuation scheme and specified payment made in respect of naval, military and air force pensions do not pass to the trustee in sequestration.³¹³ 11–114

Where a debtor's rights under a pension scheme have vested in the trustee, as with other property, the trustee takes them *tantum et tale*.³¹⁴ This means, for example, that the trustee will be unable to obtain payment of sums due under the pension scheme until they become payable in terms thereof, usually on retirement, and if, as is usual, the pension scheme provides that the debtor's rights under the scheme are unassignable, the trustee will not be able to assign those rights to a third party.³¹⁵ The trustee will, however, be entitled to all sums due under the policy whenever they are ultimately paid. 11–115

STUDENT LOANS

Prior to changes brought about by and under the Bankruptcy and Diligence etc. (Scotland) Act 2007, the treatment of student loans on the sequestration of the student's estate depended on timing: loans which the student received or was entitled to receive after the date of sequestration were not treated as income for the purposes of fixing the amount of any contribution from income and did not vest in the trustee in sequestration as *acquirenda* but were not treated as a debt or liability for the purpose of the sequestration and were not discharged on the student's discharge, while loans received prior to sequestration in so far as not utilised formed part of the student's estate and vested in the trustee accordingly and were treated as a debt or liability for the purpose of the sequestration and thus discharged on the student's discharge. However, the discharge of student loans received by the debtor prior to sequestration was regarded as inappropriate given that student loans are paid out of, and subsidised by, public funds and become repayable only when a certain income threshold is reached.³¹⁶ 11–116

³¹³ See Teachers' Superannuation Scheme (Scotland) Regulations 2005 (SSI 2005/393) reg.E38 and Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order 2006 (SI 2006/606) reg.67.

³¹⁴ See para.11–49 onwards.

³¹⁵ They may be able to exercise any right of the debtor to elect to have early payment, but this is another vexed issue.

³¹⁶ See, for example, Executive Note on the Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations 2010.

The Scottish Government therefore implemented a policy, which was agreed with and also implemented by the UK Government and the other devolved administrations acting in relation to the other parts of the UK, in which the same issue arose, of making all student loans whenever made non-dischargeable on the student's sequestration.³¹⁷

11-117 The policy was implemented in stages. The Bankruptcy and Diligence etc. (Scotland) Act 2007 amended para.6 of Sch.2 to the Education (Student Loans) Act 1990 to make appropriate provision in relation to loans made under that Act.³¹⁸ It also amended the regulation-making provisions in s.73B(12) of the Education (Scotland) Act 1980 to allow any regulations made in relation to a student's discharge on sequestration to make provision for the treatment of any debt or liability resulting from a student loan made before, on or after the date of sequestration. The Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations 2010³¹⁹ then amended reg.12 of the Education (Student Loans for Tuition Fees) (Scotland) Regulations 2006³²⁰ and reg.15 of the Education (Student Loans) (Scotland) Regulations 2007³²¹ to make appropriate provision in relation to loans to which these regulations apply.

11-118 In each case, the effect of the amended provisions is that where a student receives or is entitled to receive sums by way of loan before, on or after the date of sequestration, these are not to be treated as their income for the purpose of fixing the amount of any contribution from income and do not vest in the trustee as *acquirenda* but are not treated as a debt or liability for the purpose of the sequestration and are not discharged on the student's discharge.³²²

11-119 It may be noted that the provision that sums by way of loan do not vest in the trustee refers only to sums which would vest in the trustee as *acquirenda* and not to sums which would vest in the trustee as part of the debtor's estate at the date of sequestration. The latter, in so far as still in the student's possession and not utilised, would therefore appear to vest in the trustee notwithstanding the amendments. It is not clear if this was intended, or whether the intention was to exclude such sums from vesting in the trustee in the same way as sums received or entitled to be received after sequestration, although there might be practical difficulties in identifying any such sums which remained part of the debtor's estate in any event.

³¹⁷ See Executive Note on the Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations 2010.

³¹⁸ See Bankruptcy and Diligence etc. (Scotland) Act 2007 s.34(2). That provision had, in fact, been repealed by s.44 of and Sch.4 to the Teaching and Higher Education Act 1998, but subject to savings provisions in art.3 of the Teaching and Higher Education Act 1998 (Commencement No.2 and Transitional Provisions) Order 1998 (SI 1998/2004).

³¹⁹ Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations 2010 (SSI 2010/300).

³²⁰ Education (Student Loans for Tuition Fees) (Scotland) Regulations 2006 (SSI 2006/333).

³²¹ Education (Student Loans) (Scotland) Regulations 2007 (SSI 2007/154).

³²² See Teaching and Higher Education Act 1998 Sch.2, para.6 as saved, Education (Student Loans for Tuition Fees) (Scotland) Regulations 2006 reg.12 and Education (Student Loans) (Scotland) Regulations 2007 reg.15. These provisions continue to refer to certain provisions of the Bankruptcy (Scotland) Act 1985, which has of course been repealed by the Bankruptcy (Scotland) Act 2016 subject to savings and transitional provisions, but note that the Bankruptcy (Scotland) Act 2016 provides that any reference in any enactment to a provision repealed by that Act is to be construed, so far as the context permits, as including a reference to the corresponding provision of that Act: see Bankruptcy (Scotland) Act 2016 s.235.

THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010

Where a debtor whose estate has been sequestrated incurs or has incurred a liability to a third party in respect of which the debtor is insured, the Third Parties (Rights Against Insurers) Act 2010 transfers the debtor's rights under the policy in respect of that liability to the person to whom the liability is or was incurred and vests those rights in that party (the third party).³²³ 11-120

In addition, where a deceased debtor prior to their death had incurred a liability to a third party in respect of which the debtor was insured and, after their death, their estate is sequestrated and the award of sequestration is not recalled or reduced or a judicial factor is appointed to their estate under s.11A of the Judicial Factors (Scotland) Act 1889 and the judicial factor certifies that the estate is absolutely insolvent within the meaning of the Bankruptcy (Scotland) Act 2016, the debtor's rights under the policy in respect of that liability are transferred to and vest in the person to whom the liability was incurred.³²⁴ 11-121

The third party has certain rights to seek information from the debtor and any other person they reasonably believe can provide it, which would include the trustee in sequestration.³²⁵ 11-122

The Third Parties (Rights Against Insurers) Act 2010 replaced the earlier Third Parties (Rights Against Insurers) Act 1930 following a joint report by the Law Commission and the Scottish Law Commission which made a number of recommendations for reform to improve the operation of the legislation,³²⁶ which were generally accepted by the Government.³²⁷ The policy underlying the legislation, which was specifically endorsed in the course of the reform process,³²⁸ is to enable the third party to receive the full benefit of the insurance proceeds which would otherwise simply form part of the debtor's estate and be available for distribution among all the creditors in the sequestration. 11-123

REDUNDANCY PAYMENTS

Where a debtor receives a payment on being made redundant, the question arises as to whether or to what extent that payment vests in the trustee. AiB's *Notes for Guidance for Trustees* refer to an unreported case in Glasgow Sheriff 11-124

³²³ See Third Parties (Rights Against Insurers) Act 2010 ss.1 and 4(2) (individuals), 6(3) (corporate bodies, etc.), 6A (corporate bodies, etc. that are dissolved) and 7 (Scottish trusts). It may be noted that where the award of sequestration is subsequently recalled or reduced, any rights so transferred are re-transferred to, and vest in, the debtor: Third Parties (Rights Against Insurers) Act 2010 ss.4(5), 6(3) and 7(2). These provisions also apply where the debtor has granted a protected trust deed. Protected trust deeds are discussed in Ch.22.

³²⁴ Third Parties (Rights Against Insurers) Act 2010 ss.1, 5. Absolute insolvency is discussed in Ch.1.

³²⁵ Third Parties (Rights Against Insurers) Act 2010 s.11 and Sch.1.

³²⁶ *Third Parties – Rights Against Insurers* (Law Com. No.272; Scot. Law Com. No.184, 2001)).

³²⁷ See in particular Lord Chancellor's Department Consultation Paper, *Third Parties – Rights Against Insurers: A Consultation Paper on the implementation of the Joint Law Commission and Scottish Law Commission Report, "Third Parties – Rights Against Insurers" by way of a Regulatory Reform Order* (September 2002) and the Department for Constitutional Affairs, *Analysis of Responses to the Consultation Paper Third Parties – Rights Against Insurers: A Consultation Paper on the implementation of the Joint Law Commission and Scottish Law Commission Report, "Third Parties – Rights Against Insurers" by way of a Regulatory Reform Order* (February 2004).

³²⁸ See Lord Chancellor's Department Consultation Paper, *Third Parties – Rights Against Insurers: A Consultation Paper on the implementation of the Joint Law Commission and Scottish Law Commission Report, "Third Parties – Rights Against Insurers" by way of a Regulatory Reform Order* (September 2002), para.7.

Court where it was held that the statutory redundancy element of the payment received by the debtor in that case fell to be characterised as alimentary in nature and so did not vest in the trustee, while the remainder of the payment, which was a voluntary payment, vested in the trustee as *acquirenda*.³²⁹

- 11-125** The alimentary part of a redundancy payment which does not vest in the trustee would fall to be taken into account in calculating the amount of any income contribution by the debtor.³³⁰

INCOME CONTRIBUTIONS

Background

- 11-126** The position with regard to the debtor's post-sequestration income has changed and developed over time. Prior to the Bankruptcy (Scotland) Act 1985, post-sequestration income of the debtor vested in the trustee as *acquirenda*, although in the case of salary or wages, this applied only to that part in excess of the *beneficium competenti*?, i.e. the maintenance allowance suitable for the debtor's station in life, and the trustee could obtain an order from the court requiring the debtor to pay over the excess to the trustee when received by the debtor.³³¹ The Scottish Law Commission, however, recommended that the debtor's earnings, and any income arising from estate not vested in the trustee, should not automatically vest in the trustee in sequestration, but that the trustee should be able to apply to the sheriff to determine whether the amount of any income of the debtor was in excess of a suitable aliment for the debtor and their family and, if so, for an order requiring the excess to be paid to the trustee by the debtor or the person responsible for making payment, any such order being revocable or variable in the event of a change of circumstances.³³²
- 11-127** These recommendations were for the most part implemented by the Bankruptcy (Scotland) Act 1985 which, as enacted, provided that any income of whatever nature received by the debtor after the date of sequestration and before the debtor's discharge vested in the debtor, subject to the proviso that the sheriff, on the application of the trustee, might determine a suitable amount for the debtor's aliment and "relevant obligations" and, if the debtor's income exceeded that amount, order the excess to be paid to the trustee.³³³ The debtor's "relevant obligations" were defined as any obligation of aliment owed by them and any obligation to pay a periodical allowance to a former spouse³³⁴ and were subsequently extended to include child support under the Child Support Act 1991.³³⁵ A later amendment clarified that pension income received by the debtor fell to be taken into account in carrying out these calculations even if the pension fund

³²⁹ AiB's *Notes for Guidance for Trustees* (November 2016), para.6.24.1, referring to the case of Patrick McGrail unreported Glasgow Sheriff Court 10 August 1990 (Sheriff Murphy).

³³⁰ Income contributions are discussed further at para.11-126 onwards.

³³¹ See Bankruptcy (Scotland) Act 1913 s.98(1) and *Caldwell v Hamilton*, 1919 S.C. (HL) 100; *Birrell's Trustee v Birrell*, 1957 S.L.T. (Sh Ct) 6. Separate provision was also made in relation to any alimentary provision received by the debtor: see Bankruptcy (Scotland) Act 1913 s.98(2) and the cases referred to.

³³² See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 11.3 and 11.33-36.

³³³ Bankruptcy (Scotland) Act 1985 s.32(1) and (2) as enacted.

³³⁴ Bankruptcy (Scotland) Act 1985 s.32(3) as enacted. "Obligation of aliment" had the same meaning as in the Family Law (Scotland) Act 1985.

³³⁵ Bankruptcy (Scotland) Act 1985 s.32(3) as amended by the Child Support Act 1991.

from which the payments were made did not vest in the trustee.³³⁶ The amount allowed for relevant obligations in the form of aliment or periodical allowance did not, however, have to be sufficient to comply with any existing order or agreement.³³⁷ Further provision was subsequently made to the effect that the amount allowed for the debtor's aliment and relevant obligations must be not less than the total amount of any income received by the debtor by way of guaranteed minimum pension and in respect of their protected rights as a member of a pension scheme.³³⁸ Beyond this, however, there were no guidelines as to how the sheriff should decide what constituted a suitable amount for the debtor's aliment and relevant obligations. In what appears to be the only reported case on these provisions, *Brown's Trustee v Brown*,³³⁹ the Sheriff Principal considered that the pre-1985 Act approach to determining a suitable amount for the debtor's maintenance remained relevant and that in determining a suitable amount for the debtor's aliment and relevant obligations, the court had to balance the interests of the debtor against those of the creditors, giving due weight to each. In so doing, it was relevant to take into account the total amount which the creditors were owed, and while it was also appropriate to take into account the debtor's station in life, the provisions did not envisage that the debtor should have much free income after the payment to the trustee. The provisions were, therefore, interpreted rather restrictively. In practice, however, the trustee would generally try to reach an agreement with the debtor as to the amount of the debtor's contribution from income, and an order would generally be applied for only where no such agreement was reached or the debtor failed to adhere to the agreement. Where an order was made, there was provision for the debtor, the trustee or any other interested person to apply to the sheriff to have any order varied or recalled if circumstances changed.³⁴⁰

The Scottish Executive consultation paper *Personal Bankruptcy Reform in Scotland: A Modern Approach* issued in November 2003 sought views on a number of issues relating to debtor contributions from income. The paper took a "can pay, should pay" approach.³⁴¹ It noted that at that time, contributions from income ceased on the debtor's discharge, and it sought views on the extension of the period for making contributions beyond discharge in order to protect returns to creditors in the light of the consultation paper's proposals to reduce the period before discharge.³⁴² It also sought views on what the period for making contributions should be, including views on whether it should be fixed or variable,³⁴³ and on how to improve enforcement.³⁴⁴ The subsequent

³³⁶ See Bankruptcy (Scotland) Act 1985 s.32(2) as amended by the Welfare Reform and Pensions Act 1999. Pension income and pensions generally are discussed at para.11–105 onwards.

³³⁷ Bankruptcy (Scotland) Act 1985 s.32(3). This did not, however, apply to child support following the extension of relevant obligations to encompass such support.

³³⁸ Bankruptcy (Scotland) Act 1985 s.32(2A) as added by the Pensions Act 1995. In terms of that section as added, "guaranteed minimum pension" and "protected rights" had the same meaning as in the Pensions Schemes Act 1993.

³³⁹ *Brown's Trustee v Brown*, 1995 S.L.T. (Sh Ct) 2.

³⁴⁰ Bankruptcy (Scotland) Act 1985 s.32(4). The debtor was required to notify the trustee immediately of any substantial change in their financial circumstances and failure to do so was an offence; Bankruptcy (Scotland) Act 1985 s.32(7).

³⁴¹ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), para.2.2.

³⁴² Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 5.14–5.16.

³⁴³ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), para.5.17.

³⁴⁴ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), para.5.18.

consultation paper *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* issued in June 2004 showed a large majority of respondents in favour of extending contributions beyond discharge and the paper therefore indicated an intention to make appropriate provision, subject to a maximum period of three years from the date of the making of the relevant order, henceforth to be called an income payment order.³⁴⁵ It also indicated an intention to retain the possibility of a voluntary agreement between the trustee and the debtor, but to put such agreements—to be called income payment agreements—on a statutory footing.³⁴⁶ An income payment order, which it was envisaged would still be most likely to be used where the trustee and the debtor were unable to reach an agreement or the debtor failed to adhere to it, would have to be applied for before the debtor's discharge and specify the period for which it would last.³⁴⁷ It was noted that it had not been possible to discern a preference for a fixed or variable period of contribution from the consultation responses, but that a maximum period of three years appeared reasonable.³⁴⁸ The paper also sought further views on what an appropriate level of contribution should be and, accordingly, asked questions about what should be regarded as an allowable expense when calculating income contributions and whether there should be a formula which applied to all debtors.³⁴⁹

11–129 The Bankruptcy and Diligence etc. (Scotland) Act 2007 duly amended the provisions on income contributions by introducing new provisions as follows:

- (a) An income payment order (although that term is not in fact specifically used in the legislation) could not be applied for after the debtor's discharge, except where the debtor had failed to comply with a previous income payment agreement.³⁵⁰
- (b) Such an order had to specify the period for which it had effect, which could end after the debtor's discharge but could not exceed a period of three years from the date of the order.³⁵¹
- (c) The order could provide for a third party to pay the trustee a specified portion of money due to the debtor by way of income.³⁵²
- (d) Failure by the debtor to comply with an order constituted an offence.³⁵³
- (e) The sheriff clerk was required to send a copy of any income payment order, and any order recalling or varying such an order, to AiB.³⁵⁴
- (f) Where no income payment order had been made, the trustee and the debtor could enter into a written income payment agreement (although again that term is not in fact specifically used in the legislation),

³⁴⁵ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), paras 5.23–5.24.

³⁴⁶ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), para. 5.25.

³⁴⁷ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), para. 5.26.

³⁴⁸ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), paras 5.27–5.28.

³⁴⁹ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), paras 7.11–7.12.

³⁵⁰ Bankruptcy (Scotland) Act 1985 s.32(2WA) as inserted by the Bankruptcy and Diligence etc. (Scotland) Act 2007 s.18(2). The provisions on income payment agreements are discussed further below.

³⁵¹ Bankruptcy (Scotland) Act 1985 s.32(2XA) as so inserted.

³⁵² Bankruptcy (Scotland) Act 1985 s.32(2YA) as so inserted.

³⁵³ Bankruptcy (Scotland) Act 1985 s.32(2ZA) as so inserted.

³⁵⁴ Bankruptcy (Scotland) Act 1985 s.32(4A) as so inserted.

which provided for the debtor or a third party to pay to the trustee a specified portion of money due to the debtor by way of income.³⁵⁵

- (g) Such an agreement could not be entered into after the debtor's discharge.³⁵⁶
- (h) Such an agreement had to specify the period for which it had effect, which could end after the debtor's discharge but not exceed a period of three years from the date of the agreement.³⁵⁷
- (i) Such an agreement could be varied by written agreement between the parties or by the sheriff on application by the trustee, the debtor or any other interested party³⁵⁸ and in the latter case, the sheriff was required to grant the application if and to the extent necessary to fix a suitable amount for the debtor's aliment and relevant obligations but was not permitted to vary the agreement to include any provision which could not have been included in an income payment order.³⁵⁹
- (j) A trustee other than AiB was required to send a copy of any income payment agreement, and any subsequent variation of it, to AiB.³⁶⁰
- (k) Provided the requirement to send a copy of the agreement/any variation of it to AiB had been complied with, the agreement could be enforced as if it were an income payment order, but failure to comply with such an agreement did not constitute an offence.³⁶¹
- (l) If the debtor failed to comply with an income payment agreement, the sheriff on the application of the trustee could make an income payment order on the same terms as the income payment agreement and ending on the same date, even where the order fell to be made after the debtor's discharge.³⁶²
- (m) A third party paying the trustee in terms of an income payment order or agreement was discharged of any liability to pay that sum to the debtor.³⁶³
- (n) Particulars of income payment orders and agreements were entered into the register of insolvencies.³⁶⁴

The new provisions did not, however, extend to introducing a formula for the calculation of the debtor's income contributions and this therefore remained a matter for the trustee and the debtor or, where an order had to be sought, the sheriff. Nor were they free from difficulty in other respects, for example, in relation to enforcement, and more radical change was therefore to follow. 11-130

The Scottish Government's *Consultation on Bankruptcy Law Reform* published in February 2012 sought views inter alia on the introduction of a common financial tool, the use of which would be mandatory, for calculating debtor contributions from income in sequestration, protected trust deeds and the debt arrangement scheme.³⁶⁵ It also sought views on whether the legislation should be amended to allow an assessed contribution to be deducted directly from a 11-131

³⁵⁵ Bankruptcy (Scotland) Act 1985 s.32(4B) as so inserted.

³⁵⁶ Bankruptcy (Scotland) Act 1985 s.32(4C) as so inserted.

³⁵⁷ Bankruptcy (Scotland) Act 1985 s.32(2XA) as so inserted and applied by s.32(4D) as so inserted.

³⁵⁸ Bankruptcy (Scotland) Act 1985 s.32(4G) as so inserted.

³⁵⁹ Bankruptcy (Scotland) Act 1985 s.32(4H) as so inserted.

³⁶⁰ Bankruptcy (Scotland) Act 1985 s.32(4K) as so inserted.

³⁶¹ Bankruptcy (Scotland) Act 1985 s.32(4E) and (4F) as so inserted.

³⁶² Bankruptcy (Scotland) Act 1985 s.32(4L) as so inserted.

³⁶³ Bankruptcy (Scotland) Act 1985 s.32(4J) as so inserted.

³⁶⁴ Bankruptcy (Scotland) Act 1985 s.1A(1)(b)(iib) as so inserted.

³⁶⁵ See Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Pt 8.

debtor's wages³⁶⁶ and on the introduction of statutory provisions for payment holidays in appropriate circumstances.³⁶⁷ The majority of respondents were in favour of the mandatory use of a single common financial tool for calculating contributions from income, although they were more evenly split on the issue of whether a specific Scottish tool should be developed.³⁶⁸ The majority of respondents were also in favour of allowing an assessed contribution to be deducted directly from a debtor's wages³⁶⁹ and the introduction of statutory provisions for payment holidays.³⁷⁰ The Scottish Government duly indicated its intention to proceed with these changes and, although this had not been specifically consulted on, to standardise the expected period of contributions at four years.³⁷¹ These changes were duly implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014 together with a number of other changes related to the wider changes brought about by that Act and the current provisions are now found in ss.89–97 of the Bankruptcy (Scotland) Act 2016.

The common financial tool

11–132 Section 89(1) of the Bankruptcy (Scotland) Act 2016 provides that the Scottish Ministers may specify by regulations a method, referred to as the common financial tool, to be used to assess an appropriate amount of the income of a debtor who is a living individual to be paid to the trustee after sequestration of the debtor's estate.³⁷² The current regulations on the common financial tool are incorporated in the Bankruptcy (Scotland) Regulations 2016.

11–133 The Bankruptcy (Scotland) Regulations 2016 provide that the common financial tool is to be the common financial statement published by the Money Advice Trust.³⁷³ The common financial statement has, however, been replaced within the debt advice sector by the Standard Financial Statement, and AiB has issued a consultation entitled *Future of the Common Financial Tool Consultation 2017* seeking views on whether the Standard Financial Statement should replace the common financial statement as the common financial tool.³⁷⁴ The common financial tool may, therefore, change in due course.

11–134 The debtor's contribution is to be the whole of the debtor's surplus income calculated in accordance with the common financial tool which is in excess of either: (a) the trigger figures for reasonable expenditure as set out by the common financial statement from time to time; or (b) the debtor's expenditure, whichever is less.³⁷⁵ This is, however, subject to a number of qualifications as follows:

³⁶⁶ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012).

³⁶⁷ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.14.10.5. Such provisions already existed in relation to the debt arrangement scheme but not in relation to sequestration or protected trust deeds.

³⁶⁸ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of the Responses* (August 2012), s.3, common financial tool.

³⁶⁹ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of the Responses* (August 2012).

³⁷⁰ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of the Responses* (August 2012), para.9.32 onwards.

³⁷¹ See Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (November 2012).

³⁷² The scope of the regulations is set out in the Bankruptcy (Scotland) Act 2016 s.89(2).

³⁷³ Bankruptcy (Scotland) Regulations 2016 regs 15(1) and 2(1).

³⁷⁴ Accountant in Bankruptcy, *Future of the Common Financial Tool Consultation 2017* (August 2017).

³⁷⁵ Bankruptcy (Scotland) Regulations 2016 reg.15(2).

- (i) expenditure in excess of the trigger figures may be allowed in certain circumstances where the higher expenditure is reasonable³⁷⁶;
- (ii) the debtor is permitted to retain up to a prescribed amount towards contingencies, that amount being treated as an item of expenditure for the purposes of calculating the contribution³⁷⁷;
- (iii) in so far as the income and expenditure of any other person may be taken into account, where one is taken into account, both must be taken into account³⁷⁸;
- (iv) if the debtor has income solely from social security benefits and tax credits, no contribution is due³⁷⁹;
- (v) the amount of reasonable expenditure for a debtor must be not less than the total amount of any income received by the debtor by way of guaranteed minimum pension within the meaning of the Pension Schemes Act 1993³⁸⁰; and
- (vi) the amount allowed for expenditure must be sufficient to allow for aliment of the debtor and the debtor's relevant obligations.³⁸¹ The debtor's relevant obligations are defined as any obligation of aliment owed by the debtor ("obligation of aliment" having the same meaning as in s.1(2) of the Family Law (Scotland) Act 1985), any obligation to pay a periodical allowance to a former spouse or former civil partner and any obligation to pay child support maintenance under the Child Support Act 1991.³⁸² The amount allowed for relevant obligations in the form of aliment or periodical allowance need not, however, be sufficient to comply with any existing order or agreement.³⁸³

Any person using the common financial tool must have regard to guidance issued by AiB on specified matters.³⁸⁴ **11-135**

Although the common financial tool was meant to ensure transparency and consistency in assessing debtor contributions, it appears that this is not always achieved in practice and various issues have arisen, particularly in relation to the amount and types of expenditure which may be allowed. One such example is whether expenditure in the form of private school fees is to be regarded as a permitted type of expenditure when assessing the debtor's contribution. The common financial tool does not have a specific category of expenditure for private school fees, but there is a category for "other expenditure" under which such fees might be included. The issue of whether private school fees are to be regarded as **11-136**

³⁷⁶ See Bankruptcy (Scotland) Regulations 2016 reg.15(3)(a). The debtor must produce appropriate supporting evidence of why the expenditure is reasonable: reg.15(4).

³⁷⁷ See Bankruptcy (Scotland) Regulations 2016 reg.15(3)(b) and 16. The prescribed amount is up to 10 per cent of the debtor's contribution as assessed without reference to this provision, subject to a prescribed maximum amount.

³⁷⁸ Bankruptcy (Scotland) Regulations 2016 reg.15(5).

³⁷⁹ Bankruptcy (Scotland) Regulations 2016 reg.15(7).

³⁸⁰ Bankruptcy (Scotland) Act 2016 s.89(3) and Bankruptcy (Scotland) Regulations 2016 reg.15(8).

³⁸¹ Bankruptcy (Scotland) Act 2016 s.89(4) and Bankruptcy (Scotland) Regulations 2016 reg.15(9).

³⁸² Bankruptcy (Scotland) Act 2016 s.89(5) and Bankruptcy (Scotland) Regulations 2016 reg.15(9).

³⁸³ Bankruptcy (Scotland) Act 2016 s.89(6) and Bankruptcy (Scotland) Regulations 2016 reg.15(10).

³⁸⁴ Bankruptcy (Scotland) Regulations 2016 reg.15(11). The specified matters are the treatment of types of income and expenditure, how income and expenditure are to be verified and the conduct of money advisers in carrying out their functions in relation to the common financial tool.

a permitted type of expenditure when assessing the debtor's contribution has been the subject of judicial consideration in England, where it was held that this must depend on all the circumstances of the individual case.³⁸⁵ While the statutory provisions on income contributions in England and Wales differ from those in Scotland, in particular because there is no equivalent to the common financial tool, the fact that the common financial tool contains a category for "other expenditure" begs the question of what might properly be included in that category, and so similar issues may arise in Scotland notwithstanding the use of the common financial tool. Issues have also arisen in relation to income rather than expenditure: for example, concerns have been raised as to the inflexibility of the common financial tool where the debtor earns overtime and/or bonuses, in particular where these are irregular/not guaranteed. Such issues raise questions about the true extent of the transparency and consistency which can be achieved in assessing debtor contributions using the common financial tool.

Debtor contribution orders

- 11-137** A debtor contribution order will be made in every case where a debtor contribution falls to be made in the sequestration: it is no longer possible for the debtor's contribution to be fixed by agreement between the debtor and the trustee. The order is made by AiB, but the procedure differs in the case of a debtor application for sequestration and a petition for sequestration. A contribution order may, however, be varied or quashed by the trustee in specified circumstances.

Debtor application for sequestration

- 11-138** In the case of a debtor application for sequestration, AiB makes the order at the same time as awarding sequestration³⁸⁶ and the debtor application must either contain or be accompanied by a statement that the money adviser advising the debtor has assessed the debtor's expenditure against the common financial statement and, if relevant, explaining any instance in which the trigger figures are exceeded.³⁸⁷ In the latter case, the statement must also be accompanied by supporting evidence of why the expenditure is reasonable.³⁸⁸

Petition for sequestration

- 11-139** In the case of a petition for sequestration, AiB makes the order after considering initial proposals for the debtor's contribution submitted by the trustee.³⁸⁹ The trustee is required to send these proposals to AiB within the period of six weeks beginning with the date of the award of sequestration³⁹⁰ and they must either contain or be accompanied by a statement that the trustee has assessed the debtor's expenditure against the common financial statement and, if relevant, explaining any instance in which the trigger figures are exceeded.³⁹¹ In the latter case, the statement must also be accompanied by supporting evidence of why the expenditure is reasonable.³⁹² This requirement may, however, cause practical difficulties for the trustee: if the debtor is not co-operative, or simply

³⁸⁵ See *Rayatt v Official Receiver* [1998] BPIR 495.

³⁸⁶ Bankruptcy (Scotland) Act 2016 s.90(1)(a). The order must be in Form 17 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.19(1).

³⁸⁷ Bankruptcy (Scotland) Regulations 2016 reg.17(1).

³⁸⁸ Bankruptcy (Scotland) Regulations 2016 reg.17(2).

³⁸⁹ Bankruptcy (Scotland) Act 2016 s.90(1)(b). The order must be in Form 18 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.19(2).

³⁹⁰ Bankruptcy (Scotland) Act 2016 s.90(2).

³⁹¹ Bankruptcy (Scotland) Regulations 2016 reg.17(1).

³⁹² Bankruptcy (Scotland) Regulations 2016 reg.17(2).

dilatory in providing the trustee with the relevant information, the trustee may not be in a position to make initial proposals within this timescale or at all.

The order

AiB is required to use the common financial tool to assess the debtor's contribution.³⁹³ The contribution may be fixed at zero.³⁹⁴ Pension income received by the debtor falls to be taken into account in carrying out the relevant calculations even if the pension fund from which the payments were made does not vest in the trustee.³⁹⁵ **11-140**

The order may provide for a third party to pay a specified proportion of money due to the debtor by way of income to the trustee.³⁹⁶ Where the third party makes such a payment, they are discharged from any liability to the debtor for such payment.³⁹⁷ **11-141**

AiB must immediately give written notice of the making of the order to the debtor, the trustee and any third party mentioned in the order.³⁹⁸ The order must not take effect before the expiry of 14 days beginning with the day of notification.³⁹⁹ **11-142**

The provisions for review and appeal in relation to the making of an order are discussed further at para.11-162 onwards. **11-143**

Payment period

The order must specify the period during which payments (if not zero) are to be made and the intervals at which they are to be made.⁴⁰⁰ When making the order, AiB must fix the date of the first payment or, in a case where the contribution is zero, the date which is to be deemed to be the date of the first payment.⁴⁰¹ **11-144**

The period during which payments are to be made is 48 months beginning with the date of the first payment, such shorter period as is determined by the person making (or varying) the order *or* such longer period as is determined by the trustee (where there is a period during which the debtor has failed to make payments) or agreed by the debtor and the trustee.⁴⁰² A shorter period may be specified only where the person making (or varying) the order is of the opinion that the debtor's contributions during the shorter period, taken together with the debtor's estate in the possession of the trustee, would be sufficient to allow the debtor's debts and the costs of sequestration to be met in full.⁴⁰³ **11-145**

Effect

The debtor is required to pay the contribution as fixed or varied to the trustee irrespective of the debtor's discharge.⁴⁰⁴ Where, however, the debtor's estate **11-146**

³⁹³ Bankruptcy (Scotland) Act 2016 s.90(3).

³⁹⁴ Bankruptcy (Scotland) Act 2016 s.90(4).

³⁹⁵ Bankruptcy (Scotland) Act 2016 s.90(5). Pension income and pensions generally are discussed at para.11-105 onwards.

³⁹⁶ Bankruptcy (Scotland) Act 2016 s.90(6).

³⁹⁷ Bankruptcy (Scotland) Act 2016 s.90(7).

³⁹⁸ Bankruptcy (Scotland) Act 2016 s.90(8).

³⁹⁹ Bankruptcy (Scotland) Act 2016 s.90(9).

⁴⁰⁰ Bankruptcy (Scotland) Act 2016 s.91(1).

⁴⁰¹ Bankruptcy (Scotland) Act 2016 s.91(4).

⁴⁰² Bankruptcy (Scotland) Act 2016 s.91(2). Variation is considered at para.11-153.

⁴⁰³ Bankruptcy (Scotland) Act 2016 s.91(3).

⁴⁰⁴ Bankruptcy (Scotland) Act 2016 s.93(1), (2).

and income when taken possession of by the trustee is sufficient to pay the debtor's debts and the costs of sequestration in full, the debtor contribution order ceases to have effect.⁴⁰⁵

Deductions from earning and other income

- 11-147** Where the contribution order requires the debtor to pay an amount from the debtor's earnings or other income or requires a third party to pay a specified proportion of money due to the debtor by way of income to the trustee, the debtor is required to give a payment instruction authorising the deduction of specified amounts at source and their payment to the trustee.⁴⁰⁶
- 11-148** The payment instruction must be given to the debtor's employer in the case of a payment from the debtor's earnings from employment, to the party required to make payment to the debtor in the case of a payment from other earnings or income of the debtor, and to the third party in a case where the order requires that third party to pay a specified proportion of money due to the debtor by way of income to the trustee.⁴⁰⁷
- 11-149** If the debtor fails to give the necessary payment instruction and fails to make two contribution payments, the trustee may give the necessary payment instruction instead.⁴⁰⁸
- 11-150** The recipient of a payment instruction, whether given by the debtor or the trustee, must deduct the sum specified in the instruction on every occasion on which a payment is to be made to the debtor and pay the sum deducted to the trustee as soon as reasonably practicable.⁴⁰⁹ Where the recipient fails without good cause to make the required payment, they are liable to pay the amount which should have been paid to the trustee on demand and are not permitted to recover an amount which should have been deducted, but was not, from the debtor.⁴¹⁰ Where payment is made in accordance with the instruction, the recipient is discharged from any liability to the debtor for the payment.⁴¹¹ The recipient is entitled to charge a fee for operating the instruction equivalent to the statutory fee an employer is entitled to charge for operating diligence against earnings and deduct this from the balance due to the debtor.⁴¹²
- 11-151** Where the debtor's contribution is varied, an instruction to vary the payment instruction equivalent may be given by the debtor or trustee as the case may be.⁴¹³

⁴⁰⁵ Bankruptcy (Scotland) Act 2016 s.93(3).

⁴⁰⁶ Bankruptcy (Scotland) Act 2016 s.94(1), (2).

⁴⁰⁷ Bankruptcy (Scotland) Act 2016 s.94(3). Except in the case of a variation, the payment instruction must be in Form 19 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.20(2)(a). Variation is discussed further at para.11-153.

⁴⁰⁸ Bankruptcy (Scotland) Act 2016 s.94(4). Except in the case of a variation, the payment instruction must be in Form 20 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.20(2)(b). Variation is discussed further at para.11-153.

⁴⁰⁹ Bankruptcy (Scotland) Act 2016 s.94(5) and Bankruptcy (Scotland) Regulations 2016 reg.20(3).

⁴¹⁰ Bankruptcy (Scotland) Regulations 2016 reg.20(4).

⁴¹¹ Bankruptcy (Scotland) Act 2016 s.94(6).

⁴¹² Bankruptcy (Scotland) Regulations 2016 reg.20(5).

⁴¹³ Bankruptcy (Scotland) Regulations 2016 reg.20(7). The instruction to vary must be in Form 21 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.20(7).

At the end of the payment period, the trustee must without delay notify the recipient of any payment instruction in writing that the instruction has been recalled.⁴¹⁴ **11-152**

Variation and quashing of order

The trustee may vary or quash a debtor contribution order following a change in the debtor's circumstances, either on the application of the debtor or *ex proprio motu* where they consider it appropriate.⁴¹⁵ The trustee should be aware of any changes in the debtor's circumstances because the debtor is required to notify the trustee immediately of any substantial change in their financial circumstances⁴¹⁶ and the trustee is required, where the debtor is subject to a debtor contribution order, to obtain at six monthly intervals a written report in the prescribed form of the debtor's current state of affairs.⁴¹⁷ The trustee may also receive information about such a change from third parties or other sources, for example creditors. In the case of a debtor application, this must be accompanied by appropriate supporting evidence of the change of circumstances.⁴¹⁸ **11-153**

The trustee may also vary or quash such an order where they consider it appropriate either on sending their report to AiB prior to the debtor's discharge (where the trustee is not AiB) or on discharging the debtor (where the trustee is AiB).⁴¹⁹ **11-154**

In deciding whether to vary or quash the order, the trustee must use the common financial tool to assess the debtor's contribution.⁴²⁰ Where the trustee varies or quashes the order *ex proprio motu* following a change in the debtor's circumstances, their decision must not take effect before the expiry of 14 days beginning with the day on which the decision is made.⁴²¹ **11-155**

The trustee must notify the debtor, AiB (if not themselves), any third party required to make a payment under the debtor contribution order or who is a recipient of a payment instruction given by the trustee, and any other interested party of their decision to vary or quash a debtor contribution order or to refuse an application to do so.⁴²² **11-156**

The provisions for review and appeal in relation to the trustee's decision are discussed further at para.11-162 onwards. **11-157**

Payment breaks

The debtor may apply to the trustee for a payment break during which payments under the debtor contribution order are deferred.⁴²³ The payment break may **11-158**

⁴¹⁴ Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.20(6).

⁴¹⁵ Bankruptcy (Scotland) Act 2016 s.95(1)(a), (b).

⁴¹⁶ Bankruptcy (Scotland) Act 2016 s.87(1). Failure to do so is an offence: Bankruptcy (Scotland) Act 2016 s.87(2), (3).

⁴¹⁷ Bankruptcy (Scotland) Act 2016 s.116. The prescribed form is Form 23 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.

⁴¹⁸ Bankruptcy (Scotland) Regulations 2016 reg.17(4).

⁴¹⁹ Bankruptcy (Scotland) Act 2016 s.95(1)(c). The debtor's discharge is dealt with in Ch.17.

⁴²⁰ Bankruptcy (Scotland) Act 2016 s.95(2).

⁴²¹ Bankruptcy (Scotland) Act 2016 s.95(3).

⁴²² Bankruptcy (Scotland) Act 2016 s.95(4), (5).

⁴²³ Bankruptcy (Scotland) Act 2016 s.96(1), (2).

last for a period of up to six months.⁴²⁴ The application must specify the length of payment break which the debtor seeks.⁴²⁵

11–159 The debtor may apply for a payment break only if there has been a reduction of at least 50 per cent in the debtor's disposable income as determined by the common financial tool as a result of any of the following circumstances: the debtor's unemployment or change of employment; a period of leave from employment by the debtor because of the birth or adoption of a child or the need to care for a dependant; the debtor's illness; the debtor's divorce or dissolution of the debtor's civil partnership; the debtor's separation from their spouse or civil partner; the death of a person who, together with the debtor, cared for a dependant of the debtor.⁴²⁶ "Dependant" is not defined and there may therefore be some debate as to who qualifies as a dependant of the debtor for this purpose. The provisions are both cumulative and definitive: thus a payment break may not be applied for where there is a reduction in the debtor's disposable income of less than the specified amount even where that reduction results from the specified circumstances or where the specified reduction results from other circumstances. The threshold for obtaining a payment break may be seen as rather high and have the potential to give rise to unfairness. A payment break may be applied for only once in the sequestration.⁴²⁷ Again, this may be seen as rather restrictive and potentially giving rise to unfairness. Multiple payment breaks may, of course, be considered disruptive and have the potential to prolong the sequestration process unduly. It might, however, have been more appropriate to allow more than one payment break but apply a maximum total period for payment breaks cumulatively.

11–160 If the trustee considers that a payment break is fair and reasonable, they may grant it for such period and on such conditions as they see fit.⁴²⁸ Where the trustee grants a payment break, they must notify in writing the debtor, AiB (if not themselves) and any third party required to make a payment under the debtor contribution order of their decision⁴²⁹ and the payment period is deemed to be varied by being extended by the length of the period of the payment break.⁴³⁰ Curiously, there is no specific provision for notifying someone who is a recipient of a payment instruction, but since the grant of a payment break is a deemed variation of the contribution order, such notification might be given accordingly. Where the trustee refuses to grant a payment break, they must notify the debtor of their decision and the reasons for it in writing.⁴³¹

11–161 The provisions for review and appeal in relation to the trustee's decision are discussed further at para.11–162 onwards.

Review and appeal of decisions relating to contribution orders

11–162 The debtor, the trustee or any other interested party may apply to AiB for a review of a contribution order within 14 days of the day on which the order is

⁴²⁴ Bankruptcy (Scotland) Act 2016 s.96(2).

⁴²⁵ Bankruptcy (Scotland) Act 2016 s.96(5).

⁴²⁶ Bankruptcy (Scotland) Act 2016 s.96(3)(a) and (4).

⁴²⁷ Bankruptcy (Scotland) Act 2016 s.96(3)(b).

⁴²⁸ Bankruptcy (Scotland) Act 2016 s.96(6).

⁴²⁹ Bankruptcy (Scotland) Act 2016 s.96(7).

⁴³⁰ Bankruptcy (Scotland) Act 2016 s.96(9).

⁴³¹ Bankruptcy (Scotland) Act 2016 s.96(8).

made.⁴³² In addition, the debtor or any other interested party may apply to AiB for a review of a decision of the trustee in relation to the variation or quashing of a contribution order or on an application by a debtor for a payment break within 14 days of the day on which the relevant decision is made.⁴³³

Any application for review by the debtor or trustee must either contain or be accompanied by a statement that the money adviser advising the debtor or trustee assessed the debtor's expenditure against the common financial statement and, if relevant, explaining any instance in which the trigger figures are exceeded,⁴³⁴ and in the latter case, the statement must be accompanied by supporting evidence of why the expenditure is reasonable.⁴³⁵ This requirement does not apply to an application by an interested party,⁴³⁶ who is unlikely to have access to the relevant information/evidence. **11-163**

In the case of an application for review relating to a contribution order or a decision of the trustee to vary or quash a contribution order *ex proprio motu* following a change in the debtor's circumstances, the order or decision is suspended pending a decision on the review.⁴³⁷ **11-164**

Where an application for review is made, AiB must without delay send a copy of the application to the debtor and any other interested party and, in the case of an application for review of a contribution order, the trustee, and advise them of the right to make representations within 21 days beginning with the day on which the application is made.⁴³⁸ AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke the order or decision within 28 days beginning with the day on which the application is made⁴³⁹; and (ii) notify their decision to the debtor, any other interested party and, in the case of an application for review of a contribution order, the trustee.⁴⁴⁰ If dissatisfied with AiB's decision on review, the debtor or the trustee may appeal to the sheriff within 14 days beginning with the day on which AiB's decision is given.⁴⁴¹ **11-165**

DISPUTES ABOUT VESTING

A person claiming a right to any estate claimed by the trustee may apply to the sheriff for the estate to be excluded from vesting.⁴⁴² A copy of the application **11-166**

⁴³² Bankruptcy (Scotland) Act 2016 s.92(1), (2). The application must be made in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(m).

⁴³³ Bankruptcy (Scotland) Act 2016 s.97(1), (2). The application must be made in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(n).

⁴³⁴ Bankruptcy (Scotland) Regulations 2016 reg.17(1).

⁴³⁵ Bankruptcy (Scotland) Regulations 2016 reg.17(2).

⁴³⁶ Bankruptcy (Scotland) Regulations 2016 reg.17(3).

⁴³⁷ Bankruptcy (Scotland) Act 2016 ss.92(3) and 97(3) respectively.

⁴³⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

⁴³⁹ Bankruptcy (Scotland) Act 2016 ss.92(4) and 97(4).

⁴⁴⁰ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

⁴⁴¹ Bankruptcy (Scotland) Act 2016 ss.92(5) and 97(5). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(l) and (m).

⁴⁴² Bankruptcy (Scotland) Act 2016 s.78(11). The application should be in Form 7.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(1).

must be served on the trustee.⁴⁴³ The sheriff must grant the application if satisfied that the estate should not be vested in the trustee.⁴⁴⁴

- 11-167** There are surprisingly few reported cases on this provision or its statutory predecessors. In two cases decided under the Bankruptcy (Scotland) Act 1856, orders were made excluding funds held by the debtor on trust for the applicant even though these were not kept in a separate account or earmarked as trust funds.⁴⁴⁵ The court proceeded on the basis that it would, where possible, disentangle the funds held in an account and award the trust funds to the applicant, and in each case the funds were in fact identifiable. An order excluding funds held by the debtor on trust was also made in a more recent case under the Bankruptcy (Scotland) Act 1985.⁴⁴⁶ In contrast, where funds held by the debtor on trust had been paid into an overdrawn account, it was held that the funds had disappeared once and for all and no order could be made excluding them from the sequestration, the court noting that it would have been different if the account had been in credit, as in that case the amount might have been traced and recovered.⁴⁴⁷ Trust funds that have been paid into an overdrawn account, or for which the bank has otherwise given onerous consideration, will not therefore be recoverable by the beneficiary provided that the bank has acted in good faith.⁴⁴⁸ In *McArthur's Trustee v McArthur*,⁴⁴⁹ another case under the Bankruptcy (Scotland) Act 1985, an order was made excluding certain tax rebates due to the debtor from vesting in the trustee, but the sheriff refused to make an order for payment of the excluded funds to the debtor by the trustee, to whom the funds had been paid. The case was concerned with the competence of an appeal by the trustee, which was held to be incompetent, and the nature of the sheriff's decision is mentioned only briefly in that context. It is difficult to see, however, why it would have been incompetent for an order to have been made requiring the trustee to return the property to the applicant given that it had been excluded from vesting. AIB's *Notes for Guidance for Trustees* also refer to an unreported case in Glasgow Sheriff Court in 1990 where it appears that the statutory redundancy element of a redundancy payment received by the debtor was excluded from vesting in the trustee on the basis that it fell to be characterised as alimentary in nature.⁴⁵⁰

- 11-168** The onus is on the applicant to demonstrate that the estate should be excluded from vesting in the trustee. In the case of moveable property, the doctrine of reputed ownership arising from the possession of moveables may result in the

⁴⁴³ Bankruptcy (Scotland) Act 2016 s.78(11). See also Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(1), which provides that the sheriff is to make an order for intimation to any person who appears to have an interest in the application and an order specifying how it is to be determined.

⁴⁴⁴ Bankruptcy (Scotland) Act 2016 s.78(12).

⁴⁴⁵ *Macadam v Martin's Trustee* (1872) 11 M. 33 and *Jopp v Johnston's Trustee* (1904) 6 F. 1028.

⁴⁴⁶ See *Smith v Ritchie*, 1995 S.C.L.R. 1132. That case was concerned with the competence of an appeal, which was found to be incompetent, and the nature of the order is mentioned only briefly. Cf *Style Financial Services Ltd v Bank of Scotland (No.2)*, 1998 S.L.T. 851, where it was held in the context of a receivership that the funds which it was sought to recover were not in fact trust funds.

⁴⁴⁷ *Hofford v Gowans*, 1909 1 S.L.T. 153.

⁴⁴⁸ *Thomson v Clydesdale Bank Ltd* [1893] A.C. 282; *Hofford v Gowans*, 1909 1 S.L.T. 153; *Bank of Scotland v MacLeod Paxton Woolard & Co*, 1998 S.L.T. 258; *Style Financial Services Ltd v Bank of Scotland*, 1996 S.L.T. 421; *Style Financial Services Ltd v Bank of Scotland (No.2)*, 1998 S.L.T. 851.

⁴⁴⁹ *McArthur's Trustee v McArthur*, 1997 S.L.T. 926.

⁴⁵⁰ Accountant in Bankruptcy, *Notes for Guidance for Trustees* (November 2016), para.6.24.1, referring to the case of Patrick McGrail unreported Glasgow Sheriff Court 10 August 1990 (Sheriff Murphy).

true owner being personally barred from proving ownership, but where the circumstances do not raise the plea of personal bar, the possession of moveables can create no more than a presumption of fact as to their ownership, more or less strong according to the circumstances, which is capable of being rebutted.⁴⁵¹ In the case of a marriage or civil partnership, the Family Law (Scotland) Act 1985 contains a number of provisions relating to the ownership of property. In particular, it is provided that, subject to certain provisos which are not relevant here, marriage or civil partnership will not, of itself, affect the respective rights of the spouses or civil partners in relation to their property.⁴⁵² There is, however, a rebuttable presumption that spouses and civil partners have an equal right in any household goods as defined which were obtained in prospect of or during the marriage or civil partnership other than by gift or succession from a third party, the presumption not being rebuttable by reason only of the fact that while the spouses or civil partners were married or in civil partnership and living together, the relevant goods were purchased from a third party by one spouse or civil partner alone or by them both in unequal shares.⁴⁵³ Furthermore, in the absence of an agreement to the contrary, spouses and civil partners have an equal right to any money derived from a housekeeping allowance made by one to the other, or to any property derived therefrom.⁴⁵⁴

It has been held that in the case of funds held on deposit receipt, the question of who is entitled to uplift the funds is distinct from the question of the ownership of the funds and no inference may be drawn from the deposit receipt as to the ownership of the funds, which may need to be established separately.⁴⁵⁵ The same would appear to apply in relation to funds held in any bank or building society account.⁴⁵⁶ It has been said that if there is a dispute as to the ownership of funds, the banker's only course of action is to raise an action of multipointing.⁴⁵⁷ 11-169

It may be noted that the provisions are part of the provisions relating to the vesting of the debtor's estate at the date of sequestration, but they also appear to have been utilised in a case involving *acquirenda*.⁴⁵⁸ 11-170

POST-SEQUESTRATION DEALINGS WITH ESTATE

Subject to certain exceptions, any dealing of, or with, the debtor and relating to the estate vested in the trustee, whether estate at the date of sequestration or *acquirenda*, is of no effect in a question with the trustee.⁴⁵⁹ 11-171

⁴⁵¹ See *George Hopkinson Ltd v Napier and Son*, 1953 S.C. 139.

⁴⁵² Family Law (Scotland) Act 1985 s.24(1).

⁴⁵³ Family Law (Scotland) Act 1985 s.25(1), (2). Household goods are defined in the Family Law (Scotland) Act 1985 s.25(3). Some or all such goods may, of course, be excluded from vesting because they are exempt from attachment/exceptional attachment as discussed at para.11 55 onwards.

⁴⁵⁴ Family Law (Scotland) Act 1985 s.26.

⁴⁵⁵ See *Anderson v North of Scotland Bank Ltd* (1901) 4 F. 49; *Allan's Executor v Union Bank of Scotland Ltd*, 1909 S.C. 206; *Cairns v Davidson*, 1913 S.C. 1054; *Dickson v National Bank of Scotland*, 1917 S.C. (HL) 50.

⁴⁵⁶ See *Forest-Hamilton's Trustee v Forest-Hamilton*, 1970 S.L.T. 338 and dicta in *Bell v Jackson* unreported 31 May 2000 IH, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=cd9d87a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

⁴⁵⁷ Stair Memorial Encyclopaedia, *Banking, Money and Commercial Paper* (Reissue), para.98.

⁴⁵⁸ See Accountant in Bankruptcy, *Notes for Guidance for Trustees* (November 2016), para.6.24.1, referring to the case of Patrick McGrail unreported Glasgow Sheriff Court 10 August 1990 (Sheriff Murphy), which seems to have involved an application in relation to *acquirenda*.

⁴⁵⁹ Bankruptcy (Scotland) Act 2016 s.87(4).

11-172 Prior to changes brought about by the Bankruptcy and Diligence etc. (Scotland) Act 2007, the corresponding provision of the Bankruptcy (Scotland) Act 1985 applied only to any dealing of, or with, the debtor relating to estate which vested in the trustee as at the date of sequestration. As noted above, however, as part of the package of amendments made to the Bankruptcy (Scotland) Act 1985 as a result of the difficulties arising out of the cases of *Sharp v Thomson*⁴⁶⁰ and *Burnett's Trustee v Grainger*,⁴⁶¹ the Bankruptcy and Diligence etc. (Scotland) Act 2007 amended the Bankruptcy (Scotland) Act 1985 to make clear that post-sequestration dealings by a debtor with *acquirenda* as well as post-sequestration dealings with estate vesting in the trustee as at the date of sequestration would be of no effect in a question with the trustee, subject to specified exceptions.

11-173 As already noted, the issue of post-sequestration dealings of the debtor with *acquirenda* had caused difficulty in a number of cases where the debtor had purchased heritable property after the date of sequestration using funds lent to the debtor after the date of sequestration by a creditor in favour of whom the debtor had granted a standard security over the property. In *Alliance and Leicester Building Society v MacGregor*,⁴⁶² it was held that the property in question vested in the trustee as *acquirenda* unencumbered by the standard security, the grant of the standard security being a separate transaction which debtor had no power to undertake with the result that the standard security was invalid. That decision was not followed in *Royal Bank of Scotland Plc v MacGregor*,⁴⁶³ in which it was held that the property in question vested in the trustee as *acquirenda* subject to the standard security, which was valid. The basis for that decision was that in accordance with the principle of *tantum et tale*, the trustee could not profit from the fraud of the bankrupt, the two transactions being so interconnected that they could not be regarded as separate transactions. The debtor's power to grant the standard security was not directly considered, but seems to have been assumed. Finally, in *Halifax Plc v Gorman's Trustee*,⁴⁶⁴ it was again held that the property in question vested in the trustee as *acquirenda* subject to the standard security, which was valid. In that case, Lord Eassie also declined to follow the decision in *Alliance and Leicester Building Society v MacGregor*.⁴⁶⁵ The basis for his decision was that the statutory provisions necessarily implied a continuing authority in the debtor to give a good title to a party acquiring a right or interest in the *acquirenda* in good faith and for value, notwithstanding that it was difficult to reconcile this with the concept of the automatic vesting of *acquirenda* in the trustee. Otherwise, it was difficult, indeed impossible, to see any scope for the provision that the vesting of *acquirenda* was without prejudice to any right or interest acquired in good faith and for value. The fact that the statutory provisions on post-sequestration dealings with the debtor's estate as they then stood referred only to estate vesting in the trustee as at the date of sequestration was also noted. The view was also expressed obiter that the principle of *tantum et tale* would apply.

11-174 The amendments by the Bankruptcy (Scotland) Act 2007 sought to resolve the issue by making clear that post-sequestration dealings by a debtor with *acquirenda* as well as post-sequestration dealings with estate vesting in the

⁴⁶⁰ *Sharp v Thomson*, 1997 S.C. (HL) 66.

⁴⁶¹ *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19.

⁴⁶² *Alliance and Leicester Building Society v MacGregor*, 1994 S.C.L.R. 19.

⁴⁶³ *Royal Bank of Scotland Plc v MacGregor*, 1998 S.C.L.R. 923.

⁴⁶⁴ *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

⁴⁶⁵ *Alliance and Leicester Building Society v MacGregor*, 1994 S.C.L.R. 19.

trustee as at the date of sequestration would be of no effect in a question with the trustee, subject to specified exceptions. However, this leaves the problem identified by Lord Eassie in *Halifax Plc v Gorman's Trustee*⁴⁶⁶: if the debtor has no power to deal with the property, what is the scope of the provision that the vesting of *acquirenda* is without prejudice to any right acquired in good faith and for value?⁴⁶⁷ It may be that it should now be regarded as redundant and should therefore be repealed. It is worth noting, however, that the Scottish Law Commission recommended its enactment because it considered that a trustee should not be entitled to challenge a title to any interest in, or security over, *acquirenda* where the title to that interest was acquired in good faith and for value.⁴⁶⁸ If this remains the intention, it may be that instead of retaining the current provision, which sits uneasily with the provision that post-sequestration dealings by a debtor with *acquirenda* are of no effect in a question with the trustee, an appropriate provision should be included as one of the specified exceptions to that provision. This would make clear the extent of the protection to be afforded to post-sequestration dealings with *acquirenda*.

The exceptions to the rule that any dealing of or with the debtor relating to the estate vested in the trustee, whether estate as at the date of sequestration or *acquirenda*, is of no effect in a question with the trustee are: **11-175**

- (a) where the trustee has abandoned the property to which the dealing relates to the debtor.⁴⁶⁹ Abandonment may be express or implied, but the trustee cannot be held to have abandoned property about which they do not know.⁴⁷⁰ The onus is on the person seeking to uphold the dealing to establish that the trustee has abandoned the property.⁴⁷¹ In the case of heritable property, it is specifically provided that notice in the prescribed form given to the debtor by the trustee is sufficient evidence that the property is vested in the debtor⁴⁷² and, where such a notice is given, the trustee must as soon as practicable after giving it record a certified copy in the register of inhibitions.⁴⁷³ There does not, however, appear to be a requirement for the trustee to give such notice on abandonment, although it is thought that in practice, the trustee should do so;

⁴⁶⁶ *Halifax Plc v Gorman's Trustee*, 2000 S.L.T. 1409.

⁴⁶⁷ The words "or interest" were repealed by the Bankruptcy and Debt Advice (Scotland) Act 2014 following a recommendation by the Scottish Law Commission in its *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, 2013) that wherever the words "right or interest" appeared in the Bankruptcy (Scotland) Act 1985, the words "or interest" should be omitted: see para.2.5. It is not thought, however, that this makes any difference to the issue.

⁴⁶⁸ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 11.20.

⁴⁶⁹ Bankruptcy (Scotland) Act 2016 s.87(5)(a).

⁴⁷⁰ *Wright v Eurospares (Continental Parts) Ltd* unreported 23 October 2001 Aberdeen Sheriff Court. The concept of abandonment is discussed further at para.11-177 in the context of the debtor's title to sue.

⁴⁷¹ Bankruptcy (Scotland) Act 2016 s.87(5).

⁴⁷² Bankruptcy (Scotland) Act 2016 s.87(8). The prescribed form differs depending on whether the trustee is AiB or not. Where the trustee is not AiB, the prescribed form is Form 15 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016 and where the trustee is AiB, it is Form 16 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.24(1).

⁴⁷³ Bankruptcy (Scotland) Act 2016 s.87(9). The provision is not well expressed, since recording in the register is a matter for the keeper rather than the trustee: the provision should presumably have required the trustee to send the certified copy to the keeper for recording. For the certification of the copy notice and the recording of the certified copy where AiB is trustee, see also Bankruptcy (Scotland) Regulations 2016 reg.24(2), (3).

- (b) where the trustee has expressly or impliedly authorised the dealing.⁴⁷⁴ The onus is on the person seeking to uphold the dealing to establish that the trustee has expressly or impliedly authorised it⁴⁷⁵;
- (c) where the trustee is otherwise personally barred from challenging the dealing.⁴⁷⁶ The onus is on the person seeking to uphold the dealing to establish that the trustee is personally barred⁴⁷⁷;
- (d) where the dealing is one of a number of specified types and the person dealing with the debtor was, at the time when the dealing occurred, unaware of the sequestration and had no reason to believe that the debtor's estate had been sequestrated or was the subject of sequestration proceedings.⁴⁷⁸ The specified types of dealing are:
 - (i) the performance of an obligation undertaken before the date of sequestration by a person obliged to the debtor in the obligation,⁴⁷⁹ for example, the payment of a debt due to the debtor;
 - (ii) the purchase from the debtor of goods for which the purchaser has given value to the debtor or is willing to give value to the trustee⁴⁸⁰; and
 - (iii) a dealing which constitutes the transfer of incorporeal moveable property or the creation, transfer, variation or extinguishing of a real right in heritable property for which the person dealing with the debtor has given adequate consideration to the debtor or is willing to give adequate consideration to the trustee.⁴⁸¹ The dealing must require the delivery of a deed⁴⁸² and the delivery of the deed must have occurred during the period beginning with the date of sequestration and ending seven days after the day on which the certified copy of the sheriff's first warrant to cite or the certified copy of the determination of AiB awarding sequestration, as the case may be, is recorded in the register of inhibitions.⁴⁸³ As noted above, this provision was originally added to the Bankruptcy (Scotland) Act 1985 by the Bankruptcy and Diligence etc. (Scotland) Act 2007 as part of the amendments made to the Bankruptcy (Scotland) Act 1985 as a result of the difficulties arising out of the cases of *Sharp v Thomson*⁴⁸⁴ and *Burnett's Trustee v Grainger*.⁴⁸⁵ The Scottish Law Commission in its *Discussion Paper on Sharp v Thomson*⁴⁸⁶ had noted that as well as the problems arising from the factual situation in these cases, which involved the delivery of a disposition to a purchaser *before* the relevant insolvency event (the appointment of a receiver and consequent crystallisation of the floating charge in

⁴⁷⁴ Bankruptcy (Scotland) Act 2016 s.87(5)(b).

⁴⁷⁵ Bankruptcy (Scotland) Act 2016 s.87(5).

⁴⁷⁶ Bankruptcy (Scotland) Act 2016 s.87(5)(c).

⁴⁷⁷ Bankruptcy (Scotland) Act 2016 s.87(5).

⁴⁷⁸ Bankruptcy (Scotland) Act 2016 s.87(6)(a) and (b).

⁴⁷⁹ Bankruptcy (Scotland) Act 2016 s.87(6)(a)(i).

⁴⁸⁰ Bankruptcy (Scotland) Act 2016 s.87(6)(a)(ii).

⁴⁸¹ Bankruptcy (Scotland) Act 2016 s.87(6)(a)(iii) and (10)(a).

⁴⁸² Bankruptcy (Scotland) Act 2016 s.87(6)(a)(iii) and (10)(b).

⁴⁸³ Bankruptcy (Scotland) Act 2016 s.87(6)(a)(iii) and (10)(c).

⁴⁸⁴ *Sharp v Thomson*, 1997 S.C. (HL) 66.

⁴⁸⁵ *Burnett's Trustee v Grainger*, 2004 S.C. (HL) 19.

⁴⁸⁶ Scottish Law Commission, *Discussion Paper on Sharp v Thomson* (Discussion Paper No.114, July 2001).

Sharp and sequestration in *Burnett's Trustee*), there was also a potential problem where a disposition was delivered *after* sequestration but in ignorance of it because of the time lag before sequestration is discoverable from the public registers. It therefore proposed the introduction of provisions allowing post-sequestration deeds for a limited period in certain cases and these provisions are the result.

In each case, the onus is on the person seeking to uphold the dealing to establish that the specified requirements are satisfied.⁴⁸⁷

- (e) where the dealing is a banking transaction entered into before the receipt by the bank of the notice which the trustee is required to serve on it in accordance with the provisions discussed at para. 11–98, irrespective of whether the bank is aware of the sequestration or not.⁴⁸⁸ Prior to changes made by the Bankruptcy and Debt Advice (Scotland) Act 2014, the exception for banking transactions was more limited. It applied only where the dealing was a banking transaction in the ordinary course of business between the banker and the debtor and the person dealing with the debtor was, at the time of the dealing, unaware of the sequestration and had no reason to believe that the debtor's estate had been sequestrated or was the subject of sequestration proceedings.⁴⁸⁹ In practice, however, this gave rise to problems for banks. In the case of *Minhas's Trustee v Bank of Scotland*,⁴⁹⁰ the debtor withdrew funds from his account after the bank's head office was aware of his sequestration, although neither the teller who processed the withdrawal nor the manager of the branch in which the withdrawal was made were aware of it. It was held that the "person dealing with the debtor" was the teller in her capacity as an employee of the bank and it was therefore the bank's knowledge, not the knowledge of the teller as an individual, which was relevant, with the result that the exception did not apply. It might, of course, be argued that banks should have in place systems for ensuring that information which becomes known to one part of the bank is acted on in all parts of the bank. Be that as it may, however, as noted above, the Bankruptcy and Debt Advice (Scotland) Act 2014 made a number of changes designed to give additional protection to banks in relation to post-sequestration transactions on a debtor's bank account, including amending the provisions in relation to post-sequestration dealings by the debtor. The result is the current provisions as described.

Any dealing of, or with, the debtor relating to estate which has vested in the trustee which does not fall within one of the exceptions is of no effect *in a question with the trustee*. This does not mean that it is invalid. It means only that it is challengeable at the instance of the trustee: it is voidable, not void *ab initio*, and therefore valid so far as third parties are concerned unless and until successfully challenged by the trustee. In *Iqbal v Parneiz*,⁴⁹¹ which concerned the validity of a lease of heritable property vested in the trustee in sequestration granted by the debtor, the court held that the combined effect of the statutory provisions (in that case, the corresponding provisions of the Bankruptcy

⁴⁸⁷ Bankruptcy (Scotland) Act 2016 s.87(6).

⁴⁸⁸ Bankruptcy (Scotland) Act 2016 s.87(7).

⁴⁸⁹ Bankruptcy (Scotland) Act 1985 s.32(9)(b)(iii).

⁴⁹⁰ *Minhas's Trustee v Bank of Scotland*, 1990 S.L.T. 23.

⁴⁹¹ *Iqbal v Parneiz* [2017] SAC (Civ) 7.

(Scotland) Act 1985) was that a lease granted by the debtor would be voidable, not void, and ineffective only in so far as it was challengeable at the instance of the trustee: the debtor remained capable of dealing with his estate, but any such dealing was of no effect where it was challenged by the trustee. The court noted that in relation to the debtor's heritable property, the trustee obtained only a personal right, and the "prohibitory effect" which flowed from the recording of the first warrant to cite in the sequestration petition or the determination of the debtor application for sequestration (as the case may be) in the register of inhibitions meant only that voluntary deeds granted by the debtor subsequent to sequestration and while the prohibitory effect remained in force were reducible by the trustee, not void.⁴⁹² With regard to the trustee's ability to challenge a dealing by the debtor with heritable property which has vested in the trustee but to which the trustee has not completed title, it has already been noted that even where the prohibitory effect is no longer in force, the trustee will be able to challenge such a dealing if the party dealing with the debtor has actual knowledge of the sequestration.⁴⁹³

11–177 Particular issues arise with regard to the debtor's title to sue in relation to estate vested in the trustee while the sequestration is ongoing.⁴⁹⁴ Such issues may often arise in the context of claims for damages for personal injury, discussed at para. 11–102 onwards, but are by no means restricted to such cases. It is well-established that the debtor will have title to sue where the property or claim in question has been abandoned⁴⁹⁵ and, as noted above, one of the exceptions to the provision that post-sequestration dealings with the estate vested in the trustee are of no effect in a question with the trustee is where property has been abandoned to the debtor by the trustee. Abandonment may be express or implied.⁴⁹⁶ Whether there has been abandonment where the trustee has delayed or declined to litigate will depend on the circumstances.⁴⁹⁷ It is thought that abandonment by the trustee is all that is required rather than abandonment by the trustee and the creditors,⁴⁹⁸ and as noted above, the exception to the provision that post-sequestration dealings with the estate vested in the trustee are of no effect in a question with the trustee mentioned above refers to abandonment to the debtor by the trustee only. While abandonment will give the debtor a title to sue, however, it is not a requirement. The modern cases tend to analyse the issue in terms of whether the debtor's action will compete with the rights of the trustee or the creditors. Thus, in *Dickson v United Dominions Trust Ltd*,⁴⁹⁹ Lord McCluskey said:

⁴⁹² The "prohibitory effect" is discussed further in Ch. 8.

⁴⁹³ See *Fortune's Trustee v Medwin Investments Ltd* [2016] CSIH 49, discussed in detail in Ch. 8.

⁴⁹⁴ For the position where the sequestration is at an end, see also Ch. 18.

⁴⁹⁵ See, in particular, *King v Wieland* (1858) 20 D. 960; *Galbraith v Whitehead* (1863) 1 M. 644; *Fleming v Walker's Trustee* (1876) 4 R. 112; *Grindall v John Mitchell (Grangemouth) Ltd*, 1984 S.L.T. 335; *Dickson v United Dominions Trust Ltd*, 1988 S.L.T. 19; *Davidson v Clydesdale Bank Plc*, 2002 S.L.T. 1088; *Chiswell v Chiswell* [2016] CSOH 45.

⁴⁹⁶ See *King v Wieland* (1858) 20 D. 960; *Galbraith v Whitehead* (1863) 1 M. 644; *Fleming v Walker's Trustee* (1876) 4 R. 112; *Dickson v United Dominions Trust Ltd*, 1988 S.L.T. 19; *Davidson v Clydesdale Bank Plc*, 2002 S.L.T. 1088. Cf *Graham v Mackenzie* (1871) 9 M. 798, where the debt sued for by the debtor had been "virtually abandoned" by the trustee: it was held that the debtor did not have title to sue but should be allowed time to obtain a retrocession.

⁴⁹⁷ See *Galbraith v Whitehead* (1863) 1 M. 644; *Graham v Mackenzie* (1871) 9 M. 798; *Grindall v John Mitchell (Grangemouth) Ltd*, 1984 S.L.T. 335; *Thomson v Yorkshire Building Society*, 1994 S.C.L.R. 1014; *Davidson v Clydesdale Bank Plc*, 2002 S.L.T. 1088.

⁴⁹⁸ See *Dickson v United Dominions Trust Ltd*, 1988 S.L.T. 19, in which the view to the contrary expressed in *Grindall v John Mitchell (Grangemouth) Ltd*, 1984 S.L.T. 335 was doubted.

⁴⁹⁹ *Dickson v United Dominions Trust Ltd*, 1988 S.L.T. 19 at 22.

"The principle . . . must be that the bankrupt cannot be allowed to litigate in such a way that he competes with the creditors, or the trustee as representing them, for any part of the assets sequestered; and accordingly where such a competition exists or may exist the bankrupt will have no title to sue. That principle protects both the creditors and the party sued, whose interest is to be protected from the risk of double distress in the form of claims by a bankrupt and by the trustee in sequestration."

The basis for this approach can in fact be seen in some of the earlier authorities⁵⁰⁰ and it has been followed in subsequent cases.⁵⁰¹ **11-178**

In certain cases, only the debtor may have title to sue, although the debtor's claim will vest in the trustee once proceedings are raised.⁵⁰² **11-179**

An undischarged debtor will normally be required to find caution where they litigate as a pursuer, unless there are exceptional circumstances.⁵⁰³ An undischarged debtor who is a defender, however, will not normally be required to find caution, although there are exceptions, including where the defender is virtually the pursuer in the proceedings.⁵⁰⁴ **11-180**

OFFENCES IN RELATION TO ESTATE

A debtor, or any other person acting in the debtor's interest (whether with or without the debtor's authority), who destroys, damages, conceals, disposes of or removes from Scotland any part of the debtor's estate in the period commencing one year immediately before the date of sequestration and ending with the debtor's discharge is guilty of an offence unless they show that it was not done with intent to prejudice the creditors.⁵⁰⁵ **11-181**

RE-VESTING OF ESTATE

Background

Prior to changes brought about by the Bankruptcy and Diligence etc. (Scotland) Act 2007, there was no re-vesting in the debtor of estate vested in the trustee unless the debtor was discharged on composition.⁵⁰⁶ **11-182**

⁵⁰⁰ See *Graham v Mackenzie* (1871) 9 M. 798; *Whyte v Forbes* (1890) 17 R. 895.

⁵⁰¹ See *Thomson v Yorkshire Building Society*, 1994 S.C.L.R. 1014 (where it was found that the debtor did have a competing interest); *Chiswell v Chiswell* [2016] CSOH 45 (where it was found that the debtor did not have a competing interest).

⁵⁰² See the discussion of claims for personal injury at para.11-102 onwards and cases there cited.

⁵⁰³ See *Clarke v Muller* (1884) 11 R. 418; *McCue v Scottish Daily Record and Sunday Mail Ltd* unreported 30 November 1998 IH; *Bell v McMillan* unreported 22 December 2000 IH; *Cairns v Chief Constable Strathclyde Police* 2 April 2004, Glasgow Sheriff Court. Sheriff Principal Bowen; *Young v Bohannon* [2009] CSOH 56; *Duff, Petitioner* [2013] CSIH 112; *Aslam v Glasgow City Council* [2016] CSIH 78.

⁵⁰⁴ See *William Dow (Potatoes) Ltd v Dow*, 2001 S.L.T. (Sh Ct) 37.

⁵⁰⁵ See Bankruptcy (Scotland) Act 2016 ss.218(3) and (4), and 219(3). Intent to prejudice the creditors includes intent to prejudice an individual creditor: Bankruptcy (Scotland) Act 2016 s.219(3). A person also commits this offence if they do anything in England, Wales or Northern Ireland which would constitute the offence if done in Scotland: Bankruptcy (Scotland) Act 2016 s.219(4).

⁵⁰⁶ See further, Ch.17.

11–183 However, where estate vested in the trustee remains unrealised for a considerable period of time, perhaps for many years, this can give rise to difficult issues of both principle and practice.⁵⁰⁷ These issues were considered by the Scottish Executive in its consultation paper *Personal Bankruptcy Reform in Scotland: A Modern Approach* issued in November 2003 in relation to two particular types of estate: the debtor's home; and inheritances and other legal rights.⁵⁰⁸ In relation to the debtor's home, the catalyst appears to have been concerns as to the effect of delays by trustees in dealing with the home in some cases, generally motivated by a desire to achieve a better return for creditors by waiting for the advent of a more advantageous time to sell. While the consultation paper accepted that it remained appropriate for the debtor's right to any equity in the home to be made available to creditors,⁵⁰⁹ it considered that the matter had to be dealt with sensitively and within a reasonable timescale.⁵¹⁰ Notwithstanding that AiB's *Guidance Notes for Trustees* already encouraged early resolution of the matter of the family home where possible, therefore, the consultation paper sought views on the introduction of a three year time limit, extendable in appropriate circumstances, for the trustee to address the issue of the debtor's family home.⁵¹¹ It may be noted that a similar provision had recently been introduced in England and Wales by the Enterprise Act 2002,⁵¹² although this was not referred to in the consultation paper. In relation to inheritances and other legal rights, the consultation paper did not propose to make any change to the law where a debtor inherited during the sequestration period, but sought views on the introduction of a time limit beyond which inheritances and other legal rights would no longer form part of the sequestrated estate and the appropriate period for such a time limit.⁵¹³

11–184 A large majority of consultees were in favour of the introduction of a time limit for the trustee to address the issue of the debtor's family home, with the majority in favour of a time limit of three years,⁵¹⁴ and it was indicated that a time limit of three years for the trustee to address the issue of the debtor's family home would therefore be introduced.⁵¹⁵

11–185 A large majority of consultees were also in favour of the introduction of a time limit beyond which inheritances and other legal rights would no longer form part of the sequestrated estate, although there was less consensus on the appropriate period.⁵¹⁶ It was noted that the consultation responses had also highlighted that there was uncertainty as to exactly which rights vested in the

⁵⁰⁷ For example, see the discussion of non-vested contingent interests at para.11–48.

⁵⁰⁸ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), Pt 7.

⁵⁰⁹ See further discussion on the family home at para.11–32 onwards.

⁵¹⁰ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 7.1–7.2.

⁵¹¹ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 7.3–7.4.

⁵¹² Insolvency Act 1986 s.283A as inserted by the Enterprise Act 2002.

⁵¹³ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 7.5–7.10. In relation to inheritances and other legal rights, see discussion in relation to non-vested contingent interests at para.11–46 onwards.

⁵¹⁴ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), paras 5.29–5.30.

⁵¹⁵ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), para.5.31.

⁵¹⁶ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), para.5.32.

trustee under the provisions on non-vested contingent interests.⁵¹⁷ It was accordingly indicated that while it was considered appropriate that inheritances and other legal rights should continue to vest in the trustee, this should be subject to a time limit which would be the date of the debtor's discharge.⁵¹⁸ It was also indicated that it was intended that all rights arising in law such as legitim and rights arising under a revocable deed such as the will of a person who is alive would continue to vest in the trustee but only up until the debtor's discharge, while rights arising under an irrevocable deed such as an established trust would vest in the trustee as at the date of sequestration and before the debtor's discharge but would continue to vest after the date of the debtor's discharge, and the statutory provisions on non-vested contingent interests would be amended to clarify the law in this regard.⁵¹⁹

The Bankruptcy and Diligence etc. (Scotland) Act 2007 went on to insert 11-186 into the Bankruptcy (Scotland) Act 1985 a new s.39A, which made provision for the reinvestment in the debtor of the debtor's interest in the family home, and a new s.31(5A), which made provision for the reinvestment in the debtor of any non-vested contingent interests. No other changes, however, were made to the existing statutory provisions on non-vested contingent interests.

This was not, however, the end of the matter. The Bankruptcy and Debt Advice 11-187 (Scotland) Act 2014 amended the provisions for reinvestment in the debtor of any non-vested contingent interests to provide for reinvestment in the debtor only after a period of four years from the date of sequestration rather than on the debtor's discharge.⁵²⁰ This change, implemented in pursuance of the "can pay, should policy" which underlay the Bankruptcy and Debt Advice (Scotland) Act 2014, had not been consulted on as part of the consultation which preceded that Act, but had been the subject of discussion with stakeholders following the consultation.⁵²¹ The change aligned the period during which non-vested contingent interests remained part of the sequestrated estate with the amended period during which *acquirenda* fall into the sequestrated estate as discussed above, and also with the amended period for debtor income contributions as discussed above. No change was made, however, to the time limit for the trustee to address the issue of the debtor's family home.

The current provisions relating to re-vesting of the estate are found in s.78(10) 11-188 of the Bankruptcy (Scotland) Act 2016 (non-vested contingent interests) and s.112 of the Bankruptcy (Scotland) Act 2016 (debtor's interest in family home).

Non-vested contingent interests

Section 78(10) of the Bankruptcy (Scotland) Act 2016 provides that any non-vested contingent interest vested in the trustee by virtue of s.78(9) of that Act which remains vested in the trustee as at the date which is four years after the 11-189

⁵¹⁷ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), para.5.32 and see discussion of non-vested contingent interests at para.11-46 onwards.

⁵¹⁸ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), paras 5.33-5.34.

⁵¹⁹ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), para.5.35.

⁵²⁰ See Bankruptcy (Scotland) Act 1985 s.31(5A) as amended by the Bankruptcy and Debt Advice (Scotland) Act 2014 s.16(1).

⁵²¹ See Bankruptcy and Debt Advice (Scotland) Bill Policy Memorandum SP Bill 34-PM, Session 4 (2013), paras 132-137.

date of sequestration is re-invested in the debtor as if an assignation of that interest had been executed by the trustee, and intimation of the assignation made, on that date.

11–190 It may be noted that the provision expressly applies only to any non-vested contingent interest vested in the trustee by virtue of s.78(9) of the Bankruptcy (Scotland) Act 2016, which relates to the vesting in the trustee of any non-vested contingent interests which form part of the estate as at the date of sequestration. It would not therefore appear to apply to any non-vested contingent interests which vest in the trustee as *acquirenda*.⁵²² It is not clear if this was intentional, but if so, it would appear to be an odd result.

11–191 As noted at para.11–185, it appears to have been intended that only rights arising in law such as legitim and rights arising under a revocable deed such as the will of a person who is alive would re-vest in the debtor after a specified period, while rights arising under an irrevocable deed such as an established trust would continue to vest in the trustee after the date of the debtor's discharge. The current provisions do not appear to achieve that effect, however, since they provide for all non-vested contingent interests which remain vested in the trustee, which would include non-vested contingent interests under an irrevocable deed, to re-vest in the debtor.

Debtor's right or interest in family home

11–192 Section 112 of the Bankruptcy (Scotland) Act 2016 provides that where a debtor's sequestrated estate includes any right or interest in the debtor's family home, that right or interest ceases to form part of the sequestrated estate and is reinvested in the debtor without disposition, conveyance, assignation or other transfer at the end of the period of three years beginning with the date of sequestration.⁵²³ "Family home" has the same meaning as in s.113 of the Bankruptcy (Scotland) Act 2016 (power of trustee in relation to debtor's family home),⁵²⁴ which is discussed in Ch.12.

11–193 Re-vesting in the debtor will not, however, take place where, during the three year period, the trustee:

- (a) disposes of or otherwise realises the right or interest.⁵²⁵ It has been held in England that "realise" in the context of the corresponding provision in England and Wales does not include effecting a sale for a future cash consideration where the total cash will not be paid within the period before reversion⁵²⁶;
- (b) concludes missives for sale of the right or interest⁵²⁷;
- (c) sends a memorandum for renewal of the effect of the recording of the warrant to cite in the sequestration petition or determination of the debtor application for sequestration to the keeper of the register of inhibitions.⁵²⁸ It may be noted that it is the sending of the memo-

⁵²² *Acquirenda* are discussed further at para.11–14 onwards.

⁵²³ Bankruptcy (Scotland) Act 2016 s.112(1) and (2).

⁵²⁴ Bankruptcy (Scotland) Act 2016 s.112(8).

⁵²⁵ Bankruptcy (Scotland) Act 2016 s.112(3)(a)(i).

⁵²⁶ See *Lewis v Metropolitan Property Realisations Ltd* [2009] EWCA Civ 448.

⁵²⁷ Bankruptcy (Scotland) Act 2016 s.112(3)(a)(ii).

⁵²⁸ Bankruptcy (Scotland) Act 2016 s.112(3)(a)(iii). The effect of the recording of the warrant to cite/determination of the debtor application and the memorandum for renewal are discussed in Ch.8.

- randum which has the relevant effect rather than its receipt or recording, so that if for any reason the memorandum is not received or recorded, re-vesting will still be prevented;
- (d) completes title to the right or interest in the Land Register or Register of Sasines as the case may be⁵²⁹;
 - (e) commences proceedings to obtain the authority of the sheriff under s.113(1)(b) of the Bankruptcy (Scotland) Act 2016 to sell or dispose of the right or interest⁵³⁰;
 - (f) commences proceedings in an action of division and sale of the family home⁵³¹;
 - (g) commences proceedings in an action for the purpose of obtaining vacant possession of the family home⁵³²;
 - (h) enters into an agreement with the debtor that the debtor will incur a specified liability to the estate, with or without interest from the date of the agreement, in consideration of which the right or interest will cease to form part of the sequestrated estate and be reinvested in the debtor.⁵³³ This provision effectively allows the debtor to buy back their right or interest in the family home from the sequestrated estate. The debtor's liability to the estate will require to be met from assets or income other than those which form, or would form, part of the estate or the debtor's contributions from income; and
 - (i) commences an action under s.98 of the Bankruptcy (Scotland) Act 2016 (gratuitous alienations) in relation to the right or interest.⁵³⁴ It may be noted that the provision refers only to commencement of an action under the statutory provisions: the commencement of an action under the common law provisions on gratuitous alienations would not, therefore, have the same effect. In addition, re-vesting in the debtor will not take place where the trustee is unaware of the facts giving rise to a right of action under s.98 of the Bankruptcy (Scotland) Act 2016 during the three year period but commences an action under that section "reasonably soon" after becoming aware of such facts.⁵³⁵ How soon is "reasonably soon" may, of course, be a matter of debate. These provisions are intended to provide for the situation where the trustee has been unable to take any of the other steps to prevent re-vesting because the debtor's right or interest was the subject of a gratuitous alienation prior to the sequestration: they prevent the right or interest returned to the estate following a successful challenge of the gratuitous alienation from re-vesting in the debtor solely because of the lapse of the three year period from the date of sequestration.⁵³⁶

If the debtor has not informed the trustee or AiB about their right or interest within the period of three months beginning with the date of sequestration, **11-194**

⁵²⁹ Bankruptcy (Scotland) Act 2016 s.112(3)(a)(iv).

⁵³⁰ Bankruptcy (Scotland) Act 2016 s.112(3)(a)(v). The statutory provisions relating to the power of trustee in relation to debtor's family home are discussed in Ch.12.

⁵³¹ Bankruptcy (Scotland) Act 2016 s.112(3)(a)(vi).

⁵³² Bankruptcy (Scotland) Act 2016 s.112(3)(a)(vii).

⁵³³ Bankruptcy (Scotland) Act 2016 s.112(3)(a)(viii) and (4).

⁵³⁴ Bankruptcy (Scotland) Act 2016 s.112(3)(a)(ix). Gratuitous alienations are discussed in Ch.14.

⁵³⁵ Bankruptcy (Scotland) Act 2016 s.112(3)(b).

⁵³⁶ See Executive Note to the Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008 (SSI 2008/81), which originally added the corresponding provisions to the Bankruptcy (Scotland) Act 1985.

then the period of three years runs from the date on which the trustee becomes aware of the right or interest rather than the date of sequestration.⁵³⁷

- 11–195** Furthermore, the trustee may apply to the sheriff to extend the period of three years in prescribed circumstances or in such other circumstances as the sheriff thinks appropriate.⁵³⁸ This provision was intended to allow for cases of particular complexity or non-co-operation by the debtor.⁵³⁹ At the time of writing, no circumstances have been prescribed. It has been held that such an application is not competent after the three year period has expired without any of the steps necessary to prevent re-vesting having been taken: in such a case, the debtor's interest has already re-vested in the debtor and this cannot be reversed.⁵⁴⁰ A trustee who intends to make such an application should therefore ensure that it is made before the expiry of the three year period, and it is suggested that if the application cannot be determined before the expiry of that period, it may be necessary to seek an interim order to prevent re-vesting on the expiry of the period prior to the application being determined.
- 11–196** There is provision for the Scottish Ministers to make additional provision by regulations in relation to specified matters.⁵⁴¹
- 11–197** Although these provisions were intended to give the debtor certainty as to what will happen to the family home within a reasonable period, it is debatable to what extent they truly do so, given the nature of the steps which can be taken to prevent re-vesting in the debtor. In particular, a number of the steps which may be taken, such as completing title to the debtor's interest, would allow the trustee to take the relevant step to prevent re-vesting and then continue to wait for an extended period before doing anything further. Although this might give the debtor some degree of certainty as to the trustee's intentions, it would appear to be contrary to the spirit of the provisions. This would appear, however, to be the effect of the provisions as framed.
- 11–198** The provisions may also cause practical difficulties for conveyancers because of the fact that the debtor's right or interest is reinvested in the debtor without disposition, conveyance, assignation or other transfer, since there will be no entry in the relevant register and not all the steps which prevent re-vesting will be a matter of public record. Care will therefore be needed where dealing with a trustee after the expiry of the three year period to ensure that re-vesting has not taken place.

⁵³⁷ Bankruptcy (Scotland) Act 2016 s.112(5).

⁵³⁸ Bankruptcy (Scotland) Act 2016 s.112(6). The application must be in Form 7.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1. For the form of procedure for dealing with such an application, see r.7.4.

⁵³⁹ See Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (2003), para.7.4.

⁵⁴⁰ *Invocas*, Applicant unreported 4 June 2013 Banff Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=f79687a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

⁵⁴¹ Bankruptcy (Scotland) Act 2016 s.112(7).

CHAPTER 12

ADMINISTRATION OF THE ESTATE

INTRODUCTION

The functions of the trustee in sequestration have already been set out.¹ This chapter deals with the main aspects of the trustee's function of recovering, managing and realising the debtor's estate and related issues. **12-01**

The chapter commences with recovering, managing and realising the debtor's estate generally and goes on to consider the recovery of the debtor's estate, the management and realisation of the debtor's estate and a number of related issues including applications for directions by the trustee, applications in relation to the trustee's administration of the estate by other parties, defects in procedure and the sederunt book. **12-02**

RECOVERING, MANAGING AND REALISING THE DEBTOR'S ESTATE GENERALLY

As noted in Ch.11, the estate of the debtor vests in the trustee for the benefit of the creditors, and in carrying out their function of recovering, managing and realising the debtor's estate, the trustee must therefore act in the interests of the creditors. The trustee must also, however, consider the interests of the debtor in so far as there may be a reversion to the debtor at the end of the sequestration. In carrying out the administration of the estate, therefore, the trustee represents both the creditors and the debtor. The position has been described as follows²: **12-03**

"The trustee in a sequestration represents both the creditors and the bankrupt. He represents the creditors, as holding the bankrupt estate in trust for their benefit, for the purpose of distribution among them, according to their several rights and preferences, and also as their official organ in the exercise of their statutory powers and the assertion of their statutory privileges in the sequestration. He represents the bankrupt, as the assignee of his estate *tantum et tale* as it stood in the bankrupt, and also in a fiduciary character, so far as concerns any possible surplus or reversion. But he does not represent the bankrupt in his liabilities, beyond the duty of ranking the creditors in these liabilities on the estate according to their legal rights."

With regard to the creditors, the trustee represents the creditors as a body, not individually, and indeed the trustee in performing their functions may require take action against individual creditors, for example, in relation to the challenge of fraudulent or unfair preferences. Furthermore, the trustee represents **12-04**

¹ See Ch.10.

² *Myles v Liquidators of City of Glasgow Bank* (1879) 6 R. 718 per Lord President Inglis at 725.

the creditors only in relation to their interest in the debtor's estate, not in relation to any other interests they may have.³

- 12-05** As a trustee, the trustee owes fiduciary duties to the creditors and the debtor, with the usual consequences where these duties are breached. So for example, a breach of fiduciary duty is a ground for the removal of the trustee⁴ and a transaction by the trustee which is in breach of fiduciary duty is voidable at common law.⁵ There is a specific statutory provision to the effect that it is not competent for the trustee, an associate of the trustee or any commissioner to purchase any of the debtor's estate.⁶ The effect of that provision, however, is not entirely clear. It was said of its predecessor, which used the word "incompetent" rather than the words "not competent", that⁷:

"The use of the word "incompetent" is unusual. If it means, as would be the usual meaning, that the purchase is beyond the powers of the individuals mentioned it would suggest that the transaction is void, with a consequential effect on *bona fide* third party parties who buy from the trustee and others. McLaren took this view of the previous statutory provisions. If "incompetent" means that the transaction is voidable, there is the same effect as a breach of fiduciary duty at common law."

- 12-06** It is suggested that there is no difference between "not competent" and "incompetent" in this context. While it is accepted, however, that the use of the concept of competence would normally suggest that the transaction was void rather than voidable, it would seem strange if there was a different effect in the case of a transaction to which the statutory provision applied and one to which the common law applied. The matter therefore remains open to debate.
- 12-07** The trustee may appoint agents, such as solicitors, where appropriate, but cannot thereby escape responsibility for carrying out the functions which are properly theirs or charge against the estate the costs of employing an agent to carry out functions which are properly theirs.⁸
- 12-08** As noted previously,⁹ the trustee in performing all of their functions must have regard to advice offered to them by the commissioners (if any),¹⁰ but only in so far as to do so would, in their view, be of financial benefit to the estate of the debtor and in the interests of the creditors.¹¹
- 12-09** A trustee other than AiB must consult with AiB in relation to the exercise of their function of recovering, managing and realising the debtor's estate as soon as possible after their appointment.¹² AiB's *Notes for Guidance for Trustees*

³ See *Mann v Sinclair* (1879) 6 R. 1078 at 1081.

⁴ See, for example, *Brown v Burt* (1848) 11 D. 338. Removal of the trustee generally is discussed further in Ch.10.

⁵ See, in particular, *Fraser v Hankey & Co* (1847) 9 D. 415.

⁶ Bankruptcy (Scotland) Act 2016 s.109(11). "Associate" is defined in s.229: the definition is discussed further in Ch.14 in the context of challenge of prior transactions.

⁷ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.10.31 (references omitted).

⁸ See *Gourlay's Trustee v Straton* (1827) 5 S. 804; *Wilson's Creditors v Wilson* (1863) 2 M. 9. With regard to the appointment of agents by AiB in cases where AiB is acting as trustee, however, see Ch.4.

⁹ See Ch.10.

¹⁰ Bankruptcy (Scotland) Act 2016 s.50(2).

¹¹ Bankruptcy (Scotland) Act 2016 s.50(9).

¹² Bankruptcy (Scotland) Act 2016 s.109(1), (4).

indicate that AiB will regard this obligation as having been complied with where the trustee submits a brief report indicating their opinion as to the likely outcome of the sequestration and their intentions in relation to the exercise of their statutory powers with their first account of intromissions.¹³ Where the trustee is AiB, there is no requirement for them to consult anyone about the exercise of these functions.

Subject to certain provisos, a trustee other than AiB must comply with any general or specific directions given to them in relation to the exercise of their function of recovering, managing and realising the debtor's estate by the creditors, by the sheriff on the application of the commissioners or by AiB.¹⁴ Since this does not apply where the trustee is AiB, it would appear that they are not subject to any such direction. While it is logical that AiB as trustee should not be subject to direction by themselves, it seems somewhat surprising that they are apparently not subject to direction by the creditors or the sheriff on application of the commissioners. This appears, however, to be the result of the provisions. 12-10

The requirement to comply with any general or specific directions is subject to the proviso that the trustee may sell any perishable goods without complying with any directions given to them by the creditors or AiB if they consider that compliance with any such directions would adversely affect the sale.¹⁵ It is also subject to the proviso, introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, that they must comply with the statutory provisions on the sale of the debtor's heritable estate subject to a security, and may do anything else permitted by s.109, only in so far as it would, in their view, be of financial benefit to the estate and in the interests of creditors.¹⁶ On the face of it, this would appear to allow the trustee to ignore directions given not only by the creditors or AiB, but by the sheriff on an application by the commissioners, if in their view compliance with those directions would not be of financial benefit to the estate and in the interests of creditors. This also seems somewhat surprising, and may be contrasted with the proviso relating to the sale of perishable goods just discussed, which permits the trustee to ignore the directions of the creditors or AiB in the circumstances specified but not the directions of the sheriff on the application of the commissioners. It appears, however, to be the result of the provisions. 12-11

Where the sequestration is one to which the EU insolvency proceedings regulation applies and the sequestration is main proceedings under the regulation, the trustee may wish to give an undertaking under art.36 of the regulation in order to prevent the opening of secondary proceedings in another Member State. In such a case, s.14A of the Bankruptcy (Scotland) Act 2016 sets out a number of requirements with which the trustee must comply. These are discussed further in Ch.25. 12-12

RECOVERY OF THE DEBTOR'S ESTATE

Recovery of estate generally

The trustee must, as soon as possible after their appointment, take possession of all of the estate which has vested in them¹⁷ and any document in the debtor's 12-13

¹³ Accountant in Bankruptcy, *Notes for Guidance for Trustees* 2016, para.4.1.1.

¹⁴ Bankruptcy (Scotland) Act 2016 s.109(2), (4).

¹⁵ Bankruptcy (Scotland) Act 2016 s.109(3), (9).

¹⁶ Bankruptcy (Scotland) Act 2016 s.109(3), (12).

¹⁷ Bankruptcy (Scotland) Act 2016 s.108(a)(i).

possession or control which relates to the debtor's assets, business or financial affairs.¹⁸ This is, however, subject to the provisions relating to the debtor's family home,¹⁹ discussed further at para.12–65 onwards, which effectively restrict the trustee's ability to take immediate possession of that home.

12–14 The trustee must make up and maintain an inventory and valuation of the estate²⁰ and forthwith send a copy of it to AiB.²¹

12–15 The trustee is also entitled to have access to, and to copy, documents relating to the debtor's assets, business or financial affairs which are in the hands of third parties to whom the documents have been sent by or on behalf of the debtor²² and may require delivery to them of title deeds and other documents of the debtor even where a lien is claimed over the documents.²³ The recovery of documents and other information generally is discussed in Ch.13.

Challenge of prior transactions

12–16 The trustee may challenge certain transactions carried out by the debtor prior to the sequestration with a view to recovering property disposed of or its value for distribution to the creditors through the mechanism of the sequestration. The types of transaction which may be challenged and the conditions which require to be satisfied for a successful challenge are discussed in Ch.14.

MANAGEMENT AND REALISATION OF THE DEBTOR'S ESTATE

Management of the estate generally

12–17 The trustee is given extensive powers to manage the debtor's estate pending its realisation and distribution to the creditors.

General powers of trustee

12–18 The trustee may do any of the following in so far as, and only in so far as, to do so would in the trustee's view be of financial benefit to the estate of the debtor and in the interests of creditors²⁴:

- (a) Carry on or close down any business of the debtor.²⁵ Business is defined widely as “the carrying on of any activity, whether for profit or not”.²⁶ Where an individual debtor is in effect self-employed, for example, is a self-employed joiner or plumber, the trustee may not be concerned with the debtor's business as such and may decide simply to allow the debtor to continue with their self-employment and seek a debtor contribution from any income thereby earned. In other cases, particularly if there are employees and/or the business is subject to statutory or other requirements in relation to licensing or other regulation, the trustee may have a more difficult decision to make as to how to deal with the business. In practice, the trustee may have little

¹⁸ Bankruptcy (Scotland) Act 2016 s.108(a)(ii).

¹⁹ Bankruptcy (Scotland) Act 2016 s.108(2).

²⁰ Bankruptcy (Scotland) Act 2016 s.108(1)(b).

²¹ Bankruptcy (Scotland) Act 2016 s.108(1)(c).

²² Bankruptcy (Scotland) Act 2016 s.108(3).

²³ Bankruptcy (Scotland) Act 2016 s.108(5).

²⁴ Bankruptcy (Scotland) Act 2016 s.109(5) and (12).

²⁵ Bankruptcy (Scotland) Act 2016 s.109(5)(a).

²⁶ Bankruptcy (Scotland) Act 2016 s.228(1).

alternative but to carry on the business at least for a short time because of the nature of the business, for example, in the case of a farming business where there are livestock, etc. Alternatively, the trustee may decide to carry on the business in order to preserve goodwill and enable the business to be sold as a going concern, which will usually realise more than selling the assets individually. They may also decide to carry on the business where the debtor has indicated an intention to seek recall of the award of sequestration which would enable the debtor to carry on the business after recall. Where the business is unprofitable, however, the trustee is likely to wish to close it down as soon as possible.

In making a decision as to how to deal with the debtor's business, the trustee will need to consider a variety of factors, including the extent to which it might be necessary to adopt existing contracts or enter into new ones if they decide to carry on the business.²⁷

Where there are employees, the trustee will need to be mindful of the fact that, as well as certain debts due to employees constituting preferred debts in the sequestration,²⁸ certain debts due to employees are guaranteed by the state and fall to be paid out of the National Insurance Fund where the estate of the employer is sequestrated.²⁹ The trustee may be required to provide information to the Secretary of State in relation to such claims.³⁰ In addition, certain employer and employee contributions to an occupational or personal pension scheme are guaranteed by the state and fall to be paid out of the National Insurance Fund where the estate of the employer is sequestrated³¹ and again the trustee may be required to provide certain information to the Secretary of State in relation to these claims.³² Where the Secretary of State has made a payment under any of the provisions referred to, they stand in the shoes of the employee for the purpose of claiming the relevant debt(s) in the sequestration and, if the payment is made in respect of a preferred debt, are entitled to rank as a preferred creditor.³³ The trustee will also need to be mindful of the statutory requirements to consult which apply where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less and the requirement to notify the Secretary of State of proposed redundancies where an employer proposes to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less.³⁴ These requirements will apply to the trustee, although it is unlikely that they

²⁷ See para.12–22 onwards.

²⁸ Preferred debts are discussed in Ch.16.

²⁹ See Employment Rights Act 1996 Pt XI, Ch.VI (redundancy payments) and Pt XII (other payments). These provisions do not apply to certain classes of employees: see Employment Rights Act 1996 Pt XIII. These provisions also apply where the debtor has granted a trust deed for creditors or entered into a composition contract or where the debtor has died and a judicial factor has been appointed under s.11A of the Judicial Factors (Scotland) Act 1889. Judicial factors are discussed in Ch.23.

³⁰ See Employment Rights Act 1996 ss.169 (redundancy payments) and 190 (other payments).

³¹ See Pension Schemes Act 1993 Pt VII, Ch.II. These provisions also apply where the debtor has granted a trust deed for creditors or entered into a composition contract or where the debtor has died and a judicial factor has been appointed under s.11A of the Judicial Factors (Scotland) Act 1889. Judicial factors are discussed in Ch.23.

³² See Pension Schemes Act 1993 s.125.

³³ See Employment Rights Act 1996 ss.167 (redundancy payments) and 189 (other payments) and Pension Schemes Act 1993 s.127 (contributions to pension schemes). See also Ch.16.

³⁴ See Trade Union and Labour Relations Consolidation Act 1992 Pt IV, Ch.II.

will apply in many cases in practice. Where they do apply, failure to comply with the consultation requirements may result in the making of a protective award³⁵ and failure to comply with the requirement to notify the Secretary of State is a criminal offence.³⁶ Strict compliance with the requirements is excused if there are special circumstances which make it not reasonably practicable for the employer to comply, although the employer is still required to take all such steps as are reasonably practicable in the circumstances,³⁷ but the sequestration of itself would not be regarded as amounting to special circumstances, although it may be where combined with other factors.³⁸ These provisions have caused difficulty in practice in cases involving insolvent employers, albeit generally in cases involving corporate insolvency rather than bankruptcy, but although this has been the subject of recent consultation, at the time of writing there are no proposals for change.³⁹ If the trustee intends to sell the whole or part(s) of the debtor's business as a going concern, they will also need to be mindful of the provisions of the Transfer of Undertakings (Protection of Employees) Regulations 2006.⁴⁰ The purpose of the regulations is to safeguard the rights of employees on a relevant transfer, which is a transfer of an undertaking, business or part of an undertaking or business to another person where there is a transfer of an economic entity which retains its identity or a change in service provision.⁴¹ Certain provisions of the regulations are disapplied where the transferor is subject to

“bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner”,⁴²

which would include sequestration. The trustee will still have to comply with the other requirements of the regulations where relevant, however, including the requirements to provide information and to inform and consult employees, although this may be difficult in practice.

³⁵ See Trade Union and Labour Relations Consolidation Act 1992 s.189.

³⁶ See Trade Union and Labour Relations Consolidation Act 1992 s.194.

³⁷ See Trade Union and Labour Relations Consolidation Act 1992 ss.188(7) (requirement to consult) and 193(7) (requirement to notify Secretary of State).

³⁸ See *Clarks of Hove Ltd v Bakers' Union* [1979] 1 All E.R. 152; [1978] 1 W.L.R. 1207, CA; *Association of Patternmakers and Allied Craftsmen v Kirvin Ltd*, 1978 13 I.T.R. 446; *Hamish Armour v Association of Scientific, Technical and Managerial Staffs* [1979] I.R.L.R. 24, EAT; *Union of Shop, Distributive and Allied Workers v Leancut Bacon Ltd* [1981] I.R.L.R. 295; *Angus Jowett & Co Ltd v National Union of Tailors and Garment Workers* [1985] I.C.R. 646; *GMB v Rankin and Harrison* [1992] I.R.L.R. 514; *Re Hartlebury Printers Ltd (in liquidation)* [1992] B.C.C. 428; *GMB v Clydesdale Group Plc* [1995] I.R.L.R. 527; *Smith and Moore v Cherry Lewis Ltd (In Receivership)* [2005] I.R.L.R. 86. The cases all relate to companies, but the principle is the same.

³⁹ See Insolvency Service, *Call for Evidence: Collective Redundancy Consultation for Employers facing Insolvency* (March 2015) and Insolvency Service, *Responses to Call for Evidence on Collective Redundancy Consultation for Employers facing Insolvency* (November 2015). For an earlier consultation, see also Department for Business Innovation and Skills, *Call for Evidence: Collective Redundancy Consultation Rules* (November 2011) and Department for Business Innovation and Skills, *Collective Redundancies: Consultation on changes to the rules* (June 2012).

⁴⁰ Transfer of Undertakings (Protection of Employees) Regulations 2006 (SI 2006/246).

⁴¹ Transfer of Undertakings (Protection of Employees) Regulations 2006 reg.3(1).

⁴² Transfer of Undertakings (Protection of Employees) Regulations 2006 reg.8(7).

Where the business is subject to statutory or other requirements in relation to licensing or other regulation, the trustee will require to consider the effect of the sequestration and what steps, if any, are required on their part to ensure that the relevant requirements are complied with if they intend to carry on the business, even for a short time. For example, certain private landlords are required to be registered as such under Pt 8 of the Antisocial Behaviour etc. (Scotland) Act 2004, but a trustee in sequestration is exempt from this requirement for a period of six months.⁴³ It is not possible to consider here every statutory regime which might be relevant, but some examples of those which might be encountered include the regime for regulating the sale of alcohol, licensed premises and other premises on which alcohol is sold under the Licensing (Scotland) Act 2005; the regime for regulating all types of gambling other than the National Lottery and spread betting under the Gambling Act 2005; the regime for the regulation of financial services under the Financial Services and Markets Act 2000; and the regime for the licensing and regulation of taxis and private hire cars, second-hand dealers, knife dealers, metal dealers, boat hire, street traders, market operators, public entertainment, indoor sports entertainment, late hours catering, window cleaners and sex shops under the Civic Government (Scotland) Act 1982.

- (b) Bring, defend or continue any legal proceedings relating to the debtor's estate.⁴⁴ With regard to existing proceedings, these may be sisted or continued in order to allow the trustee time to decide whether or not to enter the proceedings.⁴⁵ Where the trustee decides to bring proceedings in relation to a claim which is part of the estate, the debtor may not do so, but the debtor may have title to sue in certain circumstances.⁴⁶ The trustee will be personally liable where expenses are awarded against them but will normally have a right of relief against the estate unless they have not acted reasonably, prudently or in good faith.⁴⁷
- (c) Create a security over any part of the estate.⁴⁸ The most likely reason for the trustee wishing to create a security would be where they borrow money as discussed further below, but the provision is not limited to that situation.
- (d) Make payments or incur liabilities with a view to obtaining for the benefit of the creditors any property which may be obtained by virtue of a right, option or power which is part of the debtor's estate.⁴⁹ For example, if the debtor has an option to purchase shares, the trustee might wish to exercise that option and pay for the shares if they can then sell them at a profit for the benefit of the creditors.
- (e) Borrow money in so far as may be necessary to safeguard the debtor's estate.⁵⁰ Prior to the changes made by the Bankruptcy and

⁴³ See Antisocial Behaviour etc. (Scotland) Act 2004 s.83 as amended by the Private Landlord Registration (Modification) (Scotland) Order 2009 (SSI 2009/33).

⁴⁴ Bankruptcy (Scotland) Act 2016 s.109(5)(b).

⁴⁵ See, for example, *Unity Trust Bank Plc v Frost* unreported 27 April 2004 OH, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=7ef486a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

⁴⁶ See Ch.11.

⁴⁷ *Smith v Berry's Trustee (No.2)*, 1996 S.L.T. (Sh Ct) 80.

⁴⁸ Bankruptcy (Scotland) Act 2016 s.109(5)(c).

⁴⁹ Bankruptcy (Scotland) Act 2016 s.109(5)(d).

⁵⁰ Bankruptcy (Scotland) Act 2016 s.109(5)(e).

Diligence etc. (Scotland) Act 2007, there was no specific provision to this effect, although the power might have been regarded as implicit from the power to create a security since, as noted above, the commonest reason for the creation of a security would be where the trustee borrows money. It may be noted that the power is limited to borrowing *in so far as may be necessary to safeguard the debtor's estate*. This might include, for example, borrowing to carry on the debtor's business or complete contracts of the debtor. It is debatable, however, whether it would allow the trustee to borrow money in order to exercise a right, power or option of the debtor with a view to obtaining property for the benefit of the creditors in accordance with the provisions discussed in the preceding paragraph, since it may be questioned whether this would be regarded as something which was necessary to *safeguard* the estate. There does not appear, however, to be any reported case law on what constitutes safeguarding the estate in this context.

- (f) Effect or maintain insurance policies in respect of the business or property of the debtor.⁵¹ Prior to the changes made by the Bankruptcy and Diligence etc. (Scotland) Act 2007, there was no specific provision to this effect, although there was such a specific provision in the case of an interim trustee. Trustees did, however, routinely effect or maintain such insurance and an explicit provision was therefore added by the Bankruptcy and Diligence etc. (Scotland) Act 2007 to make clear that the trustee did have this power.

Redirection of mail and other communications

12–19 Redirection of the debtor's mail without lawful authority constitutes an unjustified interference with the debtor's rights under art.8 of the European Convention on Human Rights.⁵² If the trustee wishes the debtor's mail to be redirected, therefore, they will need to obtain either the debtor's consent or an order of the court.

12–20 In contrast to the position in England and Wales,⁵³ however, there is no longer any specific provision for the trustee to apply for an order for the redirection of the debtor's mail. The Scottish Law Commission recommended that the relevant provision in the Bankruptcy (Scotland) Act 1913⁵⁴ should not re-enacted on the basis that it was seldom used and it was doubtful whether it remained of material assistance to trustees given the use of other forms of communication.⁵⁵ It is thought, however, that if the debtor refuses to co-operate in consenting to redirection and signing the necessary form, the trustee could apply for an order under s.215 of the Bankruptcy (Scotland) Act 2016, discussed at para.12–46, requiring the debtor, whom failing the sheriff clerk, to sign the form. Even if the trustee has obtained the debtor's consent or an order of the sheriff, however, the trustee will not be entitled to access to any redirected correspondence which is subject to legal professional privilege.⁵⁶

⁵¹ Bankruptcy (Scotland) Act 2016 s.109(5)(f).

⁵² See *Foxley v UK* (2001) 31 E.H.R.R. 25.

⁵³ See Insolvency Act 1986 s.371.

⁵⁴ Bankruptcy (Scotland) Act 1913 s.187.

⁵⁵ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.10.7.

⁵⁶ See *Foxley v UK* (2001) 31 E.H.R.R. 25.

As was already recognised by the Scottish Law Commission in 1982, however, the redirection of mail is likely to give the trustee access to only part of the debtor's correspondence, much of which is now even more likely to be conducted in other forms such as email and other forms of communication. Access to email and other forms of communication raises the same issues as redirection of mail and would therefore require to be treated in the same way in terms of obtaining the debtor's consent or an order of the sheriff. 12-21

Contracts

The debtor may be a party to one or more contracts at the time of sequestration, particularly where the debtor is running a business, and the trustee will need to consider how to deal with these contracts. There may also be circumstances where the trustee wishes to enter into new contracts for the purposes of the sequestration. 12-22

Prior to the Bankruptcy (Scotland) Act 1985, the legislation did not expressly regulate the trustee's powers in relation to these matters. However, the Bankruptcy (Scotland) Act 1985 introduced specific provisions relating to the trustee's powers in relation to both pre-sequestration contracts and new contracts as well as special provisions relating to contracts for the supply of utilities. 12-23

Pre-sequestration contracts

The trustee may adopt any contract entered into by the debtor prior to the sequestration if they consider that its adoption would be beneficial to the estate, unless such adoption is precluded by the express or implied terms of the contract, or they may refuse to adopt it.⁵⁷ Adoption will be precluded, for example, where the contract involves *delectus personae*.⁵⁸ 12-24

The trustee must make a decision on whether to adopt a contract within a reasonable time, and if they delay unduly, they may be held to have left it too late.⁵⁹ What is reasonable will, however, depend on the circumstances of the case.⁶⁰ The Scottish Law Commission noted that the other party to a contract might be put in a difficult position as a result of the relative uncertainty over when the trustee's decision might be forthcoming, and it accordingly recommended the introduction of a provision whereby such a party would be entitled to require the trustee to make a decision within a specified time or such longer time as the court might allow.⁶¹ This was duly implemented by the Bankruptcy (Scotland) Act 1985.⁶² The current provisions are found in s.110 of the Bankruptcy (Scotland) Act 2016. In accordance with those provisions, where the trustee receives a request in writing from any party to a contract entered into by the debtor, they must either adopt or refuse to adopt the contract within 28 days of the receipt of the request.⁶³ The 28 day period may be extended by the sheriff on the application of Accountant in Bankruptcy (AiB) (if AiB is the 12-25

⁵⁷ Bankruptcy (Scotland) Act 2016 s.110(1).

⁵⁸ See *Anderson v Hamilton & Co* (1875) 2 R. 355.

⁵⁹ See *Anderson v Hamilton & Co* (1875) 2 R. 355; *Crown Estate Commissioners v Liquidator of Highland Engineering Ltd*, 1975 S.L.T. 58.

⁶⁰ See *Anderson v Hamilton & Co* (1875) 2 R. 355; *Crown Estate Commissioners v Liquidator of Highland Engineering Ltd*, 1975 S.L.T. 58.

⁶¹ See Scottish Law Commission, *Report of Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.10.26.

⁶² See Bankruptcy (Scotland) Act 1985 s.42(2), (3) as enacted.

⁶³ Bankruptcy (Scotland) Act 2016 s.110(3).

trustee) or by AiB on the application of the trustee (if the trustee is not AiB).⁶⁴ Where the application is made to AiB, AiB may refer the case to the sheriff for a direction before making a decision.⁶⁵ In such a case, the trustee may not apply for a review of AiB's decision,⁶⁶ but in any other case, the trustee may apply to AiB for a review of their decision within 14 days beginning with the day of the decision.⁶⁷ Where such an application is made, AiB may refer the case to the sheriff for a direction before undertaking the review.⁶⁸ On undertaking the review, AiB must without delay send a copy of the application to any interested party and advise them of the right to make representations within 21 days.⁶⁹ AiB must then: (i) take into account any such representations and confirm, amend or revoke the decision within 28 days beginning with the day on which the application is made⁷⁰; and (ii) notify their decision to the trustee and any interested party.⁷¹ If dissatisfied with AiB's decision on review, the trustee may appeal to the sheriff within 14 days beginning with the day on which AiB's decision is given.⁷² Curiously, and in contrast to the provision precluding the trustee from applying for a review of AiB's decision where the matter was previously referred to the sheriff, there does not appear to be anything to preclude the trustee appealing to the sheriff where AiB has referred the matter to the sheriff before undertaking the review. If the trustee does not reply in writing to the request within the 28 day period or any longer period which has been allowed, they are deemed to have refused to adopt the contract.⁷³

- 12–26** What constitutes adoption depends on the circumstances. The trustee may state their intention to adopt a contract expressly⁷⁴ or adoption may be implied from the actings of the trustee.⁷⁵ It has been said that the purpose of adopting a contract is not to be readily presumed and must be evidenced by some overt and unequivocal act or by receiving the benefit which is under the contract the consideration of the continuing liability.⁷⁶ Adoption of a lease may be inferred where the trustee bases a claim against the landlord on a clause in the lease⁷⁷

⁶⁴ Bankruptcy (Scotland) Act 2016 s.110(4). In the case of an application to the sheriff, the application must be in Form 7.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(1). In the case of an application to AiB, the application must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1)(f).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.110(8)(a). The application must be in Form 7.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(2)(f).

⁶⁶ Bankruptcy (Scotland) Act 2016 s.110(9).

⁶⁷ Bankruptcy (Scotland) Act 2016 s.110(5). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(o).

⁶⁸ Bankruptcy (Scotland) Act 2016 s.110(8)(b). The application must be in Form 7.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(2)(f).

⁶⁹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

⁷⁰ Bankruptcy (Scotland) Act 2016 s.110(6).

⁷¹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

⁷² Bankruptcy (Scotland) Act 2016 s.110(7). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(n).

⁷³ Bankruptcy (Scotland) Act 2016 s.110(10).

⁷⁴ See, for example, *Anderson v Hamilton & Co* (1875) 2 R. 355, although as already noted, in that case the adoption came too late.

⁷⁵ See *Crown Estate Commissioners v Liquidator of Highland Engineering Ltd*, 1975 S.L.T. 58.

⁷⁶ *Myles v Liquidators of City of Glasgow Bank* (1879) 6 R. 718; see also *Crown Estate Commissioners v Liquidator of Highland Engineering Ltd*, 1975 S.L.T. 58.

⁷⁷ *Craig's Trustee v Lord Malcolm* (1900) 2 F. 541.

or takes possession of the subjects let other than simply for the purpose of realisation of the estate⁷⁸ but will not be inferred where the trustee does no more than realise the estate.⁷⁹ Adoption of a contract will not be inferred only from suing on the contract.⁸⁰

The trustee is personally liable on pre-sequestration contracts adopted by them,⁸¹ although it is open to them to expressly exclude such liability by agreement. They will normally, however, be entitled to a right of relief against the estate. The Scottish Law Commission considered the issue of personal liability of trustees in relation to contracts adopted by them, but recommended no change in the law on the basis that it was undesirable for the other party to the contract to be bound, in the absence of agreement to the contrary, to the performance of obligations for which the trustee was not personally liable.⁸² The law therefore remains as stated. 12-27

Where a contract is not adopted, the other party to the contract may have a claim for damages for breach of contract in the sequestration⁸³ but cannot compel performance of the contract by the trustee by specific implement.⁸⁴ If the contract is terminated by the other party, however, they will generally have no claim for damages in the sequestration.⁸⁵ 12-28

New contracts

The trustee may enter into new contracts where they consider that to do so would be beneficial for the administration of the estate.⁸⁶ This might be appropriate, for example, where the trustee is running the debtor's business or where entering into new contracts is necessary to enable the trustee to complete any pre-sequestration contracts of the debtor which they have adopted. 12-29

The trustee is personally liable on new contracts entered into by them unless such liability is specifically excluded.⁸⁷ They will normally, however, be entitled to a right of relief against the estate. 12-30

Contracts for the supply of utilities, etc.

There are special provisions regarding contracts for the supply of utilities, etc. These had their genesis in the concerns of insolvency practitioners about the ability of suppliers of certain essential services such as gas, electricity and telecommunications to hold them to ransom, in effect, by making payment of any outstanding sums due by the debtor a condition of continuing supply. Although this particular issue was not considered by the Scottish Law Commission in its *Report of Bankruptcy and Related Aspects of Insolvency* 12-31

⁷⁸ *Sturrock v Robertson's Trustee*, 1913 S.C. 582.

⁷⁹ *McGavin v Sturrock's Trustee* (1891) 18 R. 576.

⁸⁰ *Sturrock v Robertson's Trustee*, 1913 S.C. 582.

⁸¹ See *Dundas v Morrison* (1857) 20 D. 225; *Crown Estate Commissioners v Liquidator of Highland Engineering Ltd*, 1975 S.L.T. 58.

⁸² See Scottish Law Commission, *Report of Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.10.23.

⁸³ See *Kirkland v Cadell* (1838) 16 S. 860; *Crown Estate Commissioners v Liquidator of Highland Engineering Ltd*, 1975 S.L.T. 58.

⁸⁴ See *Anderson v Hamilton & Co* (1875) 2 R. 355.

⁸⁵ See *Crown Estate Commissioners v Liquidator of Highland Engineering Ltd*, 1975 S.L.T. 58.

⁸⁶ Bankruptcy (Scotland) Act 2016 s.110(11).

⁸⁷ *Mackessack and Son v Molleson* (1886) 13 R. 445.

and Liquidation,⁸⁸ it was considered by the Cork Committee in England and Wales, which recommended that a liquidator and a trustee in bankruptcy should be treated as a new customer with a right to receive supplies who would be personally liable to pay for the new supply but would not be required to pay any outstanding sums due by the debtor.⁸⁹ Appropriate provisions were duly introduced in relation to corporate insolvency and bankruptcy in both England and Wales and Scotland, in the case of bankruptcy in Scotland in the form of s.70 of the Bankruptcy (Scotland) Act 1985 (now s.222 of the Bankruptcy (Scotland) Act 2016).

12–32 As enacted, the provisions applied to specified supplies of gas, electricity, water and telecommunications. Subsequent developments, however, including the deregulation of the utilities sector, the increasing importance of IT and an increasing emphasis on the rescue of businesses in financial difficulty meant that the existing provisions came to be regarded as no longer adequate. This led the UK Government to take powers in the Enterprise and Regulatory Reform Act 2013 to add to the existing list of supplies and also to give further protections to essential supplies for the purposes of business rescue⁹⁰ and, following a consultation on the implementation of these powers,⁹¹ to the enactment of the Insolvency (Protection of Essential Supplies) Order 2015.⁹² That order added to the list of supplies in relation to corporate insolvency in England and Wales and Scotland and bankruptcy in England and Wales, and also introduced further protections for essential supplies in certain cases of corporate insolvency in England and Wales and Scotland and bankruptcy in England and Wales. Corresponding provision was subsequently made for bankruptcy in Scotland by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017,⁹³ which added to the list of supplies in relation to bankruptcy and also introduced further protections for essential supplies in the case of protected trust deeds.⁹⁴ The relevant provisions of that order came into force on 1 October 2017.

12–33 Section 222 of the Bankruptcy (Scotland) Act 2016 now applies to the following supplies:

- (a) a supply of gas by a gas supplier within the meaning of Pt 1 of the Gas Act 1986⁹⁵;
- (b) a supply of gas by a person within para.1 of Sch.2A of the Gas Act 1986 (supply by landlords, etc.)⁹⁶;
- (c) a supply of electricity by an electricity supplier within the meaning of Pt 1 of the Electricity Act 1989⁹⁷;

⁸⁸ Scottish Law Commission, *Report of Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

⁸⁹ See Insolvency Law and Practice: Report of the Review Committee (the Cork Report) (Cmnd 8558, 1982), paras 1451–1466.

⁹⁰ See Enterprise and Regulatory Reform Act 2013 ss.92–95.

⁹¹ See the Insolvency Service, *Continuity of supply of essential services to insolvent businesses* (July 2014), which also sets out the whole background.

⁹² Insolvency (Protection of Essential Supplies) Order 2015 (SI 2015/989).

⁹³ Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 (SSI 2017/209).

⁹⁴ See Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 arts 6 and 7. Trust deeds are discussed further in Ch.22.

⁹⁵ Bankruptcy (Scotland) Act 2016 s.222(4)(a).

⁹⁶ Bankruptcy (Scotland) Act 2016 s.222(4)(aa) as added by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

⁹⁷ Bankruptcy (Scotland) Act 2016 s.222(4)(b).

- (d) a supply of electricity by a class of person within Class A (small suppliers) or Class B (resale) of Sch.4 of the Electricity (Class Exemptions from the Requirement for a License) Order 2001⁹⁸;
- (e) a supply of water by Scottish Water⁹⁹;
- (f) a supply of water by a water services provider within the meaning of the Water Services etc. (Scotland) Act 2005¹⁰⁰;
- (g) a supply of water by a person who has an interest in the premises to which the supply is given¹⁰¹;
- (h) a supply of communications services by a provider of a public electronic communications service¹⁰²;
- (i) a supply of communications services by a person who carries on a business which includes giving such supplies¹⁰³; and
- (j) a supply of specified goods or services by a person who carries on a business which includes giving such supplies where the supply is for the purpose of enabling or facilitating anything to be done by electronic means.¹⁰⁴ The specified goods or services are point of sale terminals; computer hardware and software; information, advice and technical assistance in connection with the use of information technology; data storage and processing; and website hosting.¹⁰⁵

For the purposes of these provisions, communications services do not include electronic communications services to the extent that they are used to broadcast or otherwise transmit programme services within the meaning of the Communications Act 2003.¹⁰⁶ **12-34**

Where the trustee or any interim trustee requests or concurs in a request for the giving of any of the specified supplies for the purpose of carrying on the debtor's business, the supplier may make it a condition of the giving of the supply that the trustee or interim trustee personally guarantees payment of any charges for the supply, but may not make it a condition (or do anything which has the effect of making it a condition) of the giving of the supply that any outstanding charges in respect of a supply given to the debtor prior to the sequestration are paid.¹⁰⁷ **12-35**

Section 222 also applies where the debtor has granted a trust deed for creditors¹⁰⁸ and, as noted above, the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 introduced further protections for essential supplies in the case of protected trust deeds. These are discussed in Ch.22. **12-36**

⁹⁸ Bankruptcy (Scotland) Act 2016 s.222(4)(ba) as added by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

⁹⁹ Bankruptcy (Scotland) Act 2016 s.222(4)(c).

¹⁰⁰ Bankruptcy (Scotland) Act 2016 s.222(4)(ca) as added by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

¹⁰¹ Bankruptcy (Scotland) Act 2016 s.222(4)(cb) as added by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

¹⁰² Bankruptcy (Scotland) Act 2016 s.222(4)(d).

¹⁰³ Bankruptcy (Scotland) Act 2016 s.222(4)(e) as added by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

¹⁰⁴ Bankruptcy (Scotland) Act 2016 s.222(4)(f) as added by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

¹⁰⁵ Bankruptcy (Scotland) Act 2016 s.222(5A) as added by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

¹⁰⁶ Bankruptcy (Scotland) Act 2016 s.222(5).

¹⁰⁷ See Bankruptcy (Scotland) Act 2016 s.222(1), (2), (3) and (6).

¹⁰⁸ See Bankruptcy (Scotland) Act 2016 s.222(1).

Liability for council tax and other charges

- 12–37** Council tax is payable in respect of any dwelling which is not an exempt dwelling.¹⁰⁹ A dwelling is an exempt dwelling where it is not the sole or main residence of any person, an interest in the dwelling is vested in a trustee in sequestration and the trustee is the only qualifying person.¹¹⁰ A qualifying person is defined as any person who would be liable (whether solely or jointly and severally with another person or persons) for council tax in respect of the dwelling concerned but for the provisions of the Council Tax (Exempt Dwellings) (Scotland) Order 1997.¹¹¹ The effect of these provisions is that provided these conditions are met, the trustee will have no liability for council tax.
- 12–38** The trustee may, however, be liable for other charges which arise in respect of the property, depending on the relevant provision. This is discussed further above and in Ch.11.

Abandonment and compromise of claims

- 12–39** The trustee has power, but if there are commissioners, only with the consent of the commissioners, the creditors or the sheriff, to refer to arbitration any claim or question of whatever nature arising in the course of the sequestration or to make a compromise with regard to any claim of whatever nature made against or on behalf of the sequestrated estate.¹¹² It has been held under the corresponding provisions in earlier legislation that a compromise made by the trustee without the necessary consent was invalid.¹¹³ It may be necessary to consider, however, whether the trustee's act is a compromise for this purpose.¹¹⁴
- 12–40** Where a claim or question is referred to arbitration under these provisions, AiB may vary any time limit for carrying out a procedure under the Bankruptcy (Scotland) Act 2016 to allow for the arbitration.¹¹⁵
- 12–41** Any resultant decree arbitral or compromise is binding on the creditors and the debtor.¹¹⁶ The trustee must insert a copy of the decree arbitral, or record the compromise, in the sederunt book.¹¹⁷
- 12–42** Despite the potential benefits,¹¹⁸ it would appear that the power to refer a claim or question to arbitration is not much used in practice. The decision as to whether to refer to arbitration in any particular case must be taken individually, however: it cannot be decided in advance that all disputes will be referred to

¹⁰⁹ Local Government Finance Act 1992 s.72(1).

¹¹⁰ See Council Tax (Exempt Dwellings) (Scotland) Order 1997 art.3 and Sch. para.21. These provisions refer to the Bankruptcy (Scotland) Act 1985, but see Bankruptcy (Scotland) Act 2016 s.235(4) which provides for such references to be construed as if it were a reference to the corresponding provision of the Bankruptcy (Scotland) Act 2016.

¹¹¹ Council Tax (Exempt Dwellings) (Scotland) Order 1997 art.2.

¹¹² Bankruptcy (Scotland) Act 2016 s.216(1). See also Ch.16.

¹¹³ See *Dennistoun v Dennistoun's Trustees* (1863) 1 Maph. 869; *Graham's Trustee v Morton*, 1945 S.L.T. 48.

¹¹⁴ See *Hamilton's Executor v Bank of Scotland*, 1913 S.C. 743, where it was held that the trustee's act was an ordinary act of management which did not require consent. See also *Taylor, Noter*, 1993 S.L.T. 375 where the extent of the trustee's powers under these provisions were considered in the context of an application by the liquidator of two companies, the affairs of which were intermixed with those of the sequestrated debtor.

¹¹⁵ Bankruptcy (Scotland) Act 2016 s.216(2).

¹¹⁶ Bankruptcy (Scotland) Act 2016 s.216(3).

¹¹⁷ See Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.35.

¹¹⁸ As recognised in *Cook v Mowbray* (1829) 7 S. 778 per Lord Justice Clerk Boyle at 779.

arbitration.¹¹⁹ It may be noted that although the provisions refer only to arbitration, other forms of dispute resolution such as mediation are increasingly common and may also be utilised by trustees for resolving disputes in the sequestration. It is suggested that consideration might usefully be given to expanding these provisions to encompass other forms of dispute resolution accordingly.

Money received by trustee

All money received by the trustee in the exercise of their functions must be deposited in an interest-bearing account in the name of the debtor's estate in an appropriate bank or institution, subject to the provisos that: (i) where AiB is the trustee, it may alternatively be deposited in an interest-bearing account in the name of the Scottish Ministers in an appropriate bank or institution; and (ii) the trustee may retain in their hands a sum not exceeding £200 or such other sum as may be prescribed.¹²⁰ At the time of writing, no other sum has been prescribed. 12-43

Debtor's account of current state of affairs

Where the debtor is undischarged or subject to a debtor contribution order, the trustee must obtain from the debtor at six monthly intervals a written report in the prescribed form of the debtor's current state of affairs.¹²¹ 12-44

The report should allow the trustee to become aware of any changes in the debtor's circumstances even if the debtor has not complied with the requirement to notify the trustee of any substantial change in their financial circumstances.¹²² The trustee may then consider whether any steps need to be taken, such as applying for variation of a debtor contribution order.¹²³ 12-45

Co-operation of debtor

The debtor, even after discharge, must take "every practicable step" and, in particular, execute any document, which may be necessary to enable the trustee to carry out their functions under the Bankruptcy (Scotland) Act 2016.¹²⁴ 12-46

If the debtor fails to do so, the trustee may apply to the sheriff for an appropriate order. Where the debtor has failed to execute any document when requested to do so, the trustee may apply to the sheriff for an order authorising the sheriff clerk to execute the document, and the execution of the document by the sheriff clerk has the same force and effect as if the document had been executed by the debtor.¹²⁵ Where the debtor has failed to co-operate in any other respect, the trustee may apply to the sheriff for an order requiring the debtor to do so.¹²⁶ These provisions are discussed further in Ch.17. 12-47

¹¹⁹ *Cook v Mowbray* (1829) 7 S. 778.

¹²⁰ Bankruptcy (Scotland) Act 2016 s.111. "Appropriate bank or institution" is defined in the Bankruptcy (Scotland) Act 2016 s.228(1).

¹²¹ Bankruptcy (Scotland) Act 2016 s.116. The prescribed form is Form 23 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.

¹²² Bankruptcy (Scotland) Act 2016 s.87(1). Failure to do so is an offence: Bankruptcy (Scotland) Act 2016 s.87(2), (3).

¹²³ Debtor contribution orders are discussed in Ch.11.

¹²⁴ Bankruptcy (Scotland) Act 2016 ss.215(1) and 145(3)(g).

¹²⁵ Bankruptcy (Scotland) Act 2016 s.215(2)(a) and (3).

¹²⁶ Bankruptcy (Scotland) Act 2016 s.215(2)(b).

Sale of estate

- 12-48** The trustee may sell any of the debtor's estate by public sale or private bargain¹²⁷ and may sell debts owing to the estate with or without recourse against the estate.¹²⁸
- 12-49** The trustee may sell (or otherwise deal with) the debtor's heritable property notwithstanding any prior inhibition.¹²⁹ As originally enacted, this provision was subject to the proviso that any effect of the inhibition on ranking was reserved, but the proviso was repealed by the Bankruptcy and Diligence etc. (Scotland) Act 2007.¹³⁰ It has been argued that the provision applies only to a pre-sequestration inhibition against the debtor, rather than an inhibition against the trustee themselves or against the debtor's predecessor in title (in which case the trustee would take the heritage subject to the inhibition as a result of the principle of *tantum et tale*).¹³¹ Where the trustee has not completed title to heritable property, the disposition granted by the trustee will deduce title using the trustee's appointment as link in title. Where the trustee is selling a house as defined by the Housing (Scotland) Act 2006, they will require to comply with the requirements of that Act in relation to home reports.¹³²
- 12-50** Where a community interest has been registered in land under Pt 2 of the Land Reform (Scotland) Act 2003, the community right to buy will be activated on a proposed sale or other transfer of the land by the trustee and the trustee will require to follow the procedures set out in that Act.
- 12-51** Special rules apply in any case where heritable property is subject to a heritable security and/or is a family home as defined by the Bankruptcy (Scotland) Act 2016. These are discussed further below.
- 12-52** It is specifically provided that the validity of the title of any purchaser is not challengeable on the ground that there has been a failure to comply with any requirement of s.109 of the Bankruptcy (Scotland) Act 2016.¹³³

Heritable property subject to security

- 12-53** Where heritable property is subject to heritable security held by a creditor or creditors whose rights are preferable to those of the trustee, special rules apply.¹³⁴ Where the property is a family home as defined by the Bankruptcy (Scotland) Act 2016, the special rules relating to the family home discussed in the following section will also apply.
- 12-54** Although older forms of heritable security may still be found occasionally, in practice any heritable security encountered by the trustee is likely to be a standard security. Standard securities were introduced by the Conveyancing and Feudal Reform (Scotland) Act 1970, which introduced two forms of standard security¹³⁵ and a set of standard conditions which, except in so far as

¹²⁷ Bankruptcy (Scotland) Act 2016 s.109(6).

¹²⁸ Bankruptcy (Scotland) Act 2016 s.109(8).

¹²⁹ Bankruptcy (Scotland) Act 2016 s.78(5).

¹³⁰ Bankruptcy and Diligence etc. (Scotland) Act 2007 s.226(2), Sch.6, Pt I.

¹³¹ See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 9-41-9-42.

¹³² See Housing (Scotland) Act 2006 Pt 3.

¹³³ Bankruptcy (Scotland) Act 2016 s.109(10).

¹³⁴ Bankruptcy (Scotland) Act 2016 s.109(7).

¹³⁵ See Conveyancing and Feudal Reform (Scotland) Act 1970 s.9 and Sch.2.

competently varied, apply to all standard securities.¹³⁶ It also set out the procedures for the enforcement of a standard security by the creditor in the event of default. A detailed discussion of these is beyond the scope of this book, but a brief outline may be useful as background to the discussion which follows.¹³⁷

The Conveyancing and Feudal Reform (Scotland) Act 1970 provides for three enforcement procedures: calling up¹³⁸; notice of default¹³⁹; and application to the court.¹⁴⁰ **12-55**

Calling up

Where the creditor wishes to enforce the security as a result of failure to pay any sums secured by the standard security, the calling up procedure must be used.¹⁴¹ Subject to what is said below where the property is residential property, failure to comply with a calling up notice served under this procedure constitutes a default in terms of standard condition 9(1)(a) and entitles the creditor to exercise any of the rights available to them under the standard security, which includes the right of sale.¹⁴² **12-56**

Notice of default

Where there has been a failure to comply with any other, non-monetary, requirement of the standard security, this constitutes a default in terms of standard condition 9(1)(b).¹⁴³ Where the default is remediable, the creditor may (but does not have to) serve a notice of default.¹⁴⁴ Objection may be taken to a notice of default.¹⁴⁵ Subject to what is said below where the property is residential property, failure to comply with a notice of default to which objection has not successfully been taken entitles the creditor to exercise certain of the remedies available to them under the standard security, which includes the right of sale.¹⁴⁶ **12-57**

¹³⁶ See Conveyancing and Feudal Reform (Scotland) Act 1970 s.11 and Sch.3.

¹³⁷ For a succinct discussion of the law which includes the most recent statutory changes and developments in the case law, see Stewart, AEA and Sinclair, EFF, *Conveyancing Practice in Scotland*, 7th edn (London: Bloomsbury Professional, 2016), Ch.10.

¹³⁸ See Conveyancing and Feudal Reform (Scotland) Act 1970 ss.19–20.

¹³⁹ See Conveyancing and Feudal Reform (Scotland) Act 1970 ss.21–23.

¹⁴⁰ See Conveyancing and Feudal Reform (Scotland) Act 1970 s.24.

¹⁴¹ *Royal Bank of Scotland Plc v Wilson* [2010] UKSC 50.

¹⁴² See Conveyancing and Feudal Reform (Scotland) Act 1970 s.20(1), (2) and standard condition 10. Where a calling up notice is served after the debtor's sequestration and the trustee has not completed title to the property, with the result that the debtor is the person last infest, the calling up notice should be served on the trustee as well as the debtor; if the trustee has completed title, the calling up notice will be served on the trustee only as the person last infest: see Conveyancing and Feudal Reform (Scotland) Act 1970 s.19(3). In *Clydesdale Bank Plc v McCaw* unreported 24 May 2002 IH, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=479f87a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017], the calling up notice had been served on the debtor but not the trustee. The court held that while s.19(3) was imperative in its terms, it was clear that its purpose was to give the trustee an opportunity to intervene in the calling up process, and in this case, the trustee had been given that opportunity and declined. The court was therefore prepared to proceed without requiring any further formal notice to be served on the trustee.

¹⁴³ For the authority that the requirement in this case has to be a non-monetary requirement, see *Royal Bank of Scotland Plc v Wilson* [2010] UKSC 50.

¹⁴⁴ Conveyancing and Feudal Reform (Scotland) Act 1970 s.21(1), (2). Where a notice of default is served after the debtor's sequestration and the trustee has not completed title to the property, the notice should be served on the trustee as well as the debtor; if the trustee has completed title, the notice will be served on the trustee as the registered owner: see Conveyancing and Feudal Reform (Scotland) Act 1970 s.19(3) as applied by s.21(2).

¹⁴⁵ Conveyancing and Feudal Reform (Scotland) Act 1970 s.22.

¹⁴⁶ See Conveyancing and Feudal Reform (Scotland) Act 1970 s.23(1), (2) and standard condition 10.

Application to court

- 12-58** Where there has been a default in terms of standard condition 9(1)(b) (referred to above), or where the proprietor of the security subjects has become insolvent, which constitutes a default in terms of standard condition 9(1)(c), then subject to what is said below where the property is residential property, the creditor may apply to the court for warrant to exercise any of the remedies which they would be entitled to exercise on a failure to comply with a calling up notice.¹⁴⁷ As noted above, this includes the right of sale. For this purpose, a proprietor is insolvent if they are apparently insolvent, have executed a trust deed for creditors, have made a composition contract or arrangement with creditors, have died and a judicial factor has been appointed under s.11A of the Judicial Factors (Scotland) Act 1889 or their estate falls to be administered in accordance with an order under s.421 of the Insolvency Act 1986 (insolvent estates of deceased persons).¹⁴⁸
- 12-59** Where the security subjects are used to any extent for residential purposes, certain additional requirements designed to enhance the protections available to debtors and certain other persons apply as a result of changes made by the Mortgage Rights (Scotland) Act 2001 and the Home Owner and Debtor Protection (Scotland) Act 2010. In particular, there are additional requirements to serve notices in connection with the procedures for calling up and notices of default; the creditor may not exercise certain of the rights which would otherwise be available to them on a failure to comply with a calling up notice or notice of default, including the right of sale, without making an application to the court under the provisions discussed above, unless there has been a voluntary surrender of the property which satisfies specified conditions; the creditor must comply with certain pre-action requirements before making an application to the court under the provisions discussed above; there are additional requirements to serve notices in connection with such an application; the court must take into account specified matters in considering such an application; there is provision for the making of applications by entitled residents in such an application; there is special provision for the recall of a decree granted in such an application; and there is provision for lay representation in such an application.
- 12-60** It will be obvious from what has been said above that a heritable creditor may have the right to sell the property as well as the trustee. The Bankruptcy (Scotland) Act 2016 therefore regulates the respective rights of the heritable creditor and the trustee in this respect. Where the trustee wishes to sell, they may do so only with the concurrence of every heritable creditor unless they obtain a sufficiently high price to discharge every security.¹⁴⁹ Difficulties may arise in practice if the trustee does not obtain the necessary concurrence and the sale price is not sufficient to discharge every security, since if as a result any security remains undischarged, the trustee is likely to be in breach of their obligations to the purchaser. The trustee should therefore consider carefully whether the necessary concurrence should be obtained even if they believe that a sufficiently high price for the property will be obtained and they should not conclude missives for the sale of the property at a lesser price without the necessary concurrence.

¹⁴⁷ See Conveyancing and Feudal Reform (Scotland) Act 1970 s.24(1).

¹⁴⁸ See standard condition 9(2). The condition refers to notour bankruptcy which, however, now falls to be read as a reference to apparent insolvency: see Bankruptcy (Scotland) Act 2016 s.234(7). It is thought that an arrangement with creditors would include a debt payment programme under the Debt Arrangement and Attachment (Scotland) Act 2002.

¹⁴⁹ Bankruptcy (Scotland) Act 2016 s.109(7)(a).

Where the trustee decides to sell and intimates their intention to the heritable creditor(s), this precludes the heritable creditor(s) from taking steps to enforce the security.¹⁵⁰ Similarly, where a heritable creditor decides to sell and intimates their intention to commence the procedure for the sale of the property to the trustee, this precludes the trustee from commencing the procedure for sale of the property.¹⁵¹ In both cases, however, this is subject to the proviso that where the party who has given such intimation has delayed unduly in proceeding with the sale, the sheriff may authorise the other, in the case of a heritable creditor, to enforce the security, and in the case of the trustee, to sell the property.¹⁵² There may be some debate about exactly what is meant by the creditor “taking steps to enforce their security” or the creditor or the trustee “commencing the procedure for the sale of the property”. Another possibility is that the trustee may sell property on behalf of the heritable creditor. In such a case, the trustee should ensure that there is a proper agreement in place with regard to payment of the expenses of realisation and any fee payable to the trustee. AiB’s *Notes for Guidance of Trustees* provides detailed guidance for trustees in this respect. 12–61

As noted at para.12–11, it is specifically provided that the trustee must comply with these provisions only in so far as it would, in their view, be of financial benefit to the estate and in the interests of creditors to do so¹⁵³ and the validity of the title of any purchaser is not challengeable on the ground that there has been a failure to comply with any requirement of s.109 of the Bankruptcy (Scotland) Act 2016.¹⁵⁴ 12–62

The provisions appear to assume that either the trustee or the heritable creditor will wish to sell, but in practice, neither may wish to do so. This would commonly be the case where there is negative equity in the property. If the debtor continues to make payments to the secured creditor, however, or the value of the property rises due to fluctuations in the property market, the position with regard to equity may change and the creditor or trustee may once again consider the possibility of a sale. Where there is any delay in sale, the trustee will require to be mindful of the provisions for re-vesting of the debtor’s right or interest in a family home¹⁵⁵ and of the need to renew the prohibitory effect which flows from the recording in the register of inhibitions of the first warrant to cite in the sequestration petition or the determination of the debtor application for sequestration,¹⁵⁶ otherwise the trustee’s rights to the property may be lost by re-vesting in the debtor (in the case of a family home) or a dealing of the debtor with the property which is not challengeable by the trustee.¹⁵⁷ 12–63

Where they are in a position to do so, the heritable creditor may choose to exercise any of their other rights under the standard security rather than the right to sell. This may cause practical difficulties for the trustee, for example, if the heritable creditor has entered into possession and the trustee wishes to sell, but if the heritable creditor’s rights are preferable to that of the trustee, the heritable creditor will be entitled to exercise their rights even if this does cause 12–64

¹⁵⁰ Bankruptcy (Scotland) Act 2016 s.109(7)(b)(i).

¹⁵¹ Bankruptcy (Scotland) Act 2016 s.109(7)(b)(ii).

¹⁵² Bankruptcy (Scotland) Act 2016 s.109(7)(c).

¹⁵³ Bankruptcy (Scotland) Act 2016 s.109(12)(a).

¹⁵⁴ Bankruptcy (Scotland) Act 2016 s.109(10).

¹⁵⁵ See Ch.11.

¹⁵⁶ See Ch.8.

¹⁵⁷ Post-sequestration dealings of the debtor are discussed in Ch.11.

difficulty for the trustee. It is thought, however, that such a situation would arise only rarely in practice.

The family home

- 12–65** Section 113 of the Bankruptcy (Scotland) Act 2016 imposes certain limitations on the trustee's powers in relation to any right or interest in the debtor's family home which has vested in them. Where there is a heritable security or heritable securities over the family home, the special rules relating to heritable property subject to heritable security discussed in the preceding section will also apply.
- 12–66** As noted previously, the provisions restricting the trustee's powers to deal with the debtor's right or interest in a family home were introduced to prevent undue hardship to the debtor's family, although the debtor may also be protected by its provisions incidentally.¹⁵⁸ As originally enacted,¹⁵⁹ they applied only in sequestration, but they were extended to trust deeds by the Home Owner and Debtor Protection (Scotland) Act 2010.¹⁶⁰
- 12–67** As discussed in Ch.11, the debtor's heritable property, including any right or interest in a family home, vests in the trustee by virtue of their appointment.¹⁶¹ The effect of this is that the debtor has no right or title to remain in possession or occupation of the property except in so far as permitted to do so by the trustee, and the trustee may bring proceedings for recovery of possession of heritable property against the debtor and anyone else who has no independent right to remain in occupation or possession of the property.¹⁶² It would appear that it is not necessary for the trustee to be infeft in the property in order to bring such proceedings, since it is the requirements for ejection rather than removing which require to be satisfied in such a case.¹⁶³ The trustee may not, however, bring such proceedings against a co-proprietor of the debtor or any other person with an independent right to remain in occupation or possession of the property,¹⁶⁴ which may make the taking of action against the debtor pointless.¹⁶⁵
- 12–68** The realisation of heritable property which is the debtor's home and any related action such as the taking of proceedings for repossession of the property does not per se constitute a breach of human rights,¹⁶⁶ but where the property is a family home as defined by s.113 special rules apply. A family home is defined as any property in which the debtor, either alone or in common with any other person, had a right or interest at the relevant date and which was occupied as a residence at that date by:

- (a) the debtor and the debtor's spouse or civil partner (with or without a child of the family);

¹⁵⁸ See Ch.11.

¹⁵⁹ See Bankruptcy (Scotland) Act 1985 s.40 as enacted.

¹⁶⁰ See Home Owner and Debtor Protection (Scotland) Act 2010 s.11(a). Trust deeds are discussed in detail in Ch.22.

¹⁶¹ See para.11–32.

¹⁶² *White v Stevenson*, 1956 S.C. 84; see also *Cowie's Trustee v Cowie* [2008] CSIH 30; *Nolan v Patullo* (2017) SAC (Civ) 25.

¹⁶³ *Cowie's Trustee v Cowie* [2008] CSIH 30.

¹⁶⁴ *Cowie's Trustee v Cowie* [2008] CSIH 30; *Stewart's Trustee v Stewart* unreported 13 September 2011 Peterhead Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/A117_10.html [Accessed 18 September 2017].

¹⁶⁵ See *Stewart's Trustee v Stewart* unreported 13 September 2011 Peterhead Sheriff Court.

¹⁶⁶ See *Russell v van Overwaele* unreported 2 March 2005 Dumbarton Sheriff Court; *Nolan v Patullo* (2017) SAC (Civ) 25.

- (b) the debtor's spouse or civil partner (with or without a child of the family);
- (c) the debtor's former spouse or former civil partner (with or without a child of the family); or
- (d) the debtor with a child of the family.¹⁶⁷

The relevant date is the day immediately preceding the date of sequestration or the day immediately preceding the date the trust deed was granted as the case may be¹⁶⁸ and a "child of the family" is defined as including any child or grandchild of the debtor or their spouse or civil partner or former spouse or former civil partner and any person who has been brought up or accepted by either the debtor or their spouse or civil partner or former spouse or former civil partner as if they were a child of the debtor, spouse, civil partner or former spouse or civil partner, irrespective of the age of the child, grandchild or person.¹⁶⁹ 12-69

It is clear that more than one property may fall within the definition.¹⁷⁰ It has been said that it is less obvious whether one person could be regarded as occupying more than one property as a residence at the relevant date, but that this would be very unlikely: while the benefit of falling within the definition would not be lost by a short-term absence such as being on business or on holiday or even as a result of detention in custody, if the reason for absence from one property was the occupation of a different property as a residence, it was unlikely that it could be argued that the first property was also being occupied as a residence.¹⁷¹ The question of whether a particular property is occupied as a residence by the relevant person or persons at the relevant date is a question of fact and the onus of establishing this is on the person averring that it is.¹⁷² 12-70

Where the property is a family home as defined, before selling or disposing of the debtor's right or interest in the home, the trustee must obtain the relevant consent or, where they are unable to do so, the authority of the sheriff.¹⁷³ The relevant consent is: 12-71

- (a) in a case where the family home is occupied by the debtor's spouse, civil partner, former spouse or former civil partner, the consent of the spouse, civil partner, former spouse or former civil partner as the case may be, whether or not the home is also occupied by the debtor; and
- (b) in a case where the family home is not occupied by the debtor's spouse, civil partner, former spouse or former civil partner but is occupied by the debtor and a child of the family, the consent of the debtor.¹⁷⁴

An issue might arise as to whose is the relevant consent at any particular time. For example, if the family home is occupied by the debtor, the debtor's spouse and the debtor's daughter on the day immediately preceding the date of sequestration, at that date, the relevant consent would be that of the debtor's spouse. If, however, the debtor's spouse no longer occupies the family home at the time the trustee wishes to sell, but the family home is occupied by the 12-72

¹⁶⁷ Bankruptcy (Scotland) Act 2016 s.113(7).

¹⁶⁸ Bankruptcy (Scotland) Act 2016 s.113(7).

¹⁶⁹ Bankruptcy (Scotland) Act 2016 s.113(7).

¹⁷⁰ *Fortune's Trustee v Cooper Watson Ltd* [2017] CSOH 74.

¹⁷¹ *Fortune's Trustee v Cooper Watson Ltd* [2017] CSOH 74.

¹⁷² *Fortune's Trustee v Cooper Watson Ltd* [2017] CSOH 74.

¹⁷³ Bankruptcy (Scotland) Act 2016 s.113(1).

¹⁷⁴ Bankruptcy (Scotland) Act 2016 s.113(7).

debtor and the debtor's daughter, at that date, the relevant consent would be the debtor's. The Bankruptcy (Scotland) Act 2016 does not provide a clear answer to this question. It would seem to make practical sense, however, for the relevant consent to be the one relevant at the time at which it is sought by the trustee.

- 12-73** There is no prescribed form for obtaining the relevant consent, but the trustee will wish to ensure that it is clearly evidenced in case of later dispute. It may therefore be sensible to ensure that there is a written record.
- 12-74** In the absence of relevant consent, an application to the sheriff may take the form of an application for authority to sell or dispose of the debtor's right or interest in the home, an action of division and sale or an action for the purpose of obtaining vacant possession as appropriate in the circumstances.¹⁷⁵ An action of division and sale will be appropriate where the debtor is a co-owner of the home and is the most common form of action in the reported cases. Actions for the purpose of obtaining vacant possession are discussed further at para.12-85.
- 12-75** Before commencing proceedings, the trustee must give notice of the proceedings in the prescribed form to the local authority in whose area the family home is situated.¹⁷⁶ This provision was added by the Home Owner and Debtor Protection (Scotland) Act 2010 to mirror similar requirements imposed on landlords raising proceedings for repossession and secured creditors taking steps to enforce a security with a view to ensuring that local authorities are alerted to potential homelessness.¹⁷⁷
- 12-76** The sheriff must have regard to all the circumstances of the case, including the needs and financial resources of the debtor's spouse, civil partner, former spouse or former civil partner, the needs and financial resources of any child of the family, the interests of the creditors, and the length of time the home was used as a residence both before and after the sequestration by any of the persons mentioned (other than the creditors).¹⁷⁸
- 12-77** Where the proceedings are defended, the defender's pleadings should contain detailed averments of the material facts to which the sheriff is to be asked to have regard and failure to satisfy this requirement may lead to the defences being held to be irrelevant for lack of specification.¹⁷⁹ Where the proceedings are not defended, the sheriff is not obliged to carry out investigations at their own hand: they can only make an informed decision on issues which are placed

¹⁷⁵ Bankruptcy (Scotland) Act 2016 s.113(1)(b), (2), (3). In the case of an application for authority to sell or dispose of the debtor's right or interest in the family home, the application should be in Form 7.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(1). It is thought that an action of division and sale should proceed as an ordinary action (see *Simpson's Trustee v Simpson*, 1993 S.C.L.R. 867), while an action for the purpose of obtaining vacant possession should proceed as a summary cause.

¹⁷⁶ Bankruptcy (Scotland) Act 2016 s.113(4), (5). The prescribed form is Form 22 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

¹⁷⁷ See Explanatory Notes to the Home Owner and Debtor Protection (Scotland) Act 2010 s.11.

¹⁷⁸ Bankruptcy (Scotland) Act 2016 s.113(2), (3).

¹⁷⁹ See *MacLeod's Trustee v MacLeod*, 2007 Hous. L. R. 34; *Accountant in Bankruptcy v Clough* unreported 8 September 2010 Edinburgh Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=f6ef86a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

before them.¹⁸⁰ The trustee should, however, ensure that there are sufficient appropriate averments to justify the granting of the orders sought.

The sheriff may refuse the application, postpone the granting of the application for such period, not exceeding three years, as they consider reasonable in the circumstances or grant the application subject to such conditions as they think fit.¹⁸¹ As enacted, the provisions allowed the sheriff to postpone the granting of the application for a period not exceeding 12 months, but this was extended to three years by the Home Owner and Debtor Protection (Scotland) Act 2010, which was enacted in response to fears of increased homelessness following the financial crisis of 2008. 12-78

The sheriff has a wide discretion in deciding how to deal with an application, including as to the nature of any conditions which they may attach to the grant of the application.¹⁸² There is now a considerable body of case law on the provisions, but each case will ultimately turn on its own facts. 12-79

The factors mentioned in s.113 are not exhaustive. Relevant factors other than those mentioned in the section which have been taken into account in the case law include: the public interest, which encompasses the distribution of the debtor's estate and completion of sequestration without undue delay, the recoupment of fees paid from the public purse and ensuring that the debtor does not benefit from recalcitrant behaviour¹⁸³; the fact that the debtor's right or interest in the family home is the only or only substantial asset in the sequestration¹⁸⁴; the interests of the creditors in having the sequestration concluded without undue delay¹⁸⁵; the health of the debtor and the debtor's spouse¹⁸⁶; the attitude of the secured lender¹⁸⁷; the trustee's failure to properly inform the debtor's non-entitled spouse of their statutory rights to petition for recall of the sequestration¹⁸⁸; and the circumstances of the bankruptcy including the conduct and lack of co-operation of the debtor.¹⁸⁹ It has been held that the refusal to give relevant consent¹⁹⁰ and the debtor's expressed intention to seek recall (at least where no application for recall had been made and there was no explanation for the delay in doing so)¹⁹¹ are not relevant factors for the sheriff to consider. 12-80

¹⁸⁰ See *Simpson's Trustee v Simpson*, 1993 S.C.L.R. 867.

¹⁸¹ Bankruptcy (Scotland) Act 2016 s.113(2). In the case of an action of division and sale or an action for the purpose of obtaining vacant possession, the references to the granting of the application are to be construed as references to the granting of decree in the relevant action: Bankruptcy (Scotland) Act 2016 s.113(6).

¹⁸² *McMahon's Trustee v McMahon*, 1997 S.C.L.R. 439.

¹⁸³ *Salmon's Trustee v Salmon*, 1989 S.L.T. (Sh Ct) 49; also *Gourlay's Trustee, Petitioner*, 1995 S.L.T. (Sh Ct) 7; *Ritchie v Burns*, 2001 S.L.T. 1383; *Accountant in Bankruptcy v Clough* unreported 8 September 2010 Edinburgh Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=f6ef86a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

¹⁸⁴ *Salmon's Trustee v Salmon*, 1989 S.L.T. (Sh Ct) 49; *Gourlay's Trustee, Petitioner*, 1995 S.L.T. (Sh Ct) 7; *Carrie's Trustee v Carrie*, 2011 W.L. 4084999.

¹⁸⁵ *Salmon's Trustee v Salmon*, 1989 S.L.T. (Sh Ct) 49.

¹⁸⁶ *Gourlay's Trustee, Petitioner*, 1995 S.L.T. (Sh Ct) 7.

¹⁸⁷ *Wren's Trustee v Wren*, 2009 W.L. 1403429.

¹⁸⁸ See *J v S*, 2014 SCPer 13.

¹⁸⁹ See *Salmon's Trustee v Salmon*, 1989 S.L.T. (Sh Ct) 49 (although it was held that it was not relevant in that particular case); *Ritchie v Burns*, 2001 S.L.T. 1383 (where the debtor's behaviour was taken into account).

¹⁹⁰ *Gourlay's Trustee, Petitioner*, 1995 S.L.T. (Sh Ct) 7.

¹⁹¹ *Accountant in Bankruptcy v Clough* unreported 8 September 2010 Edinburgh Sheriff Court, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=f6ef86a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017].

- 12-81** In an unusual case, decree of division and sale was granted notwithstanding that it was averred that title to the property remained in the joint names of the debtor and her husband at the time of the sequestration as a result of the failure of the husband's solicitor to give effect to his instructions to transfer the property into his sole name following his purchase of the debtor's interest in the property from the debtor's trustee in a protected trust deed.¹⁹²
- 12-82** It has been held that decree may be granted in an action for division and sale subject to a condition as to the unequal division of the proceeds of sale.¹⁹³
- 12-83** There are a number of examples of cases where decree has been granted but its enforcement postponed.¹⁹⁴
- 12-84** An application will generally only be refused outright only where there are exceptional circumstances. In *Gourlay's Trustee v Gourlay*,¹⁹⁵ an application for authority to sell was refused even though there were strong factors in favour of granting it (including the fact that granting it would be in the interests of creditors because the sale would result in a fairly significant dividend being paid in the near future, the lapse of time since the sequestration and the public interest) because of considerations relating to the health of the debtor and the debtor's spouse, the sheriff describing the case as "wholly exceptional" and the circumstances as "very extreme indeed". Decree has also been refused in an action of division and sale where it was held that there would be no material benefit to the creditors, which had to be set against the trauma and stress which would be occasioned to the debtor and the co-proprietor.¹⁹⁶
- 12-85** It has been held that if an application for the authority of the sheriff to sell or dispose of the debtor's right or interest in the family home has been made and granted without any conditions providing for the continued occupation of the property, it is not necessary to have regard to all the circumstances of the case, including the specified factors, in any subsequent action for the purpose of obtaining vacant possession brought to enable the sale or disposal to proceed where a possessor of the property has declined to relinquish possession: it is only necessary to have regard to all the circumstances of the case, including the specified factors, in an action for the purpose of obtaining vacant possession which is brought where the trustee does not intend to sell or dispose of the debtor's right or interest in the family home but nevertheless wishes to obtain vacant possession, for example, in order to let the property.¹⁹⁷ In that case, the issue arose because the action for the purpose of obtaining vacant possession was raised in order to allow the sale which had previously been authorised to

¹⁹² *Carrie's Trustee v Carrie*, 2011 W.L. 4084999.

¹⁹³ See *McMahon's Trustee v McMahon*, 1997 S.C.L.R. 439; *MacLeod's Trustee v MacLeod*, 2007 Hous. L. R. 34 (where it was a matter of agreement that there would require to be a proof on the defender's averments that the sale proceeds of the property should not be divided equally). See also *Hunt's Trustee v Hunt*, 1995 S.C.L.R. 973 (where the sheriff assessed the (lack of) benefit to the creditors if the trustee's application was granted on the basis of an unequal division of the proceeds of sale and thereafter refused the trustee's application).

¹⁹⁴ See *Salmon's Trustee v Salmon*, 1989 S.L.T. (Sh Ct) 49 (where decree was granted with a condition that the sale of the property was not to take place before a specified date, extract of the decree being superseded until that date); *Ritchie v Burns*, 2001 S.L.T. 1383 (decree granted subject to a postponement of six months).

¹⁹⁵ *Gourlay's Trustee v Gourlay*, 1995 S.L.T. (Sh Ct) 7.

¹⁹⁶ *Hunt's Trustee v Hunt*, 1995 S.C.L.R. 973.

¹⁹⁷ *Cowie's Trustee v Cowie* [2008] CSIH 30.

be achieved, but subsequent to, and separately from, the original application for authority to sell. In practice, an order for vacant possession may be sought in the application for authority to sell, but with no order being moved for unless and until it becomes necessary if the person in possession of the property declines to relinquish possession, although it may be questioned whether this is procedurally correct. It is thought that a standalone action for obtaining vacant possession where the trustee does not intend to sell or dispose of the debtor's right or interest in the family home as contemplated by the court in that case would be unusual.

It has been held that the remedy of division and sale is not a breach of a co-proprietor's rights under art.1 of Protocol 1 to the European Convention on Human Rights.¹⁹⁸ **12-86**

As a result of the restrictions imposed by s.113, in practice the trustee will generally explore the possibility of a sale of the debtor's right or interest in the family home to a co-proprietor (if applicable) or family member before considering a sale on the open market. The possibility of resort to any relevant scheme such as the Scottish Government mortgage to rent scheme which exists at the time of writing may also be explored, as indeed may the possibility of remortgaging in the normal way: as discussed in Ch.11 an agreement for the debtor effectively to buy back their right or interest in the family home is contemplated as one of the possible steps for preventing the revesting of that interest in the debtor. **12-87**

It should be noted that s.113 applies only to a sale or disposal by the trustee. It does not apply to a sale by a heritable creditor even if the property falls within the definition of a family home. Where a sale on the open market is contemplated and the trustee anticipates that court proceedings will be necessary if they seek to sell themselves, they might regard a sale by the heritable creditor as preferable, and historically a heritable creditor might have been amenable to a suggestion by the trustee that the heritable creditor should sell. However, the changes to the law relating to the enforcement of securities over residential property as a result of the Mortgage Rights (Scotland) Act 2001 and the Home Owner and Debtor Protection (Scotland) Act 2010 referred to above mean that a sale by a heritable creditor may no longer be regarded as the easier option, and indeed a heritable creditor may regard a sale by the trustee as preferable.¹⁹⁹ **12-88**

APPLICATION FOR DIRECTIONS BY TRUSTEE

The Bankruptcy (Scotland) Act 1993 introduced a provision allowing the trustee to apply to the sheriff for directions in relation to any particular matter arising in the sequestration.²⁰⁰ In keeping with the underlying policy of the Bankruptcy and Debt Advice (Scotland) Act 2014 that certain functions should be removed from the court, however, while such an application may still made **12-89**

¹⁹⁸ *MacLeod's Trustee v MacLeod's*, 2007 Hous. L. R. 34. It was also held in that case that the defender's averments in relation to a breach of art.8 were lacking in specification.

¹⁹⁹ See further para. 12-53 onwards in relation to the respective rights of the trustee and the heritable creditor.

²⁰⁰ Bankruptcy (Scotland) Act 1985 s.3(6) inserted by Bankruptcy (Scotland) Act 1993 s.11, Sch.1, para.1.

to the sheriff where the trustee is AiB,²⁰¹ it is now provided that in the case of a trustee other than AiB, such an application is to be made to AiB.²⁰²

12–90 In the case of an application for directions to the sheriff by AiB as trustee, the sheriff must make an order for intimation to any person who appears to the sheriff to have an interest in it and an order specifying how the application is to be determined.²⁰³ Where the application is unopposed, the sheriff will normally dispose of it in chambers without the appearance of the parties unless they determine otherwise²⁰⁴ and in such a case, the sheriff clerk must intimate the order to the parties.²⁰⁵ Where the sheriff requires to hear parties on the application, a hearing will be fixed and intimated to the parties.²⁰⁶

12–91 In the case of an application for directions to AiB by a trustee other than AiB, before giving a direction AiB may refer the matter to the sheriff by making an application for a direction in relation to the matter²⁰⁷ and AiB must either give a direction or refer the matter to the sheriff within the period of 28 days beginning with the day on which the application is made.²⁰⁸ The trustee may apply for a review of any direction given by AiB.²⁰⁹ Such an application must be made within 14 days beginning with the day on which notice of the direction is given to the trustee but may not be made by an interim trustee or in relation to a matter on which AiB applied to the sheriff for a direction before giving the direction.²¹⁰ Where such an application is made, AiB must without delay send a copy of the application to the debtor, the creditors or any other person having an interests and advise them of the right to make representations within 21 days beginning with the day on which the application is made.²¹¹ AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke the direction within 28 days beginning with the day on which the application is made²¹²; and (ii) notify their decision to the trustee, the debtor, the creditors and any other person having an interest.²¹³ If dissatisfied with AiB's decision on review, the trustee may appeal to the sheriff.²¹⁴ The appeal must be made within 14 days beginning with the day on which AiB's decision is given.²¹⁵

²⁰¹ See Bankruptcy (Scotland) Act 2016 s.50(6). The application must be in Form 7.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(2)(a).

²⁰² Bankruptcy (Scotland) Act 2016 s.52(1), (2). Such an application must be made in Form 2 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.10(1).

²⁰³ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(1).

²⁰⁴ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(3)(a).

²⁰⁵ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(4).

²⁰⁶ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(3)(b).

²⁰⁷ Bankruptcy (Scotland) Act 2016 s.52(3). The application must be in Form 7.1-B in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(2)(b). The application will be dealt with in the same way as an application for directions to the sheriff by AiB as trustee: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(3), (4) described above.

²⁰⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.10(2).

²⁰⁹ Bankruptcy (Scotland) Act 2016 s.52(4). The application must be made in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(d).

²¹⁰ Bankruptcy (Scotland) Act 2016 s.52(5).

²¹¹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

²¹² Bankruptcy (Scotland) Act 2016 s.52(6).

²¹³ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

²¹⁴ Bankruptcy (Scotland) Act 2016 s.52(7). Such an appeal may be on a matter of fact, a point of law or the merits: Bankruptcy (Scotland) Act 2016 s.214(1), (2)(c).

²¹⁵ Bankruptcy (Scotland) Act 2016 s.52(7).

In *McNaught, Noter*,²¹⁶ it was noted that the words of the provision for seeking directions, then s.3(6) of the Bankruptcy (Act) 1985, are couched in expansive terms, the only substantial qualification being that there must be a matter arising in the sequestration. Although in some cases the application for directions is now made to AiB rather than the sheriff, in essence the provisions for seeking directions remain the same and it is therefore suggested that the same principle continues to apply. Having considered the history of the provision and the corresponding provision for directions in liquidations, the sheriff went on to say:

“In my opinion, s.3(6) requires to be read in the context of the 1985 Act as a whole. To some extent the right to seek directions from the court is the counterpart to being an officer of court. There may be many and varied circumstances in which a trustee may require directions from the court in the discharge of the functions imposed upon him by the 1985 Act. Subject to the following observations, I would not be inclined to qualify or limit the expansive words contained within s.3(6). One possible limitation is as follows. The 1985 Act contains within it specific provisions dealing with certain categories of dispute. For example s.31(6) allows a person who claims that the estate claimed by the trustee should not vest in the trustee to make an application to the sheriff to determine that such an estate should be excluded from the estate held by the trustee. S.49(6) sets out a procedure for a dissatisfied creditor to object to the acceptance or rejection of any claim. I find it difficult to envisage circumstances in which a petition for directions would be appropriate in cases where the 1985 Act already prescribes a statutory procedure for resolving such issues [but] . . . I do not say that there are no circumstances in which, with the consent of all interested parties, the petition for directions could not do so . . .”

He went on to give directions in that case on the basis that it was appropriate for him to give directions as to how the trustee should deal with the position in which he found himself as a result of the circumstances giving rise to the application and that the proposed course of action on which the trustee sought directions was an appropriate act of administration for the trustee to take. It has been held that it may be appropriate in some circumstances for a trustee to seek directions prior to adjudicating on a claim.²¹⁷

APPLICATION TO SHERIFF IN RELATION TO TRUSTEE'S ADMINISTRATION

Where the debtor, a creditor or any other person having an interest is dissatisfied with any act, omission or decision of the trustee, they may apply to the sheriff, who may confirm, revoke or modify the relevant decision, confirm or annul the relevant act, give the trustee directions or make such other order as they think fit.²¹⁸ Any such dissatisfaction is properly dealt with by an application under these provisions rather than being raised in the context of other proceedings.²¹⁹ For this purpose, a creditor need not necessarily be a person who has submitted a claim in the sequestration, but the applicant must

²¹⁶ *McNaught, Noter*, 2009 W.L. 3398632.

²¹⁷ See *Burton, Noter* [2010] CSOH 174, a liquidation case.

²¹⁸ Bankruptcy (Scotland) Act 2016 s.50(7), (8). The application must be in Form 7.1-A in Sch. 1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(1).

²¹⁹ *Russell v van Overwaele* unreported 2 March 2005 Dumbarton Sheriff Court.

demonstrate sufficient interest to make the application and whether or not they can do so will depend on the circumstances of the case.²²⁰ In *Parkes, Applicant*,²²¹ in determining an application under the corresponding provisions of the Bankruptcy (Scotland) Act 1985, the sheriff applied the test in *Re Edennote Ltd*,²²² a decision of the Court of Appeal on the corresponding provision applicable in liquidations in England and Wales to the effect that, fraud and bad faith apart, the court would only interfere with the act of a liquidator if he had done something so utterly unreasonable and absurd that no reasonable man would have done it. The sheriff noted that the test is a high one and that a court should not lightly interfere with the functions of the trustee, and declined to give the trustee directions in the circumstances of the case on the basis that the trustee's decision not to proceed with the realisation of the sequestrated estate pending the outcome of an action of reduction of the sequestration was not so utterly unreasonable and absurd that no reasonable person would have taken it. The sheriff also considered that in applying the test, there was no distinction to be drawn between directions relating to the detail of the day to day administration of the sequestration and a general direction such as the one sought in the instant case to proceed with the sequestration where the trustee was inactive. Where the act, omission or decision complained of is that of AiB, the act, omission or decision must be an act, omission or decision of AiB qua trustee and not in any other capacity.²²³

DEFECTS IN PROCEDURE

- 12–95** The procedure involved in all aspects of sequestration is complex. It is therefore almost inevitable that on occasion matters will be overlooked, time limits will not be complied with and mistakes will be made.
- 12–96** Prior to the Bankruptcy (Scotland) Act 1985, there was no special provision for dealing with such situations. The only option was recourse to the *nobile officium* of the Court of Session and the Scottish Law Commission accordingly recommended the introduction of specific powers for the sheriff to cure what might loosely be described as defects in procedure.²²⁴ The Bankruptcy (Scotland) Act 1985 duly introduced appropriate provisions.²²⁵
- 12–97** Prior to the changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014, all applications under these provisions fell to be made to the sheriff, with provision for a remit to the Court of Session in certain circumstances. However, the Scottish Government in its *Consultation on Bankruptcy Law Reform* in 2012 proposed to move the responsibility for making various decisions from the sheriff to AiB and sought views on various possible options in this regard.²²⁶ The majority of respondents were in favour of moving the

²²⁰ See *Mitchell, Appellant* 27 September 2010 Edinburgh Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/SQ538_07.html [Accessed 18 September 2017].

²²¹ *Parkes, Applicant* 12 May 2006 Edinburgh Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/s71_04.html [Accessed 18 September 2017].

²²² *Re Edennote Ltd* [1996] 2 B.C.L.C. 389.

²²³ See *Mitchell, Appellant* 27 September 2010 Edinburgh Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/SQ538_07.html [Accessed 18 September 2017].

²²⁴ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 7.41–7.47.

²²⁵ See Bankruptcy (Scotland) Act 1985 s.63 as enacted.

²²⁶ See Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.14.11 onwards.

making of decisions which could be characterised as mainly administrative, but not the making of all decisions, to AiB.²²⁷ The Scottish Government subsequently indicated its intention to make provision to move the making of decisions which could be characterised as mainly administrative to AiB.²²⁸ The Bankruptcy and Debt (Scotland) Act 2014 duly amended the Bankruptcy (Scotland) Act 1985 to make provision for certain decisions in relation to defects in procedure to be made by AiB while other decisions in relation to defects in procedure remained a matter for the sheriff.²²⁹

The current provisions are found in ss.211–213 of the Bankruptcy (Scotland) Act 2016: s.211 makes provision for applications to the sheriff, while ss.212–213 make provision for the making of decisions by AiB, including provision for review and appeal. Care should be taken to ensure that any application which is to be made under these provisions is made to the correct person. **12–98**

The following sections set out the requirements of the current provisions generally, while examples of cases where the provisions or their predecessors have been invoked are generally discussed in the context of the provisions in relation to which they have been invoked. **12–99**

Power of sheriff to cure defects in procedure

An application may be made to the sheriff by any person having an interest.²³⁰ **12–100**

Where there has been a failure to comply with a requirement of either the Bankruptcy (Scotland) Act 2016 itself or any regulations thereunder, the sheriff may make an order waiving the failure and, so far as practicable, restoring any person prejudiced by the failure to the position they would have been in but for the failure,²³¹ and where for any reason anything required or authorised to be done in or in connection with the sequestration process cannot be done, the sheriff may make such order as may be necessary to enable the thing to be done.²³² However, the sheriff may only make an order waiving a failure to comply with a specified requirement where the failure relates to a document to be lodged with the sheriff, a document issued by the sheriff, or a time limit specified in relation to proceedings before the sheriff or a document relating to those proceedings.²³³ **12–101**

The sheriff has a discretion as to whether to make an order and in what form. It is specifically provided that in making an order, the sheriff may impose such conditions, including conditions as to expenses, as they think fit, and may authorise or dispense with the performance of any act in the sequestration process; appoint as trustee in the sequestration AiB or any other person who **12–102**

²²⁷ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of The Summary of Responses* (August 2012), Pt 10.

²²⁸ See Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (November 2012).

²²⁹ See Bankruptcy (Scotland) Act 1985 s.63 as amended by the Bankruptcy and Debt Advice (Scotland) Act 2014 and ss.63A–63C as introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014.

²³⁰ Bankruptcy (Scotland) Act 2016 s.211(1). The application must be in Form 7.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(1). For the procedure to be followed in relation to such an application, see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4.

²³¹ Bankruptcy (Scotland) Act 2016 s.211(1)(a).

²³² Bankruptcy (Scotland) Act 2016 s.211(1)(b).

²³³ Bankruptcy (Scotland) Act 2016 s.211(2).

would be eligible to be elected as trustee (whether or not in place of an existing trustee); and extend or waive a time limit specified in or under the Bankruptcy (Scotland) Act 2016.²³⁴

- 12-103** Where the sheriff or the Court of Session considers that a remit to the Court of Session is desirable because of the importance or complexity of the matters raised in the application,²³⁵ such a remit: (i) may be made by the sheriff at any time, either *ex proprio motu* or on the application of any person having an interest²³⁶; and (ii) must be made if the Court of Session so directs on an application by a person having an interest.²³⁷

Power of AiB to cure defects in procedure

- 12-104** AiB may make an order correcting a clerical or incidental error in a document required by or under the Bankruptcy (Scotland) Act 2016 or waiving a failure to comply with a time limit specified by or under that Act and for which no provision is made by or under that Act.²³⁸
- 12-105** An order may be made on the application of any person having an interest or by AiB *ex proprio motu*.²³⁹ Where there is an application, the applicant must notify all interested parties²⁴⁰; where AiB proposes to make an order *ex proprio motu*, AiB must notify all interested parties.²⁴¹ In either case, the notice must inform the recipient that they have a right to make representations to AiB in relation to the application or proposed order (as the case may be) within 14 days beginning with the day on which the notice is given²⁴² and AiB must take any such representations into account before making an order.²⁴³
- 12-106** AiB has a discretion as to whether to make an order and in what form. It is specifically provided that an order may, so far as practicable, restore any person prejudiced by the relevant error or failure to the position they would have been in but for the error or failure and may impose such conditions, including conditions as to expenses, as AiB thinks fit.²⁴⁴ If an order is made which affects a matter recorded in the register of inhibitions, AiB must without delay send a certified copy of the order to the keeper of the register for recording in the register.²⁴⁵ AiB must notify all interested parties of their decision to make or refuse to make an order.²⁴⁶
- 12-107** An interested person may apply to AiB for a review of a decision to make or refuse to make an order within 14 days beginning with the day of the decision.²⁴⁷

²³⁴ Bankruptcy (Scotland) Act 2016 s.211(3).

²³⁵ Bankruptcy (Scotland) Act 2016 s.211(4).

²³⁶ Bankruptcy (Scotland) Act 2016 s.211(5)(a).

²³⁷ Bankruptcy (Scotland) Act 2016 s.211(5)(b).

²³⁸ Bankruptcy (Scotland) Act 2016 s.212(1).

²³⁹ Bankruptcy (Scotland) Act 2016 s.212(2). An application must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1)(h).

²⁴⁰ Bankruptcy (Scotland) Act 2016 s.212(3).

²⁴¹ Bankruptcy (Scotland) Act 2016 s.212(4).

²⁴² Bankruptcy (Scotland) Act 2016 s.212(5).

²⁴³ Bankruptcy (Scotland) Act 2016 s.212(6).

²⁴⁴ Bankruptcy (Scotland) Act 2016 s.212(7).

²⁴⁵ Bankruptcy (Scotland) Act 2016 s.212(8).

²⁴⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.18.

²⁴⁷ Bankruptcy (Scotland) Act 2016 s.213(1), (2). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(v).

Where such an application is made, AiB must without delay send a copy of the application to any interested person and advise that person of the right to make representations within 21 days beginning with the day on which the application is made.²⁴⁸ AiB must then: (i) take into account any such representations which are made within that period and confirm, amend or revoke the decision within 28 days beginning with the day on which the application is made²⁴⁹; and (ii) notify their decision to the debtor and any interested person.²⁵⁰ An interested person may appeal to the sheriff against AiB's decision within 14 days beginning with the day of the decision.²⁵¹ The decision of the sheriff is final.²⁵²

THE SEDERUNT BOOK

As noted previously,²⁵³ one of the trustee's functions is to maintain a sederunt book during their term of office for the purpose of providing an accurate record of the sequestration process.²⁵⁴ The form in which the sederunt book must be kept is not specified in the legislation, but it would appear that it may be kept in electronic form.²⁵⁵ **12-108**

The trustee must insert in the sederunt book the items listed in Sch.5 of the Bankruptcy (Scotland) Act 2016.²⁵⁶ The list may be modified by regulations.²⁵⁷ **12-109**

The trustee is not, however, bound to insert in the sederunt book a document of a confidential nature,²⁵⁸ and is not bound to exhibit any such document in their possession to any person other than a commissioner or AiB.²⁵⁹ An example of such a document would be a counsel's opinion obtained by the trustee. **12-110**

Any entry in the sederunt book is sufficient evidence of the facts stated therein except where the entry is founded on by the trustee in their own interest.²⁶⁰ **12-111**

The trustee must make the sederunt book available for inspection at all reasonable hours by any interested party.²⁶¹ Conditions and limitations on this requirement may be imposed by regulations where AiB is the trustee (or is otherwise the holder of the sederunt book),²⁶² but at the time of writing, no such regulations have been made. **12-112**

²⁴⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

²⁴⁹ Bankruptcy (Scotland) Act 2016 s.213(3).

²⁵⁰ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

²⁵¹ Bankruptcy (Scotland) Act 2016 s.213(4). Such an appeal may be on a matter of fact, a point of law or on the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(u).

²⁵² Bankruptcy (Scotland) Act 2016 s.213(5).

²⁵³ See Ch.10.

²⁵⁴ Bankruptcy (Scotland) Act 2016 s.50(1)(c). This is a separate requirement from the trustee's other obligations in relation to the retention of records, which are discussed further in Ch.4.

²⁵⁵ See para.12-113.

²⁵⁶ Bankruptcy (Scotland) Act 2016 s.210(3). Reference is made throughout this book to the requirement to insert items in the sederunt book where relevant.

²⁵⁷ Bankruptcy (Scotland) Act 2016 s.210(4). At the time of writing, one such modification has been made by the Insolvency (Regulation) (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/210).

²⁵⁸ Bankruptcy (Scotland) Act 2016 s.210(6).

²⁵⁹ Bankruptcy (Scotland) Act 2016 s.210(7).

²⁶⁰ Bankruptcy (Scotland) Act 2016 s.210(5).

²⁶¹ Bankruptcy (Scotland) Act 2016 s.210(1).

²⁶² Bankruptcy (Scotland) Act 2016 s.210(2).

- 12–113** When the administration of the sequestration is complete, a trustee other than AiB must send to AiB, inter alia, an electronic version of the sederunt book in such format as AiB may from time to time direct.²⁶³ Before doing so, the trustee should check carefully that all of the items which should be entered in the sederunt book have been so entered.²⁶⁴ It was formerly a requirement, albeit somewhat oddly contained in the Court of Session Rules, that AiB should hold the sederunt book for a period of at least six months from the date it was received from the trustee and make it available for public inspection during office hours,²⁶⁵ but the relevant provision was repealed by the Bankruptcy and Diligence etc. (Scotland) Act 2007 following the consolidation of almost all proceedings relating to sequestration in the sheriff court and was not re-enacted. It remains the AiB's policy, however, to make the sederunt book available for viewing for six months, after which it will be destroyed.²⁶⁶

²⁶³ See Bankruptcy (Scotland) Act 2016 s.148(1)(b)(i) and (2).

²⁶⁴ This advice also appears in Accountant in Bankruptcy, *Notes for Guidance for Trustees* (2016), para.2.25.2.

²⁶⁵ See Act of Sederunt (Rules of the Court of Session 1994) r.72.5.

²⁶⁶ See Accountant in Bankruptcy, *Notes for Guidance for Trustees* (2016), para.2.25.3.

CHAPTER 13

RECOVERY OF DOCUMENTS AND INFORMATION

INTRODUCTION

The efficient administration of sequestration proceedings depends greatly on relevant documents and information being available to the trustee, who will need detailed information about the debtor's assets, liabilities, financial affairs and, where relevant, business affairs. Such information is necessary to ensure that the debtor's estate can be identified, ingathered, managed and realised properly and efficiently; that any prior transactions which are potentially challengeable are identified and, where appropriate, challenged; that the reasons for the debtor's insolvency can be ascertained and the conduct of the debtor investigated; and that the assets are distributed properly according to the statutory scheme. **13-01**

This chapter deals with the provisions for the recovery of documents and information, including the examination of persons. **13-02**

RECOVERY OF DOCUMENTS

Provision is made for the recovery of documents by an interim trustee and a trustee. The term "document" is not defined, but it is thought that in the light of modern usage, it would include a document in electronic form. Access to documents in electronic form may, however, be controlled by a password, which has the potential to cause problems in practice. There is, unfortunately, no specific provision in the legislation for such a case, but the extent to which the current statutory provisions might be used to overcome such problems is discussed further below. **13-03**

Interim trustee

An interim trustee may require the debtor to deliver to them, inter alia, any documents relating to the debtor's business or financial affairs belonging to or in the possession of the debtor or under their control.¹ They may then place them in safe custody.² **13-04**

If necessary, an interim trustee may apply to the sheriff for a warrant authorising them to enter the debtor's residence or business premises and search for and take possession of, inter alia, any such documents, if need be by opening shut and lockfast places, and the sheriff may grant such a warrant on cause shown.³ **13-05**

¹ Bankruptcy (Scotland) Act 2016 s.39(2)(a)(ii).

² Bankruptcy (Scotland) Act 2016 s.39(2)(b).

³ Bankruptcy (Scotland) Act 2016 s.39(4)(a).

- 13-06** The debtor is guilty of an offence if they fail without reasonable excuse to comply with a requirement to deliver the relevant documents to the interim trustee *or* if they obstruct the interim trustee acting in pursuance of a warrant granted by the sheriff.⁴
- 13-07** An interim trustee may also apply to the sheriff for any other order to safeguard the debtor's estate, and the sheriff may grant such order as they think appropriate.⁵ It has been suggested that this provision might be used to obtain a warrant to search premises other than the debtor's residence or business premises.⁶ Failure to comply with any such order is not made a criminal offence, but it would amount to a contempt of court.
- 13-08** It is a moot point whether a requirement to deliver documents to the interim trustee would be regarded as complied with if documents in electronic form to which access was controlled by a password were given to the trustee but without the password. In such a case, an application to the sheriff for an order requiring the debtor to disclose the password or to provide the documents in a form which did not require it might be considered if it could be argued that this was necessary to safeguard the debtor's estate.

Trustee

- 13-09** A trustee must, as soon as may be after their appointment, take possession of *inter alia* any documents in the debtor's possession or control which relate to the debtor's assets or business or financial affairs.⁷ In contrast to an interim trustee, a trustee is not given specific power to apply for a warrant authorising them to enter the debtor's residence or business premises and search for and take possession of, *inter alia*, documents, but the debtor is required to co-operate with the trustee and, if they fail to do so, the trustee may apply to the sheriff for an order requiring them to do so.⁸ The debtor is guilty of an offence if they fail to comply with such an order.⁹ It is suggested that where any relevant documents are in electronic form to which access is controlled by a password, such an order could include an order requiring the debtor to disclose the password or to provide the documents in a form which did not require it.
- 13-10** The trustee is also entitled to access and copy documents relating to the debtor's assets or business or financial affairs sent by or on behalf of the debtor to a third party and in the hands of that third party.¹⁰ If a person obstructs the trustee in exercising or attempting to exercise this power, the trustee may apply to the sheriff for an order for that person to cease to so obstruct them.¹¹ Failure to comply with such an order would amount to a contempt of court. As already noted, the debtor is required to co-operate with the trustee and, if they fail to do so, may be ordered to do so by the sheriff¹²: where appropriate, therefore, the trustee may require the debtor to assist them in retrieving documents in the hands of third parties, including where necessary ensuring access to any documents in electronic form to which access is protected by a password.

⁴ See Bankruptcy (Scotland) Act 2016 s.40(1).

⁵ Bankruptcy (Scotland) Act 2016 s.39(4)(b).

⁶ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 7.43, 7.44.

⁷ Bankruptcy (Scotland) Act 2016 s.108(1)(a)(ii).

⁸ Bankruptcy (Scotland) Act 2016 s.215(1), (2)(b).

⁹ Bankruptcy (Scotland) Act 2016 s.215(4).

¹⁰ Bankruptcy (Scotland) Act 2016 s.108(3).

¹¹ Bankruptcy (Scotland) Act 2016 s.108(4).

¹² Bankruptcy (Scotland) Act 2016 s.215(1), (2)(b).

The trustee may require the delivery to them of any title deeds or other documents of the debtor even if the holder claims a right of lien over them,¹³ but this is without prejudice to any preference to which the holder of the lien would have been entitled as a result of the lien.¹⁴ Provision to this effect was first made in the Bankruptcy (Scotland) Act 1985 on the recommendation of the Scottish Law Commission, on the basis that it did not represent any material change in the law but should be expressly stated in the legislation.¹⁵ The validity of the lien claimed falls to be determined in the normal way, and if it is found that there is in fact no valid lien, the holder will not be entitled to any preference.¹⁶ Where there is a valid lien, the holder is entitled to claim in the sequestration and obtain a preferential ranking, but not to sue the trustee for payment.¹⁷ The ranking to which the holder of the lien is entitled has, however, been described as “in some respects, a mystery”.¹⁸ The cases generally refer to the right of the holder of the lien to obtain a preferential ranking without specifying exactly what that is. In *Patullo v Accountant in Bankruptcy*,¹⁹ it was accepted that whatever right the holder of the lien might have, it was not a preferred debt in terms of the legislation.²⁰ The holder of a lien is, however, a secured creditor in terms of the legislation.²¹ In *Miln's JF v Spence's Trustees*,²² it was held that the trustees under a trust deed for creditors who had delivered the trust deed to the judicial factor subsequently appointed on the debtor's estate under reservation of their rights were entitled to a preferential ranking on the estate in respect of their liabilities incurred in the course of the administration of the debtor's estate, but postponed to the right of a heritable creditor in respect of her security and under reservation of any other preference to which she might be found entitled. It was also held that the preference did not give them any priority over the estate until the expenses of administration had been met and the estate was available for distribution: the trustees were not entitled to a preference on the gross estate ingathered by the judicial factor without deduction of charges of any kind, in particular the judicial factor's own remuneration. In reaching this decision, the Lord Ordinary (Fleming) noted that there were to be found in the decided cases expressions of opinion to the effect

¹³ Bankruptcy (Scotland) Act 2016 s.108(5).

¹⁴ Bankruptcy (Scotland) Act 2016 s.108(6).

¹⁵ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.10.4. As to the law prior to the introduction of these provisions, see in particular *Renny & Webster v Myles Murray* (1847) 9 D. 619; *Adam & Winchester v White's Trustee* (1884) 11 R. 863; *Miln's JF v Spence's Trustees*, 1927 S.L.T. 425; *Garden Haig Scott & Wallace v Stevenson's Trustee*, 1962 S.C. 51. In some cases, there was an express reservation of the holder's rights, but it seems to have been accepted that this was not in fact necessary.

¹⁶ See, for example, *Renny & Webster v Myles Murray* (1847) 9 D. 619; *Miln's JF v Spence's Trustees*, 1927 S.L.T. 425; *Garden Haig Scott & Wallace v Stevenson's Trustee*, 1962 S.C. 51; *Patullo v Accountant in Bankruptcy*, 2010 W.L. 1608631. In all of these cases apart from *Miln's JF v Spence's Trustees*, for a variety of reasons it was found that there was no valid lien.

¹⁷ See *Renny & Webster v Myles Murray* (1847) 9 D. 619; *Adam & Winchester v White's Trustee* (1884) 11 R. 863; *Miln's JF v Spence's Trustees*, 1927 S.L.T. 425; *Patullo v Accountant in Bankruptcy*, 2010 W.L. 1608631.

¹⁸ See McBryde, W.W., *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.10-53. See also Steven, A., “Pledge and Lien”, 2008 Edin. L.R. Vol.2, para.15.10 and the comment of Sheriff Holligan in *Patullo v Accountant in Bankruptcy* that neither agent in that case was able to specify just what the nature of the preference was and how, precisely, it was allowed for. Ranking is discussed further in Ch.16.

¹⁹ *Patullo v Accountant in Bankruptcy*, 2010 W.L. 1608631.

²⁰ Preferred debts are discussed in Ch.16.

²¹ See Bankruptcy (Scotland) Act 2016 s.228(1), which defines “secured creditor” as a creditor who holds a security for a debt over any part of the debtor's estate and “security” as any security, heritable or moveable, or any right of lien, retention or preference.

²² *Miln's JF v Spence's Trustees*, 1927 S.L.T. 425.

that a creditor who had parted with the subject of the lien under reservation was entitled to a preference over the whole fund, although he did not refer to any specific cases, but he relied on the case of *Adam & Winchester v White's Trustee*, reasoning that the decision in that case that the holder of a lien has a claim in the sequestration necessarily implied a claim on the estate after it had been reduced into money and had paid all necessary charges and a commission to the trustee. It has been held, however, that the right of the holder of a lien was preferable to that of a heritable creditor, even where the heritable creditor's infetment was prior to the account in respect of lien arose.²³ It has been held that a trustee is entitled to require delivery of the debtor's title deeds and other documents from the agent to whom they had been delivered by a previous trustee in the sequestration on the reservation to the agent of a preferential ranking in the sequestration.²⁴

- 13–12** The debtor or any relevant person may be ordered in the context of a private or public examination to produce for inspection any documents in their custody and control which relate to the debtor's assets, the debtor's dealings with those assets or the debtor's conduct in relation to their business or financial affairs and to deliver any such document or a copy of it to the trustee.²⁵
- 13–13** A debtor, or any other person acting in the debtor's interest (whether with or without the debtor's authority), who destroys, damages, conceals, disposes of or removes from Scotland any documents relating to the debtor's assets or business or financial affairs in the period commencing one year immediately before the date of sequestration and ending with the debtor's discharge is guilty of an offence unless they show that it was not done with intent to prejudice the creditors.²⁶ In addition, a debtor, or any other person acting in the debtor's interest (whether with or without the debtor's authority), who falsifies any documents relating to the debtor's assets or business or financial affairs in the period commencing one year immediately before the date of sequestration and ending with the debtor's discharge is also guilty of an offence unless they show that they had no intention to mislead the trustee, a commissioner or any creditor,²⁷ and a debtor whose estate is sequestrated and who knows that a person has falsified any documents relating to the debtor's assets or business or financial affairs and fails to report that knowledge to the trustee within one month of acquiring it is guilty of an offence.²⁸

²³ See *Ranking of Hamilton of Provenhall's Creditors* (1781) Mor 6253; *Campbell v Smith* 1 Feb 1817 FC; *Campbell v Goldie* (1822) 2 S. 16.

²⁴ See *Paul v Mathie* (1826) 4 S. 420.

²⁵ Bankruptcy (Scotland) Act 2016 s.120(6) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.3(6). Examination of persons is discussed at para.13–22 onwards.

²⁶ See Bankruptcy (Scotland) Act 2016 ss.218(3) and (4) and 219(3). Intent to prejudice the creditors includes intent to prejudice an individual creditor: Bankruptcy (Scotland) Act 2016 s.219(3). A person also commits this offence if they do anything in England, Wales or Northern Ireland which would constitute the offence if done in Scotland: Bankruptcy (Scotland) Act 2016 s.219(4).

²⁷ See Bankruptcy (Scotland) Act 2016 ss.218(6) and (7) and 219(3). A person also commits this offence if they do anything in England, Wales or Northern Ireland which would constitute the offence if done in Scotland: Bankruptcy (Scotland) Act 2016 s.219(4).

²⁸ Bankruptcy (Scotland) Act 2016 s.218(8). A person also commits this offence if they do anything in England, Wales or Northern Ireland which would constitute the offence if done in Scotland: Bankruptcy (Scotland) Act 2016 s.219(4).

STATEMENT OF ASSETS AND LIABILITIES

A statement of assets and liabilities is a document (including a copy of a document) in prescribed form containing a list of the debtor's assets and liabilities, a list of income and expenditure and such other information as is prescribed.²⁹ **13-14**

In the case of a debtor application for sequestration by a living individual, the debtor is required to send a statement of assets and liabilities to Accountant in Bankruptcy (AiB) with the application,³⁰ but in fact the relevant information is incorporated in the application form itself.³¹ The debtor commits an offence if they fail to disclose any material fact or makes a material misstatement in such a statement of assets and liabilities,³² but it is a defence for the debtor to show that they had a reasonable excuse for the failure to disclose or material misstatement.³³ Prior to the changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014, the debtor was also guilty of an offence if they failed to send a statement of assets and liabilities to AiB,³⁴ but this provision was repealed by the Bankruptcy and Debt Advice (Scotland) Act 2014. If on the award of sequestration AiB is not appointed trustee, the debtor must send a copy of the statement of assets and liabilities to the trustee not later than seven days after the trustee's appointment.³⁵ Again, the debtor commits an offence if they fail to disclose any material fact or makes a material misstatement in the statement of assets and liabilities,³⁶ but it is a defence for the debtor to show that they had a reasonable excuse for the failure to disclose or material misstatement.³⁷ It has been held that a failure to disclose certain liabilities of a partnership of which the debtor was a partner but which had not itself been sequestrated was not a failure constituting an offence for this purpose.³⁸ **13-15**

In the case of a debtor application for sequestration by a trust, a partnership, a body corporate or an unincorporated body or a limited partnership, the debtor must send a statement of assets and liabilities to AiB along with the application.³⁹ If on the award of sequestration AiB is not appointed trustee, the debtor must send a copy of the statement of assets and liabilities to the trustee not later than seven days after the trustee's appointment.⁴⁰ The debtor commits an offence if the debtor fails to disclose any material fact or makes a material misstatement in the statement of assets and liabilities,⁴¹ but it is a defence for the debtor to show that the debtor had a reasonable excuse for the failure to disclose or material misstatement.⁴² **13-16**

²⁹ Bankruptcy (Scotland) Act 2016 s.228(1). As to the prescribed form, see further below.

³⁰ Bankruptcy (Scotland) Act 2016 s.8(3)(a).

³¹ See further Ch.7.

³² Bankruptcy (Scotland) Act 2016 s.8(4).

³³ Bankruptcy (Scotland) Act 2016 s.8(6).

³⁴ Bankruptcy (Scotland) Act 1985 s.5(9)(a) as inserted by the Bankruptcy (Scotland) Act 1993.

³⁵ Bankruptcy (Scotland) Act 2016 s.41(1).

³⁶ Bankruptcy (Scotland) Act 2016 s.41(3).

³⁷ Bankruptcy (Scotland) Act 2016 s.41(5).

³⁸ See *Heywood v Scrimgeour*, 1995 S.C.C.R. 644.

³⁹ Bankruptcy (Scotland) Act 2016 s.8(3)(a) as applied by s.6(9). The statement of assets and liabilities must be in Form 4 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 regs 3, 12(1)(b).

⁴⁰ Bankruptcy (Scotland) Act 2016 s.41(1). The requirement applies to a debtor who has made a debtor application and "debtor" is defined by s.228(1) of the Bankruptcy (Scotland) Act 2016 as including, inter alia, an entity whose estate may be sequestrated by virtue of s.6 of the Bankruptcy (Scotland) Act 2016.

⁴¹ Bankruptcy (Scotland) Act 2016 s.41(3).

⁴² Bankruptcy (Scotland) Act 2016 s.41(5).

- 13-17** In the case of a petition for sequestration presented by a creditor or a trustee acting under a trust deed, the debtor must send a statement of assets and liabilities to the trustee not later than seven days after having been notified of the trustee's appointment under s.51(13) of the Bankruptcy (Scotland) Act 2016.⁴³ The requirement applies to a debtor, "debtor" being defined by s.228(1) of the Bankruptcy (Scotland) Act 2016 as including an entity whose estate may be sequestrated by virtue of s.6 of the Bankruptcy (Scotland) Act 2016, a deceased debtor, a deceased debtor's executor or a person entitled to be appointed a deceased debtor's executor. It seems obvious that the provisions cannot be taken as requiring a deceased debtor to provide a statement of assets and liabilities, since this is physically impossible, but the view has been expressed that the executor or person entitled to be appointed as executor must provide one.⁴⁴ The debtor commits an offence if the debtor fails to disclose any material fact or makes a material misstatement in the statement of assets and liabilities,⁴⁵ but it is a defence for the debtor to show that the debtor had a reasonable excuse for the failure to disclose or material misstatement.⁴⁶ Curiously, the requirement to send a statement of assets and liabilities to the trustee does not seem to apply where a petition for sequestration is presented by someone other than a creditor or a trustee acting under a trust deed.
- 13-18** Where the debtor has failed to provide the trustee with a statement of assets and liabilities as required, the trustee may apply for an order under s.215 of the Bankruptcy (Scotland) Act 2016 requiring the debtor to provide it.⁴⁷
- 13-19** A debtor who makes a false statement relating to the debtor's assets or business or financial affairs to a creditor or a person concerned in the administration of the debtor's estate in the period commencing one year immediately before the date of sequestration and ending with the debtor's discharge is also guilty of an offence unless the debtor shows that the debtor neither knew nor had reason to believe that the statement was false.⁴⁸

DEBTOR'S ACCOUNT OF CURRENT STATE OF AFFAIRS

- 13-20** Where the debtor is undischarged or subject to a debtor contribution order, the trustee must obtain from the debtor at six monthly intervals a written report in the prescribed form of the debtor's current state of affairs.⁴⁹
- 13-21** If the debtor fails to provide the trustee with the necessary report, the trustee may apply for an order under s.215 of the Bankruptcy (Scotland) Act 2016 requiring the debtor to provide it.

⁴³ Bankruptcy (Scotland) Act 2016 s.41(2). The statement of assets and liabilities must be in Form 10 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.3.

⁴⁴ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), at para.7-64.

⁴⁵ Bankruptcy (Scotland) Act 2016 s.41(3).

⁴⁶ Bankruptcy (Scotland) Act 2016 s.41(5).

⁴⁷ See *Ingle's Trustee v Ingle*, 1996 S.L.T. 26, a case decided under the corresponding provisions of the Bankruptcy (Scotland) Act 1985.

⁴⁸ See Bankruptcy (Scotland) Act 2016 ss.218(1) and (2) and 219(3). A person also commits this offence if they do anything in England, Wales or Northern Ireland which would constitute the offence if done in Scotland: Bankruptcy (Scotland) Act 2016 s.219(4).

⁴⁹ Bankruptcy (Scotland) Act 2016 s.116. The prescribed form is Form 23 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016.

EXAMINATION OF PERSONS

A trustee may seek to recover information directly from the debtor or others in a number of ways: an appearance before the trustee; a private examination; and a public examination. Where the debtor is an entity whose estates may be sequestrated by virtue of s.6 of the Bankruptcy (Scotland) Act 2016, rather than an individual, a reference to the debtor in these provisions is to be construed, unless the context otherwise requires, as a reference to a person representing the entity.⁵⁰ **13-22**

Prior to the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, an interim trustee also had powers to seek to recover information by way of an appearance before the interim trustee or a private examination.⁵¹ These powers were removed, however, when the appointment of an interim trustee became restricted to certain cases prior to the award of sequestration and the functions of the interim trustee became correspondingly restricted. Initially, this might seem appropriate, but there may be circumstances in which the retention of these powers would have proved useful. The Bankruptcy and Diligence etc. (Scotland) Act 2007 introduced new provisions for the continuation of a petition for sequestration in certain circumstances which may result in some cases in a considerable period of time elapsing before an award of sequestration is made and a trustee appointed.⁵² If an interim trustee is appointed in such a case, bearing in mind the circumstances in which such an appointment is likely to be made, the ability to recover information at this earlier stage may be important. It may be, however, that in an appropriate case, an order might be obtained under the provisions, discussed at para.13-07, which allow an interim trustee to apply to the sheriff for any other order necessary to safeguard the debtor's estate.⁵³ **13-23**

Appearance before trustee

The trustee may request the debtor to appear before them and give information on the debtor's assets, the debtor's dealings with them or the debtor's conduct in relation to the debtor's business or financial affairs.⁵⁴ The trustee may also request the debtor's spouse or civil partner or any other person whom the trustee believes can give such information (referred to as "a relevant person") to appear before them and give that information.⁵⁵ There are no particular formalities attending such an appearance, which is likely to be arranged in the trustee's office or some other convenient location as may be agreed. **13-24**

The trustee is likely to request the debtor or a relevant person to appear before them before resorting to a private or public examination. There is no specific sanction for failing to comply with a request to appear before the trustee or to give information at such an appearance, but such a failure is likely to result in an application by the trustee for a private or public examination. **13-25**

⁵⁰ Bankruptcy (Scotland) Act 2016 s.118(9).

⁵¹ See Bankruptcy (Scotland) Act 1985 s.20(4) as enacted.

⁵² See further Ch.8.

⁵³ Bankruptcy (Scotland) Act 2016 s.39(4)(b).

⁵⁴ Bankruptcy (Scotland) Act 2016 s.118(1)(a).

⁵⁵ Bankruptcy (Scotland) Act 2016 s.118(1)(b), (2).

Private examination

- 13–26** Where the trustee considers it necessary, they may apply to the sheriff for an order requiring the debtor or a relevant person to attend for private examination before the sheriff on a date and at a time specified in the order.⁵⁶ The sheriff has a discretion as to whether to make an order. If the debtor or relevant person is prevented from attending for examination for a good reason, the sheriff may grant a commission to take the examination before an examining commissioner instead of making an order.⁵⁷ Where an order is made, the date specified in the order must be not earlier than eight and not later than 16 days after the date of the order.⁵⁸ It has been held that such an order may be made in the absence of the person against whom the order is sought.⁵⁹ Failure to comply with an order without reasonable excuse is an offence.⁶⁰

Public examination

- 13–27** At least eight weeks before the end of the first accounting period, the trustee may, or if requested to do so by AiB, the commissioners (if any) or at least one quarter in value of the creditors, must apply to the sheriff for an order for the public examination before the sheriff of the debtor or a relevant person in relation to the debtor's assets, the debtor's dealings with them or the debtor's conduct in relation to the debtor's business or financial affairs.⁶¹ An application may, however, be made at any time on cause shown.⁶² The sheriff has no discretion and must make an order requiring the debtor or relevant person to attend for examination before the sheriff in open court on a date and at a time specified in the order.⁶³ This is, however, subject to the proviso that if the debtor or relevant person is prevented from attending for examination for a good reason, the sheriff may grant a commission to take the examination before an examining commissioner instead.⁶⁴ The date specified in the order must be not earlier than eight and not later than 16 days after the date of the order.⁶⁵ The trustee must send a notice in the prescribed form to AiB; send a copy of the notice to every creditor known to them and, where the examination is of a relevant person, the debtor; and inform the creditors and, if applicable, the debtor, of their right to participate in the examination.⁶⁶ Failure to comply with an order to attend a public examination without reasonable excuse is an offence.⁶⁷

Procedure

- 13–28** The main difference between a private and public examination is that a private examination takes place before the sheriff in private while a public examination

⁵⁶ Bankruptcy (Scotland) Act 2016 s.118(3), (4).

⁵⁷ See Bankruptcy (Scotland) Act 2016 ss.118(5) and 120(3) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 (SI 2016/1034) art.3(3).

⁵⁸ Bankruptcy (Scotland) Act 2016 s.118(6).

⁵⁹ *Gupta's Trustee v Gupta*, 1996 S.C. 52.

⁶⁰ Bankruptcy (Scotland) Act 2016 s.118(7).

⁶¹ Bankruptcy (Scotland) Act 2016 s.119(1). Accounting periods are discussed further in Ch.16.

⁶² Bankruptcy (Scotland) Act 2016 s.119(2).

⁶³ Bankruptcy (Scotland) Act 2016 s.119(3).

⁶⁴ See Bankruptcy (Scotland) Act 2016 ss.119(4) and 120(3) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.3(3).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.119(5).

⁶⁶ Bankruptcy (Scotland) Act 2016 s.119(6). The prescribed form is Form 24 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: Bankruptcy (Scotland) Regulations 2016 reg.3. AiB must enter particulars of the notice in the register of insolvencies: Bankruptcy (Scotland) Act 2016 s.119(7).

⁶⁷ Bankruptcy (Scotland) Act 2016 s.119(8).

takes place in open court and creditors (and if the examination is of a relevant person, the debtor) may attend and ask questions. Otherwise, private and public examinations and examinations before an examining commissioner are conducted in the same way.

The examination is conducted on oath.⁶⁸ A failure to tell the truth may therefore result in a charge of perjury. 13-29

The trustee or their legal representative, and in the case of a public examination, any creditor, may question the debtor or a relevant person about the debtor's assets, the debtor's dealings with them and the debtor's conduct in relation to their business or financial affairs.⁶⁹ Where the examination is of a relevant person, the debtor may also question the relevant person as to these matters.⁷⁰ It has been held that the legal representative of a relevant person, although entitled to attend the examination and take exception to objectionable questions, is not entitled to examine or cross-examine the relevant person, but the presiding sheriff is entitled to ask questions since it is the court's duty 13-30

“to watch for obscurities and misunderstandings, to rescue a witness innocently entangled in his own inadequacies just as surely as it should censure prevarication and artifice”.⁷¹

An examinee is obliged to answer any questions relating to the matters referred to and may not refuse to answer on the ground that their answers might incriminate or tend to incriminate them or on the ground of confidentiality.⁷² Any statement made in answer to a question is not, however, admissible in evidence in any subsequent criminal proceedings against the person making it except in the case of proceedings for perjury,⁷³ and an examinee is not required to disclose any information received from a person who is not also called for examination if the information is confidential between them.⁷⁴ By implication, however, any statement made in answer to a question may be admissible in evidence in civil proceedings.⁷⁵ 13-31

An examinee may be ordered to produce for inspection any document relating to the debtor's assets, the debtor's dealings with them and the debtor's conduct in relation to the debtor's business or financial affairs which is in their custody or control and to deliver any such documents or copies thereof to the trustee for further examination.⁷⁶ 13-32

The examination may be adjourned at any time to such day as the sheriff or examining commissioner may fix.⁷⁷ 13-33

⁶⁸ Bankruptcy (Scotland) Act 2016 s.121(1).

⁶⁹ Bankruptcy (Scotland) Act 2016 s.121(2)(a).

⁷⁰ Bankruptcy (Scotland) Act 2016 s.121(2)(b).

⁷¹ *Holmes, Petitioner*, 1998 S.L.T. (Sh Ct) 47.

⁷² Bankruptcy (Scotland) Act 2016 s.121(3).

⁷³ Bankruptcy (Scotland) Act 2016 s.121(4)(a).

⁷⁴ Bankruptcy (Scotland) Act 2016 s.121(4)(b).

⁷⁵ *Holmes, Petitioner*, 1998 S.L.T. (Sh Ct) 47 at 48.

⁷⁶ See Bankruptcy (Scotland) Act 2016 s.120(6) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.3(6).

⁷⁷ See Bankruptcy (Scotland) Act 2016 s.120(5) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.3(5).

- 13–34** The evidence at the examination is recorded in the same way as in an ordinary cause in the sheriff court.⁷⁸ In the case of an examination of the debtor, the debtor's deposition must be signed by the debtor and the sheriff or examining commissioner⁷⁹ and inserted in the sederunt book.⁸⁰ The trustee must send a copy of the record of the examination to AiB⁸¹ and insert it in the sederunt book.⁸²
- 13–35** A relevant person is entitled to fees or allowances for attending an examination as if they were a witness in an ordinary civil cause in the sheriff court, but the sheriff has a discretion to disallow or restrict these if they think it is appropriate in all the circumstances.⁸³
- 13–36** Where the trustee is apprehensive that the debtor or a relevant person will not attend the examination, they may apply to the sheriff for a warrant to secure the debtor's or relevant person's attendance at the examination⁸⁴ and the sheriff may grant such a warrant if they are satisfied that it is necessary to do so to secure the attendance of the debtor or relevant person at the examination.⁸⁵ Where the debtor or relevant person is residing in Scotland, the warrant is a warrant to apprehend the debtor or relevant person and to have them taken to the place of the examination and it may be executed by a messenger-at-arms or sheriff officer anywhere in Scotland.⁸⁶ Where the debtor or relevant person is residing in any other part of the UK, the warrant is a warrant for the arrest of the debtor or relevant person and to have them taken to the place of the examination.⁸⁷ The reason for specifying a warrant for arrest in this case was to allow its enforcement in any other part of the UK through the application of s.426(7) of the Insolvency Act 1986, which in turn provides for s.38 of the Criminal Law Act 1977 (execution of warrant of arrest throughout the UK) to apply to a warrant for the arrest of a person issued in the exercise of insolvency jurisdiction in any part of the UK in the same way as it applies to a warrant for the arrest of a person charged with an offence. Section 38 of the Criminal Law Act 1977 was, however, repealed by the Criminal Justice and Public Order Act 1994,⁸⁸ which enacted new provisions for the execution of a warrant of arrest of a person charged with an offence throughout the UK.⁸⁹ No consequential amendment was made to the Insolvency Act 1986, however, which continues to refer to the repealed provision. This was, presumably, an oversight. It is thought, however, that in an appropriate case, a request for assistance could be made directly under s.426(4) of the Insolvency Act 1986, for example to allow the examination of the person outwith Scotland.⁹⁰

⁷⁸ Bankruptcy (Scotland) Act 2016 s.121(5).

⁷⁹ Bankruptcy (Scotland) Act 2016 s.121(6).

⁸⁰ See Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.23.

⁸¹ Bankruptcy (Scotland) Act 2016 s.121(7).

⁸² See Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.24.

⁸³ Bankruptcy (Scotland) Act 2016 s.121(8), (9).

⁸⁴ See Bankruptcy (Scotland) Act 2016 s.120(1) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.3(1).

⁸⁵ See Bankruptcy (Scotland) Act 2016 s.120(2) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.3(2).

⁸⁶ See Bankruptcy (Scotland) Act 2016 s.120(1).

⁸⁷ See Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.3(1).

⁸⁸ Criminal Justice and Public Order Act 1994 s.168, Sch.11, para.1.

⁸⁹ Criminal Justice and Public Order Act 1994 s.136.

⁹⁰ Section 426 of the Insolvency Act 1986 is discussed further in Ch.25.

CHAPTER 14

CHALLENGE OF PRIOR TRANSACTIONS

INTRODUCTION

Prior transactions of a debtor may be challenged in certain circumstances with a view to returning assets disposed of by the debtor, or their value, to the debtor's estate. This chapter considers the types of transaction which are open to challenge and the circumstances in which a challenge may be made. **14-01**

Background

Prior to the Bankruptcy (Scotland) Act 1985, prior transactions of the debtor could be challenged under the Bankruptcy Act 1621 (which made provision for the challenge of certain alienations by a debtor to a conjunct and confident person) or under the Bankruptcy Act 1696 (which made provision for the challenge of certain preferences by the debtor in favour of creditors) or the common law. The law of gratuitous alienations and the law of fraudulent or unfair preferences, as they have become known, are the two branches into which the law divided the *actio pauliana* of Roman law.¹ The Scottish Law Commission in 1982 noted that there were differences in the existing statutory provisions which made the law confusing for those who had to apply it, and considered that a greater measure of consistency could be introduced into the law.² It therefore recommended the replacement of the Bankruptcy Act 1621 and the Bankruptcy Act 1696 with new statutory provisions for the challenge of alienations and preferences which were assimilated in so far as possible.³ It also recommended the introduction of a specific provision for the challenge of an order for the payment of a capital sum on divorce, which it considered would not be challengeable under the existing law as an alienation or preference and indeed should not be challengeable as an alienation.⁴ Finally, and contrary to the proposals of its working party as set out in its earlier *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland*,⁵ it recommended that the common law rules should be retained alongside the proposed new statutory provisions.⁶ **14-02**

These recommendations were duly implemented by the Bankruptcy (Scotland) Act 1985, which repealed the Bankruptcy Act 1621 and the Bankruptcy Act 1696 **14-03**

¹ See McBryde, WW "National Report for Scotland" in McBryde, WW, Flessner, A and Kortmann, SCJJ (eds), *Principles of European Trust Law* (Netherlands: Kluwer, 2003), p.564.

² Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 12.1–12.12.

³ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 12.19–12.28 (alienations) and 12.45–12.49 (preferences).

⁴ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 12.30–12.32.

⁵ Scottish Law Commission, *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland* (Memorandum No.16, 1971).

⁶ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation*, paras 12.16 (alienations) and 12.44 (preferences).

and introduced new statutory provisions on gratuitous alienations⁷ and unfair preferences⁸ as well as a new provision for recall of certain orders on divorce⁹ and a new provision, not discussed by the Scottish Law Commission, for the challenge of extortionate credit transactions.¹⁰ The right to challenge prior transactions at common law was retained alongside the new statutory provisions and extended to a trustee in sequestration, a trustee under a protected trust deed and a judicial factor appointed under s.11A of the Judicial Factors (Scotland) Act 1889.

- 14-04** The Bankruptcy (Scotland) Act 1985 was subsequently amended to include provisions for the challenge of excessive pension contributions and provisions regulating the challenge of gratuitous alienations, unfair preferences and orders on divorce in cases involving pension-sharing. These provisions were introduced as part of the changes to the law on the vesting of the debtor's pension in sequestration.¹¹

Statutory provisions

- 14-05** The statutory provisions are now contained in the Bankruptcy (Scotland) Act 2016. There are provisions for the challenge of gratuitous alienations, unfair preferences, orders on divorce or dissolution of a civil partnership, excessive pension contributions and extortionate credit transactions and provisions regulating the challenge of gratuitous alienations, unfair preferences and orders on divorce in cases involving pension-sharing. The provisions for the challenge of gratuitous alienations, unfair preferences and extortionate credit transactions were harmonised with the corresponding provisions in corporate insolvency law, with the result that the corresponding provisions in the Insolvency Act 1986 are in more or less identical terms to those in the Bankruptcy (Scotland) Act 2016.¹² Cases under these provisions are therefore referred to where appropriate in discussing the corresponding provisions in the Bankruptcy (Scotland) Act 2016.
- 14-06** It has been held that the statutory provisions on gratuitous alienations, and by analogy, the statutory provisions on unfair preferences and orders on divorce or dissolution of a civil partnership, do not of themselves confer jurisdiction on a Scottish court in proceedings under these provisions.¹³

Common law

- 14-07** The transactions which can be challenged at common law have traditionally been divided into two types corresponding with the two types of transaction

⁷ Bankruptcy (Scotland) Act 1985 s.34 as enacted.

⁸ Bankruptcy (Scotland) Act 1985 s.36 as enacted.

⁹ Bankruptcy (Scotland) Act 1985 s.35 as enacted. The provision as enacted applied not only to an order for the payment of a capital sum on divorce but also to an order for the transfer of property on divorce. Following the introduction of civil partnerships, such orders could also be made on the dissolution of a civil partnership, and s.35 effectively became applicable to such orders also.

¹⁰ Bankruptcy (Scotland) Act 1985 s.61 as enacted.

¹¹ The background to the introduction of these provisions is discussed further in Ch.11 and at para.14-83 onwards.

¹² The provisions for the challenge of orders on divorce or dissolution of a civil partnership and excessive pension contributions, and the provisions regulating the challenge of gratuitous alienations, unfair preferences and orders on divorce in cases involving pension-sharing, are applicable only in the case of individual debtors and therefore have no corresponding provisions in the context of corporate insolvency.

¹³ *Reid v Ramlort Ltd*, 1998 S.C. 887, discussed in Crawford, EB, "A question of jurisdiction in respect of sequestration" 1999 J.R. 203. For the sequel, see *Reid v Ramlort Ltd* [2004] EWCA (Civ) 800. Where the EU insolvency proceedings regulation applies, questions of jurisdiction and choice of law are governed by that regulation: see further Ch.25.

previously challengeable under statute and two of the several types of transaction now challengeable under statute, namely gratuitous alienations and fraudulent preferences.¹⁴ It has been argued by McBryde that this approach does not accurately reflect the principles involved,¹⁵ that there are cases which do not fall neatly into either of the traditional categories¹⁶ and that a proper analysis of the cases discloses a general principle of striking at any transaction which is a fraud on the creditors.¹⁷ His arguments are persuasive: earlier-cases, while providing examples of the challenge of both alienations and preferences, do not tend to categorise the transactions at issue as such.¹⁸ The more recent cases, however, perhaps influenced by the traditional treatment of the topic, do tend to refer to transactions as being challengeable as either gratuitous alienations or fraudulent preferences¹⁹ and in practice most cases will involve transactions which can be classified as one or the other. McBryde himself notes that for most practical purposes, there will not be much difference between the traditional approach and his own approach.²⁰ For this reason, the traditional approach is maintained here and the common law is discussed as it has been applied in cases of alienations and preferences. Some general points may, however, be made here.

The general principle underlying the common law is explained in the leading modern case, *Nordic Travel Ltd v Scotprint Ltd*,²¹ which was concerned with fraudulent preferences. In that case, it was argued for the pursuers, relying on certain passages in Bell's *Commentaries on the Law of Scotland*, that a debtor who was absolutely insolvent and knew it was a trustee for behoof of all his creditors and would, prima facie, be in breach of trust even if he merely paid one of his creditors in cash for a debt which was due and payable. In response to this argument, Lord President Emslie said²²:

"It is of course the fact that in a number of passages in Bell's *Commentaries* it is suggested that the doctrine that an insolvent with knowledge of his absolute insolvency is a trustee for all his creditors, is at the root of the common law on fraudulent preferences. When all these passages are read together, however, it is quite evident that the suggestion is not to be taken literally. In particular, nowhere in Bell's *Commentaries* or in any other authority or decided case is it for the moment suggested that it is, even prima facie, a breach of trust for an insolvent person who knows of his absolute insolvency to fulfil obligations which are due and prestable and, in particular, to pay in cash debts which are past due. There are no doubt certain acts which, in the interests of all his creditors, such an insolvent person is obliged not to do, but to say that he is, literally, a trustee for his creditors is unwarranted in authority and wholly misleading."

¹⁴ See, in particular, Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), Chs 3 and 4. His treatment has been followed by most other writers. The Scottish Law Commission, in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982) also discussed the law under the headings of gifts and preferences.

¹⁵ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.12-20.

¹⁶ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.12-24, referring in particular to *Wilson v Drummond* (1853) 16 D. 275 and *Laurie's Trustee v Beveridge* (1867) 6 M. 85.

¹⁷ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), Ch.12, Pt II generally.

¹⁸ The cases are discussed further below.

¹⁹ The cases are discussed further below.

²⁰ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.12-22.

²¹ *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

²² *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1 at 9-10.

14-09 He went on to say²³:

“The true position of such an insolvent becomes, I believe, quite clear in the very first of the passages from Bell’s Commentaries relied on by the pursuers . . .

As I read this passage, Professor Bell recognises at the outset that the insolvent is *not*, strictly, a trustee for his creditors and proceeds to explain (a) that he is entitled, so long as he is permitted (and this I take to mean before he has been relieved of the administration of his estate) to continue his trade and (b) that he ceases to be entitled secretly to set his funds apart for his own use, or to alienate them voluntarily. What he is not entitled to do under the latter of these prohibitions as I understand it is to alienate to third parties any part of his assets gratuitously and voluntarily, or to confer directly, or by means of some scheme in which the creditor is a willing participant, a preference upon a particular creditor which is voluntary.”

14-10 It seems quite clear, therefore, that the same principle underlies the challenge of both alienations and preferences at common law. The constituent elements of such a challenge are examined in more detail in the discussion of the common law under these headings.

14-11 Prior to the changes to the statutory provisions brought about by the Bankruptcy (Scotland) Act 1985, it was common for transactions to be challenged under the relevant statutory provisions *and* at common law. Following the enactment of the Bankruptcy (Scotland) Act 1985, however, the cases disclose that any challenge is generally brought under the statutory provisions only, these provisions being more “user-friendly” than both the statutory provisions which they replaced and the common law. The common law retains certain advantages, however, most notably the fact that there are no time limits for bringing a challenge at common law.²⁴ Although rare, therefore, challenges at common law are not unknown.

14-12 The common law applies equally to transactions by companies,²⁵ and therefore cases relating to company debtors may be referred to where appropriate in discussing the common law provisions.

Interrelationship of provisions

14-13 It is specifically provided that the power to challenge extortionate credit transactions may be exercised concurrently with any powers which may be exercised in relation to that transaction as a gratuitous alienation or unfair preference.²⁶ There is nothing, however, to prevent any transaction being challenged under more than one of the statutory provisions and/or at common law where the relevant conditions are satisfied. It has also been held that a challenger is not obliged to pursue any alternative remedies which may be open to them: the only issue for the court is whether the challenger is entitled to the remedy they have sought.²⁷ Some grounds of challenge may be mutually exclusive: it has been said, for example, that gratuitous alienations and unfair

²³ *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1 at 10.

²⁴ See further below.

²⁵ See *Bank of Scotland, Petitioners*, 1988 S.L.T. 690.

²⁶ Bankruptcy (Scotland) Act 2016 s.209(7).

²⁷ See *Joint Administrators of Loanwell Ltd v Stonegale Ltd*, *Joint Administrators of Oceancrown Ltd v Stonegale Ltd* and *Joint Administrators of Questaway Ltd v Pelosi* [2016] UKSC 30.

preferences are very separate and distinct concepts.²⁸ Where relevant, however, the potential to challenge a transaction on more than one ground, or at common law as well as (or instead of) under statute, means that anyone seeking to challenge a transaction should consider carefully which provisions might apply and, in the event of there being more than one, which may be used most advantageously in the circumstances.

GRATUITOUS ALIENATIONS

Statutory provisions

The relevant statutory provisions are contained in s.98 of the Bankruptcy (Scotland) Act 2016.²⁹ Although they replaced the provisions of the Bankruptcy Act 1621, the case law on the latter remains relevant. Special provisions apply in pension-sharing cases.³⁰ 14–14

Application of provisions

The provisions apply where the debtor's estate has been sequestrated (other than after the death of an individual debtor)³¹; the debtor has granted a trust deed which has become protected³²; the estate of a deceased debtor has been sequestrated within 12 months of their death³³; or a judicial factor has been appointed to the estate of a deceased debtor under s.11A of the Judicial Factors (Scotland) Act 1889 within 12 months of the debtor's death and the estate was absolutely insolvent at the date of death.³⁴ 14–15

Persons who may challenge

The challenge may be made by the trustee in sequestration, the trustee under the protected trust deed or the judicial factor as the case may be.³⁵ 14–16

It may also be made by any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, the granting of the trust deed or the debtor's death as the case may be.³⁶ It has been held that a creditor's right to challenge is an independent right and that it is competent for a creditor to bring proceedings even after proceedings have been brought by a trustee in sequestration or to be sisted in the proceedings brought by a trustee even where a settlement of those proceedings has been agreed but authority has not yet been interponed to the joint minute, notwithstanding the procedural difficulties to which this might give rise.³⁷ By analogy, the same would apply 14–17

²⁸ *Johnstone v Peter H Irvine Ltd*, 1984 S.L.T. 209; *McGruther v AB Services (Scotland) Ltd* unreported 13 December 2010 Glasgow Sheriff Court, upheld on appeal, July 2011, Sheriff Principal of Glasgow and Strathkelvin, unreported. Cf *Fraser, Petitioner* [2012] CSOH 184, where the proceedings seem to have been raised on the basis that an assignation was a gratuitous alienation, failing which it was an unfair preference.

²⁹ The corresponding section of the Insolvency Act 1986 is s.242; the provisions are identical except for the differences in terminology necessary to reflect the different types of debtor.

³⁰ The relevant provisions are contained in ss.104–106 of the Bankruptcy (Scotland) Act 2016 and as noted at para.14–04, they also apply in the case of unfair preferences and orders on divorce or dissolution of a civil partnership. They are therefore discussed separately at para.14–93 onwards.

³¹ Bankruptcy (Scotland) Act 2016 s.98(1)(b)(i).

³² Bankruptcy (Scotland) Act 2016 s.98(1)(b)(ii). Protected trust deeds are dealt with in Ch.22.

³³ Bankruptcy (Scotland) Act 2016 s.98(1)(b)(iii).

³⁴ Bankruptcy (Scotland) Act 2016 s.98(1)(b)(iv). Judicial factors are discussed in Ch.23.

³⁵ Bankruptcy (Scotland) Act 2016 s.98(2)(b).

³⁶ Bankruptcy (Scotland) Act 2016 s.98(2)(a).

³⁷ *Accountant in Bankruptcy v Brown* [2009] CSIH 2. The position may be different where a settlement has been agreed and the court has already interponed authority to a joint minute and

where proceedings had been brought by a trustee under a protected trust deed or judicial factor. The challenge may be made after the discharge of the debtor.³⁸

What may be challenged

- 14–18** The provisions allow the challenge of an alienation by a debtor whereby any of the debtor's property has been transferred or any claim or right of the debtor has been discharged or renounced.³⁹ This is very wide. The alienation must, however, be of the debtor's property. It has been held that money in a debtor's bank account was the debtor's property for this purpose even where it was alleged that the money had been paid into the debtor's bank account in error and was thus subject to a personal claim for its return to the payer.⁴⁰ On the other hand, it has been held that property held in trust for the alienee would not constitute the debtor's property for this purpose.⁴¹ Examples of alienations from the case law include the transfer of heritage,⁴² the transfer of shares,⁴³ the transfer of money⁴⁴ and the renunciation of a contractual right to the assignation of a lease.⁴⁵ It has been held that the transfer of a sum of money constitutes a single alienation rather than a series of alienations even where the transfer reflected various underlying transactions.⁴⁶ The discharge of a standard security under which no advances have been made is not, however, an alienation for this purpose.⁴⁷ The question of whether a guarantee granted by the debtor can constitute an alienation has caused difficulty. It appears to be accepted that the granting of a guarantee does not of itself constitute an alienation because it does not involve a transfer of the debtor's property,⁴⁸ but it has been held that there was an alienation where a guarantee granted by a debtor was called up and the debtor's funds were consequently frozen.⁴⁹ In a very recent case, the Sheriff Appeal Court reserved its opinion on the correctness of that decision, but said that there was

“some force in the argument . . . that the grant of a guarantee followed by subsequent events which have the effect of reducing the estate of the guarantor can be an alienation, although we would reserve our position on whether calling up itself results in transfer”.⁵⁰

- 14–19** At the time of writing, therefore, the matter remains one of doubt.

granted decree implementing its terms: see the opinion of the Lord Ordinary at [2007] CSOH 133, [28]. On appeal, the Inner House noted that if effect had been given to the joint minute, a problem would arise since the result would be that the defender would be assailed from the conclusions of the action against her by the pursuer, but the question would then arise as to whether that would give rise to a plea of compromise against the minuter—but it was not necessary for the court to express an opinion on the matter, although it could be said that a plea of compromise might not be available if the grounds in the second action were not precisely the same.

³⁸ *Ovenstone's Trustee v Ovenstone*, 1995 S.C.L.R. 969.

³⁹ Bankruptcy (Scotland) Act 2016 s.98(1)(a).

⁴⁰ *Brown v Simpson* [2012] CSOH 107.

⁴¹ *Accountant in Bankruptcy v Mackay*, 2004 S.L.T. 777. See also *Johnston's Trustee v Baird* [2012] CSOH 117, where it was held on the facts that no trust was established.

⁴² For example, *Matheson's Trustee v Matheson*, 1992 S.L.T. 685.

⁴³ *Walton's Trustee v Walton*, 2004 S.C.L.R. 319.

⁴⁴ For example, *Cay's Trustee v Cay*, 1998 S.C.L.R. 456.

⁴⁵ *Ahmed's Trustee v Ahmed (No.2)*, 1993 S.L.T. 651.

⁴⁶ *Johnston's Trustee v Baird* [2012] CSOH 117.

⁴⁷ *Rankin v Meek*, 1995 S.L.T. 526.

⁴⁸ See *First Time Ltd v Fraser* [2017] SAC (Civ) 4, where this was a matter of concession.

⁴⁹ *Jackson v Royal Bank of Scotland*, 2002 S.L.T. 1123. *First Time Ltd v Fraser* [2017] SAC (Civ) 4.

⁵⁰ *First Time Ltd v Fraser* [2017] SAC (Civ) 4.

Time limits

The alienation must have taken place on a relevant day.⁵¹ Where the alienation was made to an associate of the debtor, this means a day not earlier than five years before the date of sequestration, the granting of the trust deed or the debtor's death, as the case may be⁵²; in any other case, it means a day not earlier than two years before the date of sequestration, the granting of the trust deed or the debtor's death, as the case may be.⁵³ It may be a day after the date of sequestration, the granting of the trust deed or the debtor's death (as the case may be).⁵⁴ 14-20

Definition of associate

"Associate" is defined in s.229 of the Bankruptcy (Scotland) Act 2016. The definition is extremely complex and encompasses a variety of personal and business relationships. Section 229 attempts to make the interpretation of the provisions easier by designating some of the persons referred to by letter, but in the writer's view this does not in fact add to the clarity of the provisions, rather the reverse. 14-21

In terms of the provisions, a person is an associate of a natural person if they are that person's spouse or civil partner *or* a relative of that person or that person's spouse or civil partner *or* the spouse or civil partner of such a relative.⁵⁵ A relative of a natural person is defined as that person's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant, treating a relationship of the half-blood as a relationship of the whole-blood and a stepchild or adopted child as a person's child.⁵⁶ Spouses and civil partners include former and reputed spouses and civil partners.⁵⁷ 14-22

A person is an associate of anyone with whom they are in partnership and of any person who is an associate of anyone with whom they are in partnership,⁵⁸ and a firm is an associate of anyone who is member of it.⁵⁹ A person is an associate of the person's employer or employee,⁶⁰ and for this purpose, any director or other officer of a company is treated as employed by it.⁶¹ 14-23

A company is an associate of another company if the same person has control of both companies *or* a person has control of one company and persons who are their associates have control of the other.⁶² A company is also an associate of another company if a group of two or more persons has control of each company and the groups *either* consist of the same persons *or* could be regarded as consisting of the same persons if one or more members of either group were replaced by a member of whom that person is an associate.⁶³ A company is an 14-24

⁵¹ Bankruptcy (Scotland) Act 2016 s.98(1)(c).

⁵² Bankruptcy (Scotland) Act 2016 s.98(4)(a).

⁵³ Bankruptcy (Scotland) Act 2016 s.98(4)(b).

⁵⁴ See *Jackson v Royal Bank of Scotland*, 2002 S.L.T. 1123.

⁵⁵ Bankruptcy (Scotland) Act 2016 s.229(4).

⁵⁶ Bankruptcy (Scotland) Act 2016 s.229(7).

⁵⁷ Bankruptcy (Scotland) Act 2016 s.229(8).

⁵⁸ Bankruptcy (Scotland) Act 2016 s.229(5).

⁵⁹ Bankruptcy (Scotland) Act 2016 s.229(6).

⁶⁰ Bankruptcy (Scotland) Act 2016 s.229(9).

⁶¹ Bankruptcy (Scotland) Act 2016 s.229(10).

⁶² Bankruptcy (Scotland) Act 2016 s.229(11)(a). For the definition of control, see Bankruptcy (Scotland) Act 2016 s.229(13) and (14).

⁶³ Bankruptcy (Scotland) Act 2016 s.229(11)(b). For the definition of control, see Bankruptcy (Scotland) Act 2016 s.229(13) and (14).

associate of another person if that person has control of it *or* that person and that person's associates together have control of it.⁶⁴

- 14–25** For the purposes of these provisions, a company includes any body corporate, whether incorporated in Great Britain or elsewhere.⁶⁵
- 14–26** The definition of associate may be amended by regulations made by the Scottish Ministers.⁶⁶ At the time of writing, no such regulations have been made.

Alienation takes place when completely effectual

- 14–27** An alienation takes place on the day on which it becomes “completely effectual”.⁶⁷ When an alienation becomes completely effectual for this purpose will depend on the type of transaction and the particular circumstances of the case. For example, an alienation of heritage becomes completely effectual on the day on which the relevant deed is recorded in the Register of Sasines or registered in the Land Register⁶⁸; a mandate for payment to a third party becomes completely effectual when the mandatory receives the funds to enable them to implement the mandate⁶⁹; the consignment of sums in court pending the outcome of litigation becomes completely effectual on such consignment⁷⁰; and the consignment of funds on deposit receipt pending the outcome of litigation becomes completely effectual on the date of deposit provided that the debtor has been completely divested of the funds and of power and control over them.⁷¹ It has been held that a guarantee became completely effectual when it was called up and funds in the debtor's account were consequently frozen,⁷² but the difficulties in cases involving guarantees have been discussed above. In a case where a purchaser of heritage was to receive a discount subject to a condition, it was held that the reduction did not become completely effectual until the condition was satisfied.⁷³

Onus of proof

- 14–28** The onus is on the challenger to show that an alienation has taken place within the relevant time limits.

Defences

- 14–29** The person seeking to uphold the alienation may seek to defeat the challenge on any of the following grounds:

⁶⁴ Bankruptcy (Scotland) Act 2016 s.229(12). For the definition of control, see Bankruptcy (Scotland) Act 2016 s.229(13) and (14).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.229(15).

⁶⁶ Bankruptcy (Scotland) Act 2016 s.230.

⁶⁷ Bankruptcy (Scotland) Act 2016 s.98(3).

⁶⁸ *Accountant in Bankruptcy v Orr*, 2005 S.L.T. 1019.

⁶⁹ See *Masson's Trustee v W & J Bruce (Builders) Ltd* unreported 20 April 1998, a decision on s.36 of the Bankruptcy (Scotland) Act 1985, now s.99 of the Bankruptcy (Scotland) Act 2016, which relates to unfair preferences and uses the same phrase.

⁷⁰ See *Craiglaw Developments v Wilson*, 1997 S.C.L.R. 1157, a decision on s.243 of the Insolvency Act 1986 which relates to unfair preferences and uses the same phrase.

⁷¹ *Craiglaw Developments v Wilson*, 1997 S.C.L.R. 1157.

⁷² See *Jackson v Royal Bank of Scotland*, 2002 S.L.T. 1123.

⁷³ *Anderson v Dickens* [2008] CSOH 134, a decision on s.243 of the Insolvency Act 1986 which relates to unfair preferences and uses the same phrase.

- (1) That immediately, or at any other time, after the alienation, the debtor's assets were greater than the debtor's liabilities.⁷⁴ In determining this, the court will apply a "balance sheet" test,⁷⁵ and for this purpose, "assets" means assets which, if realised, would be available to meet the debtor's liabilities.⁷⁶ It has been held that a claim and counter-claim, although dependent on an action which had yet to be resolved and therefore not yet quantified, were assets held or debts due at the date of the alienation and therefore had to be taken into account for this purpose.⁷⁷
- (2) That the alienation was made for adequate consideration.⁷⁸ This involves a question of mixed fact and law in respect of which it has been said that a finding that no party gave the transferors anything in return for the conveyances under challenge came very close indeed to determining the matter of whether adequate consideration had been given.⁷⁹ Two issues arise in this context: what amounts to consideration and what is adequate.

In *McFadyen's Trustee v McFadyen*,⁸⁰ the court said that in the absence of a statutory definition, consideration must be given its ordinary meaning

"as something which is given or surrendered in return for something else"⁸¹ and must be "something of material or patrimonial value which could be vindicated in a legal process, whether by being claimed or possibly by being pled in answer to another's claim".⁸²

The following have been held to be capable of amounting to consideration for this purpose: an assumption of liability for the debtor's debts⁸³; the issue of an exemption certificate by the Inland Revenue⁸⁴; an agreement whereby the debtor would receive future rental income from properties⁸⁵; an agreement to continue the debtor's overdraft facility⁸⁶; an agreement to extend an overdraft facility to another party where that resulted in a substantial benefit to the debtor⁸⁷; and the discharge or reduction of a debt.⁸⁸ On the other hand, an undertaking to use funds transferred to the defender to fulfil the defender's obligation of aliment to the debtor has been held not amount to

⁷⁴ Bankruptcy (Scotland) Act 2016 s.98(6)(a).

⁷⁵ *Walton's Trustee v Walton* unreported 31 October 2003 Perth Sheriff Court; *Accountant in Bankruptcy v Sneddon* [2008] CSOH 11.

⁷⁶ *Walton's Trustee v Walton*, 2004 S.C.L.R. 319.

⁷⁷ *Accountant in Bankruptcy v Sneddon* [2008] CSOH 11.

⁷⁸ Bankruptcy (Scotland) Act 2016 s.98(6)(b).

⁷⁹ See *Joint Administrators of Loanwell Ltd v Stonegale Ltd, Joint Administrators of Oceancrown Ltd v Stonegale Ltd and Joint Administrators of Questaway Ltd v Pelosi* [2015] CSIH 12; upheld on appeal at [2016] UKSC 30.

⁸⁰ *McFadyen's Trustee v McFadyen*, 1994 S.L.T. 1245.

⁸¹ *McFadyen's Trustee v McFadyen*, 1994 S.L.T. 1245 at 1248I.

⁸² *McFadyen's Trustee v McFadyen*, 1994 S.L.T. 1245 at 1248J–1248K.

⁸³ *Cay's Trustee v Cay*, 1998 S.C.L.R. 456. See also *Henderson v Foxworth Investments Ltd* [2011] CSOH 66.

⁸⁴ *John E Rae (Electrical Services) Linlithgow Ltd v Lord Advocate*, 1994 S.L.T. 788.

⁸⁵ *Nova Glaze Replacement Windows Ltd v Clark Thomson and Co*, 2001 S.C. 815.

⁸⁶ *Jackson v Royal Bank of Scotland*, 2002 S.L.T. 1123.

⁸⁷ *Jackson v Royal Bank of Scotland*, 2002 S.L.T. 1123.

⁸⁸ *Joint Administrators of Loanwell Ltd v Stonegale Ltd, Joint Administrators of Oceancrown Ltd v Stonegale Ltd and Joint Administrators of Questaway Ltd v Pelosi* [2015] CSIH 12; upheld on appeal at [2016] UKSC 30.

consideration for this purpose⁸⁹ and the discharge of a heritable security without the discharge of the underlying obligation does not amount to consideration.⁹⁰ The consideration must be accepted by the other party.⁹¹ Something which was not intended to be consideration at the time it was given cannot later be said to be consideration.⁹²

In order to be adequate, the consideration need not necessarily be the best price that could have been obtained in the open market in a properly conducted arms length transaction,⁹³ but it has been held that the term “adequate” implies an objective assessment, and the consideration should be

“not less than would reasonably be expected in the circumstances, assuming that persons . . . were acting in good faith and at arm’s length from each other”.⁹⁴

It has been held what is reasonable in the circumstances can be assessed in the light of the fact that the debtor had very limited options, was in a perilous financial position and could not afford the luxury of a lengthy marketing period because a creditor was threatening to enforce its security and do other diligence and there were no other concrete offers available to the debtor.⁹⁵ It is thought, however, that this approach may be regarded as suspect, and it is understood that the decision has been appealed. It has been held that consideration amounting to less than 60 per cent of the value of the property transferred could not be adequate,⁹⁶ but generally the court will be reluctant to reach a view on the adequacy of consideration without enquiry.⁹⁷ There may be circumstances where it is open to a defender to argue that no consideration is adequate.⁹⁸ Cases involving cautionary obligations may present difficulties. In *Jackson v Royal Bank of Scotland*,⁹⁹ it was held that where a company had guaranteed the overdraft facility extended to another company, the extension of an overdraft to that other company being to the company’s own benefit, the adequacy of the consideration should not be assessed too precisely, the benefit obtained by the company rarely being capable of precise quantification, and if the transaction on the whole appeared commercial, it should generally be assumed that the consideration was adequate; the creditor extending the overdraft facility must,

⁸⁹ *Cay’s Trustee v Cay*, 1998 S.C.L.R. 456.

⁹⁰ *Joint Administrators of Loanwell Ltd v Stonegale Ltd, Joint Administrators of Oceancrown Ltd v Stonegale Ltd and Joint Administrators of Questaway Ltd v Pelosi* [2015] CSIH 12; upheld on appeal at [2016] UKSC 30.

⁹¹ *McGruther v McFadyen* unreported 24 January 2010 Glasgow Sheriff Court.

⁹² *McFadyen’s Trustee v McFadyen*, 1994 S.L.T. 1245. See also *Matheson’s Trustee v Matheson*, 1992 S.L.T. 685; *Accountant in Bankruptcy v Mahmood* [2016] CSOH 164.

⁹³ See the opinion of the Lord Ordinary set out in *Short’s Trustee v Chung*, 1991 S.L.T. 472 at 475A–475B, not challenged on this point on appeal and followed in *McLuckie Brothers Ltd v Newhouse Contracts Ltd*, 1993 S.L.T. 641. See also *Lafferty Construction Ltd v McCombe*, 1994 S.L.T. 858; *Liquidators of Grampian MacLennan’s Distribution Services Ltd v Carnbroe Estates Ltd* [2017] CSOH 8.

⁹⁴ *Lafferty Construction Ltd v McCombe*, 1994 S.L.T. 858 at 861D–861E.

⁹⁵ *Liquidators of Grampian MacLennan’s Distribution Services Ltd v Carnbroe Estates Ltd* [2017] CSOH 8.

⁹⁶ *Cay’s Trustee v Cay*, 1998 S.C.L.R. 456. See also *Johnston’s Trustee v Baird* [2012] CSOH 117.

⁹⁷ *Nova Glaze Replacement Windows Ltd v Clark Thomson and Co*, 2001 S.C. 815. See also *Henderson v Nova Scotia Ltd* [2006] UKHL 21, which involved a motion for summary decree.

⁹⁸ *Rankin v Meek*, 1995 S.L.T. 526.

⁹⁹ *Jackson v Royal Bank of Scotland*, 2002 S.L.T. 1123.

however, have given full consideration in money or money's worth to the company to whom the overdraft was extended, and the adequacy of that consideration should be assessed strictly.¹⁰⁰ The adequacy of the consideration must generally be assessed at the time it is given.¹⁰¹ The fact that a disposition of heritable property bears to be granted for "love, favour and affection" is not conclusive that no consideration has been given, even where no proceedings for rectification of the disposition have been raised, but in practice, it will normally present serious difficulties for the defender seeking to establish that adequate consideration has been paid.¹⁰² It is specifically provided that an alienation in implement of a prior obligation is deemed to be one for which there is no consideration or no adequate consideration to the extent that the prior obligation itself was undertaken for no consideration or no adequate consideration.¹⁰³

- (3) That the alienation was a permitted gift.¹⁰⁴ There are two categories of permitted gift. The first is a birthday, Christmas or other conventional gift.¹⁰⁵ "Other conventional gift" is not defined, but would be likely to include gifts such as an engagement or wedding gift or a retirement gift for an employee. The second is a charitable gift, provided that it was not made to an associate of the debtor.¹⁰⁶ "Charitable" is given a wide meaning for this purpose: it covers any gift which has a "charitable, benevolent or philanthropic purpose", and is not restricted to gifts which are charitable within the meaning of any rule of law.¹⁰⁷ The meaning of associate has already been discussed. Permitted gifts falling within either category must have been reasonable in all the circumstances.¹⁰⁸

The onus of establishing any of the specified grounds is on the person seeking to uphold the alienation and detailed averments will be required.¹⁰⁹ It has been held that the terms of the statutory defences are not incompatible with the European Convention on Human Rights.¹¹⁰ **14-30**

Although not one of the statutory defences, it would also be open to a defender to show that the property alienated had been returned to the debtor.¹¹¹ In such **14-31**

¹⁰⁰ See also *Joint Administrators of Loanwell Ltd v Stonegate Ltd*, *Joint Administrators of Oceanicrown Ltd v Stonegate Ltd* and *Joint Administrators of Questaway Ltd v Pelosi* [2015] CSIH 12; upheld on appeal at [2016] UKSC 30.

¹⁰¹ *McFadyen's Trustee v McFadyen*, 1994 S.L.T. 1245; *John E Rae (Electrical Services) Linlithgow Ltd v Lord Advocate*, 1994 S.L.T. 788; *Nova Glaze Replacement Windows Ltd v Clark Thomson and Co*, 2001 S.C. 815. Cf *Jackson v Royal Bank of Scotland*, 2002 S.L.T. 1123.

¹⁰² *McFadyen's Trustee v McFadyen*, 1994 S.L.T. 1245; *Matheson's Trustee v Matheson*, 1992 S.L.T. 685; *Bank of Scotland v Reid* unreported 13 June 2000 Outer House, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=658687a6-8980-69d2-b500-ff0000d74aa7> [Accessed 18 September 2017]; *Nottay's Trustee v Nottay*, 2001 S.L.T. 769; *Accountant in Bankruptcy v Mahmood* [2016] CSOH 164.

¹⁰³ Bankruptcy (Scotland) Act 2016 s.98(9).

¹⁰⁴ Bankruptcy (Scotland) Act 2016 s.98(6)(c).

¹⁰⁵ Bankruptcy (Scotland) Act 2016 s.98(6)(c)(i).

¹⁰⁶ Bankruptcy (Scotland) Act 2016 s.98(6)(c)(ii).

¹⁰⁷ Bankruptcy (Scotland) Act 2016 s.98(8).

¹⁰⁸ Bankruptcy (Scotland) Act 2016 s.98(6)(c).

¹⁰⁹ See, for example, *Matheson's Trustee v Matheson*, 1992 S.L.T. 685; *McLuckie Brothers Ltd v Newhouse Contracts Ltd*, 1993 S.L.T. 641; *Lafferty Construction Ltd v McCombe*, 1994 S.L.T. 858; *Sands v Taylor*, 2010 W.L. 783735.

¹¹⁰ *Accountant in Bankruptcy v Walker* [2017] CSOH 78. On the issue of human rights, see also *Johnston's Trustee v Baird* [2012] CSOH 117, referred to at para.14-33.

¹¹¹ See *Blackburn v Alexander* [2015] CSOH 179.

a case, however, the onus is on the defender to establish that the full amount has been returned.¹¹²

Remedy

- 14–32** On a successful challenge, the court must grant decree of reduction, restoration of the property or such other redress as appropriate.¹¹³ This is, however, without prejudice to any right or interest acquired in good faith and for value from or through the original transferee.¹¹⁴ In *Short's Trustee v Chung*,¹¹⁵ it was held that the purpose of the statutory provisions was to ensure that, so far as possible, any property which had been improperly alienated should be restored to the debtor's estate and the reference to "other redress as may be appropriate" was not intended to give the court a general discretion to decide a case on equitable principles but was designed to enable the court to make an appropriate order where reduction or restoration was not available.¹¹⁶ Thus, reduction or restoration of the property is the primary remedy where available, and only where this is not available will "other redress" be appropriate: for example, where the property in question has been disposed of by the original transferee and reduction or restoration is not possible because the subsequent transferee has acquired the property in good faith and for value or because the whereabouts of the property are unknown.¹¹⁷ It should be noted that a successful challenge results in the return of the property or the payment of other redress to the debtor's estate irrespective of who the challenger is: a challenge by a creditor does not result in any transfer of property or payment of other redress directly to the creditor. A defender may not set off any sums due to them against their liability under these provisions.¹¹⁸
- 14–33** The approach taken in *Short's Trustee v Chung*¹¹⁹ does raise issues of equity, particularly in cases where there has been inadequate consideration rather than no consideration at all. In such cases, reduction or restoration of the property to the estate in effect creates what might be regarded as an unfair benefit for the estate, which has recovered the property and has also had the benefit of whatever consideration was paid, while the alienee has only a postponed claim in the sequestration.¹²⁰ It has been held, however, that this interpretation is compatible with art.1 of Protocol 1 of the European Convention on Human Rights.¹²¹
- 14–34** The approach taken in that case also gave rise to practical difficulties in cases involving heritable property registered in the Land Register. While an extract decree of reduction could be recorded in the Register of Sasines or used as a

¹¹² *Blackburn v Alexander* [2015] CSOH 179.

¹¹³ Bankruptcy (Scotland) Act 2016 s.98(5).

¹¹⁴ Bankruptcy (Scotland) Act 2016 s.98(7). The onus of establishing that any right or interest was acquired in good faith and for value lies on the acquiree: *Henderson v Foxworth Investments Ltd* [2011] CSOH 66; ultimately upheld on appeal at [2014] UKSC 41.

¹¹⁵ *Short's Trustee v Chung*, 1991 S.C.L.R. 629.

¹¹⁶ See also *Cay's Trustee v Cay*, 1998 S.C.L.R. 456; *Nottay's Trustee v Nottay*, 2001 S.L.T. 769.

¹¹⁷ For an example of the last-mentioned situation, see *Nottay's Trustee v Nottay*, 2001 S.L.T. 769.

¹¹⁸ See *John E Rae (Electrical Services) Linlithgow Ltd v Lord Advocate*, 1994 S.L.T. 788; *Cay's Trustee v Cay*, 1998 S.C.L.R. 456.

¹¹⁹ *Short's Trustee v Chung*, 1991 S.C.L.R. 629.

¹²⁰ Bankruptcy (Scotland) Act 2016 s.129(4) and see further Ch.16.

¹²¹ *Johnston's Trustee v Baird* [2012] CSOH 117; *Accountant in Bankruptcy v Walker* [2017] CSOH 78.

link in title,¹²² in *Short's Trustee v The Keeper of the Registers*,¹²³ it was held that an extract decree of reduction obtained under these provisions could not be registered in the Land Register and that the remedy available to the holder of the decree was either rectification of the register where the conditions for rectification were satisfied or indemnity where they were not.¹²⁴ The grounds for rectification were, however, limited. The result was further litigation, which finally resulted in the trustee obtaining an order ordaining the defender to execute and deliver a disposition of the relevant properties to the trustee.¹²⁵ That decision seemed to provide a practical way round the problem, but it was unsatisfactory in a number of respects.¹²⁶ In a subsequent case, *Brown v Stewart*,¹²⁷ decree was granted reducing a disposition and ordaining the Keeper of the Registers of Scotland to rectify the Land Register accordingly, but it is not clear on what basis the order for rectification was made. The Scottish Law Commission recognised the problem in its *Discussion Paper on Land Registration: Void and Voidable Titles*¹²⁸ and sought views on a proposal that reductions of voidable deeds should be given effect to as of right by an appropriate entry in the Land Register.¹²⁹ In its subsequent *Report on Land Registration*,¹³⁰ it noted that most respondents agreed with that proposal and made a formal recommendation to that effect.¹³¹ This recommendation was duly given effect to by the s.54 of the Land Registration (Scotland) Act 2014, which added a new s.46A to the Conveyancing (Scotland) Act 1924. That section provides that where a voidable deed relating to land registered in the Land Register is reduced, the decree of reduction may be registered in the Land Register and does not have real effect until so registered. Thus, the practical difficulties resulting from the decision in *Short's Trustee v Chung*¹³² have been solved, but the issues of equity raised above remain.

Until recently, an action for reduction was competent only in the Court of Session, but reduction (other than reduction of a court decree) is now competent in the sheriff court.¹³³ In a case in which proceedings relating to a gratuitous alienation were brought in the Court of Session, it was held that the correct form of procedure was an ordinary action, but that where the proceedings had been brought by petition, it would not necessarily be appropriate to dismiss the petition and require the petitioners to begin again by way of an action on the commercial roll in the absence of any actual or perceived prejudice or unfairness.¹³⁴ **14-35**

A trustee in sequestration must insert a copy of any decree granted under these provisions affecting the sequestrated estate in the sederunt book.¹³⁵ **14-36**

¹²² Conveyancing (Scotland) Act 1924 s.46(1).

¹²³ *Short's Trustee v The Keeper of the Registers*, 1996 S.L.T. 166.

¹²⁴ For a detailed analysis of the case, see McKenzie, DW. "Short's Tr v Keeper of the Registers". 1996 J.R. 217.

¹²⁵ *Short's Trustee v Chung (No.2)*, 1997 S.C.L.R. 1181.

¹²⁶ See the commentary on the case at 1998 Bus. L.B. 31-7.

¹²⁷ *Brown v Stewart* [2008] CSOH 155.

¹²⁸ See Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (Discussion Paper No.125, 2004), Pt 6.

¹²⁹ Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (Discussion Paper No.125, 2004), para.6.18.

¹³⁰ Scottish Law Commission, *Report on Land Registration* (Scot. Law Com. No.222).

¹³¹ Scottish Law Commission, *Report on Land Registration* (Scot. Law Com. No.222), para.20.7 and para.28.21.

¹³² *Short's Trustee v Chung*, 1991 S.C.L.R. 629.

¹³³ See Courts Reform (Scotland) Act 2014 s.38.

¹³⁴ *Fraser, Petitioner* [2012] CSOH 184.

¹³⁵ Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.18.

- 14–37** It has been held that the fact that there are two decrees of the same court which are inconsistent on the matter of whether there has been a gratuitous alienation could constitute an exceptional reason justifying the reduction of a decree by default in an action for the reduction of a gratuitous alienation where reduction of the decree by default was necessary to produce substantial justice.¹³⁶
- 14–38** Section 98 is without prejudice to the operation of s.2 of the Married Women's Policies of Assurance (Scotland) Act 1880, including the operation of that section as applied by the Civil Partnership Act 2004.¹³⁷ That section provides that a policy of assurance effected by a man or woman on their own life and expressed on the face of it to be for the benefit of his or her spouse or children, or his or her spouse and children is deemed to be a trust for their benefit and, *inter alia*, is not "revocable as a donation, or reducible on any ground of excess or insolvency". It goes on to provide, however, that if it is proved that the policy was effected and premiums paid with intent to defraud creditors, or if the person upon whose life the policy is effected is made bankrupt within two years from the date of the policy, it shall be competent to the creditors to claim repayment of the premiums from the trustee of the policy out of the proceeds thereof.
- 14–39** Section 422 of the Proceeds of Crime Act 2002 provides that where a person whose estate has been sequestrated in Scotland has made a tainted gift (whether directly or indirectly), no decree may be granted under, *inter alia*, s.98 of the Bankruptcy (Scotland) Act 2016 in respect of the making of the gift at any time when any property of the recipient of the tainted gift is subject to a restraint order under specified provisions of that Act, or such property is detained under or by virtue of specified provisions of that Act, or there is in force in respect of such property certain other orders under specified provisions of that Act, and any decree granted under s.98 of the Bankruptcy (Scotland) Act 2016 after any such order is discharged must take into account any realisation of property held by the recipient of the tainted gift under Pts 2, 3 or 4 of the Proceeds of Crime Act 2002.
- 14–40** The making of a gratuitous alienation may in some circumstances be an offence: a person who is absolutely insolvent and who, *inter alia*, transfers anything to another person for an inadequate consideration in the period commencing one year immediately before the date of sequestration and ending with the debtor's discharge is guilty of an offence unless they show that they did not do so with intent to prejudice the creditors.¹³⁸ In *Moore v HMA*,¹³⁹ the debtor was sentenced to six months imprisonment for transferring certain properties to another for an inadequate consideration in the year prior to his sequestration; his appeal against conviction on the ground that there was insufficient evidence of the value of the properties and, thus, the inadequacy of the consideration was refused.¹⁴⁰

¹³⁶ See *Nova Scotia Ltd v Henderson* [2015] CSOH 126.

¹³⁷ Bankruptcy (Scotland) Act 2016 s.98(10).

¹³⁸ Bankruptcy (Scotland) Act 2016 ss.218(9)(a), (10) and 219(3). The reference to intent to prejudice the creditors includes intent to prejudice an individual creditor: Bankruptcy (Scotland) Act 2016 s.219(3). A person also commits this offence if they do anything in England, Wales or Northern Ireland which would constitute the offence if done in Scotland: Bankruptcy (Scotland) Act 2016 s.219(4).

¹³⁹ *Moore v HMA*, 2010 HCJAC 26.

¹⁴⁰ See also *Forster v Ferguson & Forster, Macfie & Alexander*, 2010 S.L.T. 867, in which reference is made to the pursuer having been sentenced to 18 months imprisonment having pled guilty to six breaches of s.67(6) of the Bankruptcy (Scotland) Act 1985, the predecessor of the current provision, although it is not clear from the report whether the transactions involved in that

Common law

The types of transaction which may be challengeable at common law will be similar to those which may be challengeable under statute. Examples from the cases include the transfer of heritage¹⁴¹; the grant of a bond¹⁴²; the transfer of funds¹⁴³; a post-nuptial marriage contract¹⁴⁴; the expenditure of funds for the benefit of third parties¹⁴⁵; the discharge of legitim¹⁴⁶; the exercise of a power of appointment (even though it did not result in an alienation of property of the appointer)¹⁴⁷; the sale of a ship.¹⁴⁸ 14-41

As referred to above, the transaction must be voluntary, in the sense that it could not be legally compelled.¹⁴⁹ 14-42

The challenger must establish that the alienation was for no or inadequate consideration. The cases generally do not discuss the nature or adequacy of consideration in any great detail, although it is clear that consideration may include payment in money.¹⁵⁰ On the other hand, it has been held that a wife's renunciation of the rights which would accrue to her on her husband's death could not constitute consideration for a post-nuptial marriage contract.¹⁵¹ It is thought, however, that the same principles which are discussed above in relation to the nature and adequacy of consideration in the context of the statutory provisions would apply at common law. 14-43

The challenger must also establish both the debtor's insolvency at the time of the transaction and since and their knowledge of their insolvency.¹⁵² What constitutes the debtor's insolvency for this purpose, however, is not free from difficulty. It has generally been accepted that it is absolute insolvency which is required,¹⁵³ but McBryde argues that it is enough that the debtor is afraid that he might fail,¹⁵⁴ and it has been said, albeit obiter, that this analysis is preferable.¹⁵⁵ 14-44

case were transfers for inadequate consideration or unfair preferences, which are also covered by this provision: see further para.14-62.

¹⁴¹ See *Street v Mason* (1672) Mor 4911; *Reid v Reid* (1673) Mor 4923; *Earl of Glencairn v Birsbane* (1677) Mor 1011.

¹⁴² See *Blair v Wilson* (1677) Mor 4927; *Creditors of William Robertson v His Children* (1688) Mor 4929.

¹⁴³ *Dobie v McFarlane* (1854) 17 D. 97; *Gilmour, Shaw and Co's Trustee v Learmonth*, 1972 S.C. 137.

¹⁴⁴ *Dunlop v Johnston* (1867) 5 M. (HL) 22. Cf *McLay v McQueen* (1899) 1 F. 804, where an ante-nuptial marriage contract was held not to be challengeable.

¹⁴⁵ *Main v Fleming's Trustee* (1881) 8 R. 880; *Boyle's Trustee v Boyle*, 1988 S.L.T. 581.

¹⁴⁶ *Obers v Paton's Trustees* (1897) 24 R. 719.

¹⁴⁷ *Thomson v Spence*, 1961 S.L.T. 395.

¹⁴⁸ *Abram Steamship Co Ltd v Abram*, 1925 S.L.T. 243.

¹⁴⁹ See, in particular, *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

¹⁵⁰ See, for example, *Earl of Glencairn v Birsbane* (1677) Mor 1011, where it was however argued that the price was not adequate because the pursuer was willing to pay more.

¹⁵¹ *Dunlop v Johnston* (1867) 5 M. (HL) 22.

¹⁵² *Abram Steamship Co Ltd v Abram*, 1925 S.L.T. 243. See also *Street v Mason* (1672) Mor 4911; *Reid v Reid* (1673) Mor 4923; *Dobie v McFarlane* (1854) 17 D. 97; *Main v Fleming's Trustee* (1881) 8 R. 880.

¹⁵³ See Bell, *Commentaries*, ii, 154; Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.18; Stair Memorial Encyclopaedia *Bankruptcy* (Reissue), para.86. Absolute insolvency is discussed in Ch.1.

¹⁵⁴ McBryde, W.W. *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.12-32, referring to dicta in the case of *McCowan v Wright* (1852) 14 D. 968; (1853) 15 D. 494. That case was concerned with unfair preferences.

¹⁵⁵ See *Kenneil v Kenneil*, 2006 S.L.T. 449. That case was also concerned with unfair preferences.

- 14-45** The challenger must establish that the transaction was to the prejudice of lawful creditors in so far as it diminished the estate which would otherwise have been available to the creditors.¹⁵⁶ It is not, however, necessary to establish actual fraud: the fraud consists in the debtor, in the knowledge of their insolvency, disposing of assets which ought to have been available to their creditors.¹⁵⁷
- 14-46** The alienation is voidable, not void. The challenger may seek reduction where appropriate,¹⁵⁸ but reduction may not always be necessary to enable the challenger to recover the property alienated. In an appropriate case, the challenger may seek to recover the amount by which the defender is *lucratus* as a result of expenditure by the debtor¹⁵⁹ or the difference between inadequate consideration and the true value of the property.¹⁶⁰ A third party who has acquired the alienated property or an interest in the alienated property in good faith and for value will not be affected by the fact that the alienation is challengeable.¹⁶¹ In such a case, since the alienation cannot be reduced, the challenger is likely to seek payment of the value of the property from the recipient of the alienation.
- 14-47** As noted above, a challenge at common law may now be made by a trustee in sequestration, a trustee acting under a protected trust deed or a judicial factor appointed under s.11A of the Judicial Factors (Scotland) Act 1889.¹⁶² It is thought that a challenge at common law may also be made by a trustee under a trust deed which is not protected where they act as the representative of the creditors.¹⁶³ A challenge at common law may also be made by a creditor, whether they became a creditor before or after the alienation.¹⁶⁴ Such a challenge may be made at any time after the alienation has taken place and is not dependent on the debtor's sequestration, etc. This has the advantage that a challenge may therefore be made at a much earlier stage. A creditor may, however, be reluctant to incur the expense of making a challenge, since the result of any successful challenge is not to transfer what is recovered to the creditor, but to restore it to the debtor's estate where it is subject to the diligence of all creditors, including the challenging creditor: any other result would simply result in the creation of a preference in favour of the challenging creditor in place of the earlier preference.¹⁶⁵ An early challenge might, however, be worthwhile, if it means that the assets disposed of is recovered directly.
- 14-48** As noted at para.14-11, another advantage of the common law provisions is that there is no requirement that the transaction must have taken place within specific time limits.

¹⁵⁶ See, for example, *Main v Fleming's Trustee* (1881) 8 R. 880.

¹⁵⁷ *Main v Fleming's Trustee* (1881) 8 R. 880.

¹⁵⁸ See, for example, *Street v Mason* (1672) Mor 4911 and *Reid v Reid* (1673) Mor 4923 (reduction of dispositions of heritable property); *Dobie v McFarlane* (1854) 17 D. 97 (reduction of deposit-receipt); *Dunlop v Johnston* (1867) 5 M. (HL) 22 (reduction of part of marriage contract); *Obers v Paton's Trustees* (1897) 24 R. 719 (reduction of discharge of legitim).

¹⁵⁹ See, for example, *Main v Fleming's Trustee* (1881) 8 R. 880; *Boyle's Trustee v Boyle*, 1988 S.L.T. 581.

¹⁶⁰ *Abram Steamship Co Ltd v Abram*, 1925 S.L.T. 243.

¹⁶¹ See, for example, *Williamson v Sharp* (1851) 14 D. 127.

¹⁶² Bankruptcy (Scotland) Act 2016 s.98(11).

¹⁶³ See *McLaren's Trustee v National Bank of Scotland Ltd* (1897) 24 R. 920. The case concerned a fraudulent preference, but the principle is the same.

¹⁶⁴ See *Street v Mason* (1672) Mor 4911; *Reid v Reid* (1673) Mor 4923; *Blair v Wilson* (1677) Mor 4927; *Creditors of William Robertson v His Children* (1688) Mor 4929.

¹⁶⁵ See *Cook v Sinclair & Co* (1896) 23 R. 925; *McLaren's Trustee v National Bank of Scotland Ltd* (1897) 24 R. 920.

UNFAIR PREFERENCES

Statutory provisions

The relevant statutory provisions are contained in s.99 of the Bankruptcy (Scotland) Act 2016.¹⁶⁶ In accordance with the recommendations of the Scottish Law Commission, discussed above, they have been harmonised so far as possible with the statutory provisions on gratuitous alienations. Although they replace the provisions of the Bankruptcy Act 1696, the case law on the latter remains relevant. Special provisions apply in pension-sharing cases.¹⁶⁷ **14-49**

Application of provisions

The provisions apply where the debtor's estate has been sequestrated (in the case of an individual debtor, within the debtor's lifetime)¹⁶⁸; the debtor has granted a trust deed which has become protected¹⁶⁹; the estate of a deceased debtor has been sequestrated within 12 months of their death¹⁷⁰; or a judicial factor has been appointed to the estate of a deceased debtor under s.11A of the Judicial Factors (Scotland) Act 1889 within 12 months of the debtor's death and the estate was absolutely insolvent at the date of death.¹⁷¹ **14-50**

Persons who may challenge

The challenge may be made by the trustee in sequestration, the trustee under the protected trust deed or the judicial factor as the case may be.¹⁷² It may also be made by any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, the granting of the trust deed or the debtor's death as the case may be.¹⁷³ It is thought that, in the same way as in the case of the statutory provisions on gratuitous alienations, a creditor's right to challenge would be regarded as an independent right and it would be competent for a creditor to bring proceedings even where proceedings have been brought by any of the other persons entitled to bring them or to be sisted in such proceedings.¹⁷⁴ It is also thought that, in the same way as in the case of the statutory provisions on gratuitous alienations, proceedings may be brought after the discharge of the debtor.¹⁷⁵ **14-51**

What may be challenged

The provisions allow the challenge of a transaction entered into by the debtor "which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors".¹⁷⁶ Thus, the transaction must be **14-52**

¹⁶⁶ The corresponding section of the Insolvency Act 1986 is s.243; as with the statutory provisions on gratuitous alienations, the provisions are identical except for the differences in terminology necessary to reflect the different types of debtor.

¹⁶⁷ The relevant provisions are contained in ss.104–106 of the Bankruptcy (Scotland) Act 2016 and as noted at para.14-04, they also apply in the case of gratuitous alienations and orders on divorce or dissolution of a civil partnership. They are therefore discussed separately at para.14-93 onwards.

¹⁶⁸ Bankruptcy (Scotland) Act 2016 s.99(1)(a).

¹⁶⁹ Bankruptcy (Scotland) Act 2016 s.99(1)(b). Protected trust deeds are dealt with in Ch.22.

¹⁷⁰ Bankruptcy (Scotland) Act 2016 s.99(1)(c)(i).

¹⁷¹ Bankruptcy (Scotland) Act 2016 s.99(1)(c)(ii). Judicial factors are discussed in Ch.23.

¹⁷² Bankruptcy (Scotland) Act 2016 s.99(5)(b).

¹⁷³ Bankruptcy (Scotland) Act 2016 s.99(5)(a).

¹⁷⁴ See discussion at para.14-17 and *Accountant in Bankruptcy v Brown* [2009] CSIH 2: while that case was concerned with the statutory provisions on gratuitous alienations, the court in reaching its decision drew on relevant authority on preferences and noted that the same principles had been treated as applying to gratuitous alienations.

¹⁷⁵ See discussion at para.14-17 and *Ovenstone's Trustee v Ovenstone*, 1995 S.C.L.R. 969.

¹⁷⁶ Bankruptcy (Scotland) Act 2016 s.99(1).

made by the debtor, it must create a preference in favour a creditor and it must have a detrimental impact on the general body of creditors. If all of these elements are not present, the transaction will not be challengeable. For the purpose of these provisions, a creditor "is to be construed merely as a person making a claim upon the debtor's estate; the category need not be a very strict one".¹⁷⁷ It is the effect of the transaction which is important. It is not necessary to have specific averments of the prejudice of the general body of creditors, as this may be inferred.¹⁷⁸

- 14–53** The paradigm example of such a transaction is the granting by the debtor of a security for a previously unsecured debt.¹⁷⁹ Other examples include the transfer of assets in satisfaction of a debt,¹⁸⁰ the transfer of assets in security for a pre-existing debt¹⁸¹; the endorsement of cheque in favour of a creditor¹⁸²; and payment of invoices where payment in the ordinary course of trade would have been withheld for lack of specification and vouching.¹⁸³ It has been held that an agreement to sell equipment belonging to the debtor to a creditor in exchange for a sum previously loaned to the debtor by the creditor, the equipment remaining in the possession of the debtor, was not a sale but an attempt to create security without delivery and constituted an unfair preference.¹⁸⁴ It has also been held that a payment made directly or indirectly to a creditor through the instrumentality of a cautioner which has the effect of relieving the cautioner constitutes an unfair preference and the trustee can proceed against the cautioner without the necessity of proceeding against the creditor to whom payment was made.¹⁸⁵ A trust deed for creditors may constitute an unfair preference.¹⁸⁶ If, however, a transaction transfers to a creditor something which the creditor would have been able to claim in a sequestration as wholly theirs, such as property held in trust for the creditor, this will not create a preference in favour of the creditor to the prejudice of the general body of creditors since the general body of creditors would have had no right to the property transferred.¹⁸⁷

Time limits

- 14–54** The preference must have been created not earlier than six months before the date of sequestration, granting of the trust deed or the debtor's death, as the case may be.¹⁸⁸ It is thought that, in the same way as in the case of a gratuitous alienation, the creation of a preference for this purpose may be on a day after the date of sequestration, the granting of the trust deed or the debtor's death (as the case may be).¹⁸⁹ The time limit is obviously very short.

¹⁷⁷ *McGruther v AB Services (Scotland) Ltd* unreported 13 December 2010 Glasgow Sheriff Court, upheld on appeal, unreported July 2011 Sheriff Principal of Glasgow and Strathkelvin.

¹⁷⁸ *Balcraig House's Trustee v Roosevelt Property Services Ltd*, 1994 S.L.T. 1133.

¹⁷⁹ See *McCowan v Wright* (1853) 15 D. 494.

¹⁸⁰ See *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

¹⁸¹ *Dumbarton Building & Civil Engineering Co Ltd v Devoy* unreported 19 January 1996 IH.

¹⁸² *Walkraft Paint Co Ltd v James H Kinsey Ltd*, 1964 S.L.T. 104.

¹⁸³ *McGruther v AB Services (Scotland) Ltd* 13 unreported December 2010 Glasgow Sheriff Court, upheld on appeal, unreported July 2011 Sheriff Principal of Glasgow and Strathkelvin.

¹⁸⁴ *Balcraig House's Trustee v Roosevelt Property Services Ltd*, 1994 S.L.T. 1133.

¹⁸⁵ *Anderson v Dickens* [2008] CSOH 134.

¹⁸⁶ *Mackenzie v Calder* (1868) 6 M. 833; *Munro v Rothfield*, 1920 2 S.L.T. 172.

¹⁸⁷ *Raymond Harrison & Co's Trustee v North West Securities Ltd*, 1989 S.L.T. 718. In that case, the court found on the facts that there was no constructive trust or other basis for the creditor's claim to be entitled to what was transferred.

¹⁸⁸ Bankruptcy (Scotland) Act 2016 s.99(1).

¹⁸⁹ See para.14–20 and *Jackson v Royal Bank of Scotland*, 2002 S.L.T. 1123, a case on s.242 of the Insolvency Act 1986. All of the relevant provisions use the words "not earlier than".

Preference created when completely effectual

A preference is created on the day on which it becomes “completely effectual”.¹⁹⁰ This concept is discussed at para.14–27 in the context of gratuitous alienations, where the same concept is used. 14–55

Nature of preference

The Bankruptcy Act 1696 required the preference to be voluntary, in the sense that it could not have been legally compelled.¹⁹¹ It is a moot point whether this remains a requirement under the current provisions.¹⁹² If so, the result would be that a preference which becomes completely effectual on a day not earlier than six months prior to the date of sequestration, granting of the trust deed or the debtor’s death, but which implements an obligation entered into more than six months before the relevant date, would escape challenge. The current provisions do not, however, contain any reference to such a requirement. On the other hand, it has been argued that there is no evidence that it was intended to change the previous law.¹⁹³ Perhaps surprisingly, the matter does not seem to have arisen for decision.¹⁹⁴ On balance, it is thought that the better view is that in the absence of specific statutory provision to that effect, a preference does not require to be voluntary in the sense referred to. 14–56

Exemptions

The following transactions are exempt from challenge:

14–57

- (1) A transaction in the ordinary course of trade or business.¹⁹⁵ Whether or not a transaction falls into this category depends on the particular circumstances of each case and it may be necessary to have an enquiry into the facts in order to determine whether this exception applies.¹⁹⁶ In particular, it may be necessary to consider the specific practices in the particular trade or profession in question to determine if a transaction falls within this category. There is a close link between this exception and the exception for payments in cash, which must also be in the normal course of trade and business.¹⁹⁷ The endorsement of a cheque in favour of a creditor is not normally a transaction in the normal course of business, particularly where it is “isolated and unprecedented”.¹⁹⁸ A payment to a creditor by the debtor’s debtor on the debtor’s instructions is not normally in ordinary course of business.¹⁹⁹ It has been held that an agreement to sell equipment belonging to the debtor to a creditor in exchange for a sum previously loaned to the debtor by the creditor, the equipment remaining in possession of the debtor, was not a transaction in the ordinary course of business.²⁰⁰

¹⁹⁰ Bankruptcy (Scotland) Act 2016 s.99(4).

¹⁹¹ See *Taylor v Farrie* (1855) 17 D. 639; *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

¹⁹² See, in particular, McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), paras 12–114 to 12–116, McKenzie, “Gratuitous Alienations and Unfair Preferences on Insolvency” 1993 JLSS 141 and letter in response thereto by Sellar, DP, 1993 JLSS 215.

¹⁹³ Letter by Sellar, DP, 1993 JLSS 215.

¹⁹⁴ Although see *Leslie v White* [2013] CSIH 20, where the requirement seems to have been conceded by the liquidator.

¹⁹⁵ Bankruptcy (Scotland) Act 2016 s.99(2)(a).

¹⁹⁶ See, for example, *Leslie v White* [2013] CSIH 20.

¹⁹⁷ See cases cited below.

¹⁹⁸ *Walkraft Paint Co Ltd v James H Kinsey Ltd*, 1964 S.L.T. 104.

¹⁹⁹ *Bob Gray (Access) Ltd v T M Standard Scaffolding Ltd*, 1987 S.C.L.R. 720.

²⁰⁰ *Balcairg House’s Trustee v Roosevelt Property Services Ltd*, 1994 S.L.T. 1133.

It has also been held that the raising of an action and arrestment on the dependence by a creditor followed by the granting of a mandate by the debtor to release the arrested funds to the creditor, though common, is not a transaction in the ordinary course of trade or business.²⁰¹

- (2) A payment in cash for a debt which, when it was paid, had become payable, unless the transaction was collusive with the purpose of prejudicing the general body of creditors.²⁰² Cash includes coins and banknotes and also cheques and bankers' drafts.²⁰³ It is thought that a payment in cash would also include a payment made electronically, since such a payment represents cash in the hands of the recipient. The endorsement of a bill or cheque in favour of a creditor is not generally a payment in cash, although it has been held in very special circumstances that a cheque payable to the debtor's law agent and endorsed by them to one of the debtor's creditors was a payment in cash.²⁰⁴ It has been held that the consignment of sums in court and the placing of funds on deposit receipt pending the outcome of litigation is a payment in cash for this purpose.²⁰⁵ A payment to a creditor by the debtor's debtor on the debtor's instructions, however, will not normally be a payment in cash for this purpose.²⁰⁶ The payment must have been made bona fide and, in a business context, in the ordinary course of business,²⁰⁷ but a payment in cash for a debt which has become payable will normally be in the ordinary course of business.²⁰⁸ The payment need not have been made immediately the debt became payable.²⁰⁹ The onus of establishing that the debt in respect of which the payment was made was valid and had become payable lies on the defender.²¹⁰ It has been held that a debt was not payable where the invoices on which it was based were defective pending proper vouching and specification.²¹¹ Collusion in this context has the same meaning as at common law.²¹²
- (3) A transaction whereby the parties undertake reciprocal obligations (whether their performance occurs at the same time or at different times), unless the transaction was collusive with the purpose of prejudicing the general body of creditors.²¹³ Such transactions are commonly referred to as "*nova debita*". The reciprocal obligations must be of a strictly equivalent value.²¹⁴ It has been doubted whether

²⁰¹ *R Gaffney & Sons Ltd (in liquidation) v Davidson*, 1996 S.L.T. (Sh Ct) 36.

²⁰² Bankruptcy (Scotland) Act 2016 s.99(2)(b), (3).

²⁰³ *Whatmough's Trustee v British Linen Bank*, 1932 S.C. 525; on appeal, 1934 S.C. (H.L.) 51.

²⁰⁴ *Richmond v United Collieries* (1905) 12 S.L.T. 741; 13 S.L.T. 458.

²⁰⁵ *Craiglaw Developments Ltd v Gordon Wilson & Co*, 1997 S.C.L.R. 1157 (Notes).

²⁰⁶ *Richmond v Alexander Finlayson & Co Ltd*, 1928 S.L.T. 468; *Walkraft Paint Co Ltd v James H Kinsey Ltd*, 1964 S.L.T. 104; *Bob Gray Access Ltd v TM Standard Scaffolding Ltd*, 1987 S.C.L.R. 720; *R Gaffney & Sons Ltd (in liquidation) v Davidson*, 1996 S.L.T. (Sh Ct) 36. Cf *Craig v Hunter & Son* (1905) 13 S.L.T. 525.

²⁰⁷ *McCowan v Wright* (1853) 15 D. 494; *Bob Gray (Access) Ltd v TM Standard Scaffolding Ltd*, 1987 S.C.L.R. 720; *Baillie Marshall Ltd (in liquidation) v Avian Communications Ltd*, 2002 S.L.T. 189.

²⁰⁸ *McCowan v Wright* (1853) 15 D. 494.

²⁰⁹ *Secretary of State for Trade and Industry v Burn*, 1998 S.L.T. 109.

²¹⁰ *McLennan v Revlis Ltd* unreported 20 September 1999 Aberdeen Sheriff Court.

²¹¹ *McGruther v AB Services (Scotland) Ltd* unreported 13 December 2010 Glasgow Sheriff Court, upheld on appeal, unreported July 2011 Sheriff Principal of Glasgow and Strathkelvin.

²¹² *McLennan v Revlis Ltd* unreported 20 September 1999 Aberdeen Sheriff Court and *Baillie Marshall Ltd (in liquidation) v Avian Communications Ltd*, 2002 S.L.T. 189, each applying *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1. See also *Secretary of State for Trade and Industry v Burn*, 1998 S.L.T. 109. The common law is discussed at para.14–63 onwards.

²¹³ Bankruptcy (Scotland) Act 2016 s.99(2)(c), (3).

²¹⁴ *Nicoll v Steelpress (Supplies) Ltd*, 1992 S.C.L.R. 332.

the reduction of prior indebtedness can ever qualify as a *novum debitum*.²¹⁵ As the words in parentheses make clear, the reciprocal obligations may be performed at different times so long as they are undertaken at the same time: for example, a security for a loan may be granted before or after the advance of the loan provided the agreement requires the granting of the security.²¹⁶ Where there is a running account, advances made subsequent to the undertaking to grant security are *nova debita*²¹⁷ and, unless there is an agreement to the contrary, the rule in *Clayton's case*²¹⁸ will apply for the purpose of ascertaining to what extent the balance of the debt due to the creditor constitutes *nova debita*.²¹⁹ As in relation to the previous exception, collusion in this context has the same meaning as at common law.²²⁰

- (4) The granting of a mandate by the debtor authorising an arrestee to pay over the whole or part of the arrested funds to the arresting creditor where there has been a decree for payment or a summary warrant which was preceded by an arrestment on the dependence or followed by an arrestment in execution.²²¹ It has been said that if a payment did not satisfy the requirements of this provision, that would in most cases be determinative of the matter, but it would be going too far to say that a payment which was not exempt under this provision could never be exempt as a transaction in the ordinary course of trade or business or as a payment in cash for a debt which had become payable.²²²

Remedy

On a successful challenge, the court must grant decree of reduction, restoration of the property or such other redress as appropriate.²²³ This is, however, without prejudice to any right or interest acquired in good faith and for value from or through the creditor in whose favour the preference was created.²²⁴ There is no general equitable power available to make the operation of the provisions discretionary, the mandatory terms of the provisions contradicting such a suggestion.²²⁵ It has been held that the approach taken by the court in *Short's Trustee v Chung*²²⁶ to the corresponding provision in the context of the statutory provisions on gratuitous alienations also applies in the context of these provisions with the result that a claim for damages under these provisions was not permissible.²²⁷ That case and the issues to which gave rise and continue to give rise are discussed at para. 14–32 onwards in the context of the statutory provisions on gratuitous alienations. It should be noted that a successful challenge results in return of any property or the payment of other redress to the debtor's estate irrespective of who the challenger is: a successful challenge by

14–58

²¹⁵ *Nicoll v Steelpress (Supplies) Ltd*, 1992 S.C.L.R. 332.

²¹⁶ This reflects the earlier law: see *McCowan v Wright* (1853) 15 D. 494.

²¹⁷ *Robertson's Trustee v Union Bank of Scotland*, 1917 S.C. 549; *Thomas Montgomery & Sons v Gallacher*, 1982 S.L.T. 138.

²¹⁸ *Devaynes v Noble* (1816) 1 Mer. 529.

²¹⁹ *Thomas Montgomery & Sons v Gallacher*, 1982 S.L.T. 138.

²²⁰ *Baillie Marshall Ltd (in liquidation) v Avian Communications Ltd*, 2002 S.L.T. 189 applying *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1. The common law is discussed at para. 14–63 onwards.

²²¹ Bankruptcy (Scotland) Act 2016 s.99(2)(d).

²²² *R Gaffney & Sons Ltd (in liquidation) v Davidson*, 1996 S.L.T. (Sh Ct) 36.

²²³ Bankruptcy (Scotland) Act 2016 s.99(6).

²²⁴ Bankruptcy (Scotland) Act 2016 s.99(7). The onus of establishing that any right or interest was acquired in good faith and for value, as in the case of a gratuitous alienation, lies on the acquirer: *Henderson v Foxworth Investments Ltd* [2011] CSOH 66.

²²⁵ *Raymond Harrison & Co's Trustee v North West Securities Ltd*, 1989 S.L.T. 718.

²²⁶ *Short's Trustee v Chung*, 1991 S.C.L.R. 629.

²²⁷ *Raymond Harrison & Co's Trustee v North West Securities Ltd*, 1989 S.L.T. 718.

a creditor does not result in any transfer of property or payment of other redress directly to the creditor.²²⁸ A defender may not set off any sums due to them against their liability under these provisions.²²⁹

- 14–59** As noted above in relation to gratuitous alienations, until recently, an action for reduction was competent only in the Court of Session, but reduction (other than reduction of a court decree) is now competent in the sheriff court.²³⁰ In a case in which proceedings relating to a gratuitous alienation were brought in the Court of Session, it was held that the correct form of procedure was an ordinary action, but that where the proceedings had been brought by petition, it would not necessarily be appropriate to dismiss the petition and require the petitioners to begin again by way of an action on the commercial roll in the absence of any actual or perceived prejudice or unfairness.²³¹ The same would apply in relation to proceedings relating to an unfair preference.
- 14–60** A trustee in sequestration must insert a copy of any decree granted under these provisions affecting the sequestrated estate in the sederunt book.²³²
- 14–61** Section 422 of the Proceeds of Crime Act 2002 provides that where a person whose estate has been sequestrated in Scotland has made a tainted gift (whether directly or indirectly), no decree may be granted under, inter alia, s.99 of the Bankruptcy (Scotland) Act 2002 in respect of the making of the gift at any time when any property of the recipient of the tainted gift is subject to a restraint order under specified provisions of that Act, or such property is detained under or by virtue of specified provisions of that Act, or there is in force in respect of such property certain other orders under specified provisions of that Act, and any decree granted under s.99 of the Bankruptcy (Scotland) Act 2016 after any such order is discharged must take into account any realisation of property held by the recipient of the tainted gift under Pts 2, 3 or 4 of the Proceeds of Crime Act 2002.
- 14–62** The giving of an unfair preference may in some circumstances be an offence: a person who is absolutely insolvent and who, inter alia, grants any unfair preference to any of their creditors in the period commencing one year immediately before the date of sequestration and ending with the debtor's discharge is guilty of an offence unless they show that they did not do so with intent to prejudice the creditors.²³³

Common law

- 14–63** Preferences which are challengeable at common law are referred to as fraudulent preferences.

²²⁸ See *Cook v William Sinclair & Co* (1896) 23 R. 925.

²²⁹ *Raymond Harrison & Co's Trustee v North West Securities Ltd*, 1989 S.L.T. 718.

²³⁰ See Courts Reform (Scotland) Act 2014 s.38.

²³¹ *Fraser, Petitioner* [2012] CSOH 184.

²³² Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.20.

²³³ Bankruptcy (Scotland) Act 2016 ss.218(9)(b), (10) and 219(3). The reference to intent to prejudice the creditors includes intent to prejudice an individual creditor: Bankruptcy (Scotland) Act 2016 s.219(3). A person also commits this offence if they do anything in England, Wales or Northern Ireland which would constitute the offence if done in Scotland: Bankruptcy (Scotland) Act 2016 s.219(4). See also the cases cited at para.14–40 in the context of the discussion of this provision as it relates to transfers for inadequate consideration.

The same types of transaction will generally be challengeable at common law as under statute. Examples from the case law include: the granting of security for previously unsecured debts²³⁴; abandoning the defence of an action with the result that decree passes against the debtor²³⁵; the transfer of assets in payment of a debt²³⁶; and the granting of a trust deed for creditors.²³⁷ 14-64

As referred to above, the transaction must be voluntary, in the sense that it could not be legally compelled.²³⁸ 14-65

Certain transactions will not be challengeable at common law. It is generally accepted that the categories of transactions which cannot be challenged at common law are the same as the previous statutory exceptions under the Bankruptcy (Scotland) Act 1696, which now constitute three of the four statutory exceptions under the Bankruptcy (Scotland) Act 2016, i.e. payments in cash, transactions in the normal course of trade and *nova debita*.²³⁹ McBryde argues that it is questionable whether these types of transaction should be treated as more than examples of common situations in which a transaction is usually not fraudulent,²⁴⁰ noting that other transactions outside those categories may not be fraudulent,²⁴¹ while a transaction apparently within the categories may be challengeable²⁴² and collusion may make an otherwise unimpeachable transaction reducible.²⁴³ Be that as it may, a great many of the cases on unfair preferences are concerned with the circumstances in which transactions falling within these categories will or will not be challengeable, and they are thus examined here under those headings. 14-66

- (a) Payments in cash. A payment in cash in the ordinary course of business where the debt is due will not normally be challengeable as an unfair preference.²⁴⁴ In essence, such a payment is not voluntary. Cash includes coins and banknotes and also cheques and bankers' drafts.²⁴⁵ Beyond this, the issue of what constitutes a payment in cash has not really arisen in the cases at common law, but it is suggested that the same principles would apply as in the case of the statutory exemption discussed above. A payment in cash before the debt is due may not be challengeable if it is in the ordinary course of business.²⁴⁶ On the other hand, a payment in cash may be challengeable if it is not

²³⁴ *Grant v Grant* (1748) Mor 949; *Wylie, Stewart & Marshall v Jervis*, 1913 1 S.L.T. 465; *MacDougall's Trustee v Ironside*, 1914 S.C. 186; *McCowan v Wright* (1853) 15 D. 494; *Kenneil v Kenneil*, 1934 S.L.T. 392.

²³⁵ *Wilson v Drummond's Representatives* (1853) 16 D. 275; *Laurie's Trustee v Beveridge* (1867) 6 M. 85.

²³⁶ See *Coutt's Trustee v Webster* (1886) 13 R. 1112.

²³⁷ *Mackenzie v Calder* (1868) 6 M. 833; *Munro v Rothfield*, 1920 2 S.L.T. 172.

²³⁸ See, in particular, *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

²³⁹ See Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.39; *Stair Memorial Encyclopaedia, Bankruptcy* (Reissue), para.88. See also *Whatmough's Trustee v British Linen Bank*, 1932 S.C. 525; on appeal, 1934 S.C. (HL) 51.

²⁴⁰ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.12-28.

²⁴¹ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), referring to the case of *Matthew's Trustee v Matthew* (1876) 5 M. 957.

²⁴² McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), referring to the case of *Jones' Trustee v Jones* (1888) 15 R. 328.

²⁴³ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995),

²⁴⁴ *McCowan v Wright* (1852) 14 D. 968; (1853) 15 D. 494; *Coutt's Trustee v Webster* (1886) 13 R. 1112; *Pringle's Trustee v Wright* (1903) 5 F. 522; *Whatmough's Trustee v British Linen Bank*, 1932 S.C. 525; *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

²⁴⁵ *Whatmough's Trustee v British Linen Bank*, 1932 S.C. 525; on appeal, 1934 S.C. (H.L.) 51.

²⁴⁶ *McLaren's Trustee v National Bank of Scotland Ltd* (1897) 24 R. 920.

in the ordinary course of business²⁴⁷ or if there is collusion.²⁴⁸ For this purpose, the creditor's knowledge of the debtor's insolvency is not enough: what is required is

"participation by a creditor whose co-operation is necessary to achieve the result in some device or transaction designed particularly to confer upon him a preference which would itself be fraudulent".²⁴⁹

In the same way, a payment in cash intended to prefer a cautioner, rather than a creditor, may be challengeable if there is collusion.²⁵⁰

- (b) Transactions in the ordinary course of business. As referred to above, a debtor is entitled to continue their trade unless and until they are relieved of the administration of their estate and, accordingly, any transaction in the ordinary course of business will not normally be challengeable as an unfair preference.²⁵¹ In this context, it may be noted that,²⁵²

"a distinction ought to be made betwixt ordinary acts of management, levying rents, uplifting and paying debts, granting securities &c done in the prosecution of a man's affairs; and extraordinary acts, such as granting a preference to one set of creditors before another, when a man has no other prospect but bankruptcy. Insolvency merely is no objection to the first; because such acts are done with a view to carry on his affairs, and in the hopes of better fortune; and therefore are not only innocent but commendable. The second, though not properly a fraud, is a moral wrong; because, in effect, it is bestowing upon one creditor what ought to be given to all: and such moral wrong cannot be supported by a court of justice: it must be reduced, and no person allowed to take benefit by it".

Thus, transactions in the ordinary course of business will not normally be challengeable but extraordinary transactions will be challengeable. There has been little discussion in the cases at common law of the issue of what constitutes a transaction in the normal course of business other than in the context of payments in cash, but it is suggested that the same principles would also apply as in the case of the statutory exemption discussed above. As in the case of payments in cash, a transaction in the ordinary course of business will be challengeable if there is collusion in the sense discussed in the preceding paragraph.²⁵³

- (c) *Nova debita*. Where a debtor enters into a transaction in respect of which full value is given in return, such a transaction will not normally be challengeable as a fraudulent preference because there is no diminution of the debtor's estate. The paradigm example is the granting of a security for new money. In *Renton & Gray's Trustee v Dickison*,²⁵⁴

²⁴⁷ See *Bob Gray (Access) Ltd v TM Standard Scaffolding Ltd*, 1987 S.C.L.R. 720.

²⁴⁸ See, in particular, *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

²⁴⁹ *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1. See also *Broadfoot v Leith Banking Co* 9 Dec 1808 FC; *Coutt's Trustee v Webster* (1886) 13 R. 1112; *Jones' Trustee v Jones* (1888) 15 R. 328 (which may be explicable on this basis); *Angus Trustee v Angus* (1901) 4 F. 181.

²⁵⁰ *Broadfoot v Leith Banking Co* 9 Dec 1808 FC; *Mitchell v Rodger* (1834) 12 S. 802.

²⁵¹ See, in particular, *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

²⁵² *Grant v Grant* 1748 (Mor) 949.

²⁵³ *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

²⁵⁴ *Renton & Gray's Trustee v Dickison* (1880) 7 R. 951.

it was held in somewhat unusual circumstances that the granting of a security was not a fraudulent preference at common law where full value was given and it was granted in fulfilment of a prior onerous obligation. Beyond this, the issue of *nova debita* has not really arisen in the cases at common law, but it is suggested that the same principles would apply as in the case of the statutory exemption discussed above.

The challenger must establish both the debtor's insolvency at the time of the transaction and since and their knowledge of their insolvency.²⁵⁵ As has already been discussed in the context of gratuitous alienations, what constitutes the debtor's insolvency for this purpose is not free from difficulty: it has generally been accepted that it is absolute insolvency which is required,²⁵⁶ but McBryde argues that it is enough that the debtor is afraid that they might fail²⁵⁷ and it has been said, albeit obiter, that this analysis is preferable.²⁵⁸ 14-67

The challenger must establish that the transaction was to the prejudice of lawful creditors in so far as it diminished the estate which would otherwise have been available to the creditors.²⁵⁹ 14-68

It is not necessary to establish that the creditor receiving the preference knew of the debtor's insolvency, and even if the creditor did know, this will make no difference in the absence of actual collusion.²⁶⁰ It is not necessary to establish actual fraud: the fraud consists in the debtor, in the knowledge of their insolvency, deciding to prefer one creditor over others.²⁶¹ 14-69

The preference is voidable, not void.²⁶² The challenger may seek reduction where appropriate, but reduction may not always be necessary.²⁶³ There is no right to recover property from a third party who has acquired it from the creditor in good faith and for value.²⁶⁴ In such a case, the challenger is likely to seek payment of the value of the property from the recipient of the preference. 14-70

As noted above, a challenge at common law may now be made by a trustee in sequestration, a trustee acting under a protected trust deed or a judicial factor appointed under s.11A of the Judicial Factors (Scotland) Act 1889.²⁶⁵ It is thought that a challenge at common law may also be made by a trustee under a trust deed which is not protected where they act as the representative of the 14-71

²⁵⁵ *McCowan v Wright* (1852) 14 D. 968; (1853) 15 D. 494; *MacDougall's Trustee v Ironside*, 1914 S.C. 186; *Wharmouth's Trustee v British Linen Bank*, 1932 S.C. 525.

²⁵⁶ See Bell, *Commentaries*, ii, 154; Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.41; Stair Memorial Encyclopaedia, *Bankruptcy* (Reissue), para.88. Absolute insolvency is discussed in Ch.1.

²⁵⁷ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.12-32, referring to dicta in the case of *McCowan v Wright* (1852) 14 D. 968; (1853) 15 D. 494.

²⁵⁸ See *Kenneil v Kenneil*, 2006 S.L.T. 449.

²⁵⁹ See, for example, *Miller's Trustee v Shield* (1862) 24 D. 821, where it was held that the debtor's estate was not, in fact diminished by the transaction in question and there was therefore no fraudulent preference.

²⁶⁰ *Grant v Grant* (1748) Mor 949; *Coutt's Trustee v Webster* (1886) 13 R. 1112; *McCowan v Wright* (1852) 14 D. 968; (1853) 15 D. 494; *Wharmouth's Trustee v British Linen Bank*, 1932 S.C. 525; on appeal, 1934 S.C. (HL) 51; *Nordic Travel Ltd v Scotprint Ltd*, 1980 S.C. 1.

²⁶¹ See, in particular, *McCowan v Wright* (1852) 14 D. 968; (1853) 15 D. 494.

²⁶² See, for example, *Munro v Rothfield*, 1920 S.C. (HL) 165.

²⁶³ *McLaren's Trustee v National Bank of Scotland Ltd* (1897) 24 R. 920.

²⁶⁴ See, for example, *Laurie's Trustee v Beveridge* (1867) 6 M. 85.

²⁶⁵ *Bankruptcy (Scotland) Act 2016* s.99(8).

creditors.²⁶⁶ A challenge at common law may also be made by a creditor.²⁶⁷ Such a challenge may be made at any time after the preference has taken place and is not dependent on the debtor's sequestration, etc. As in the case of gratuitous alienations, discussed at para.14–47, this has the advantage that a challenge may therefore be made at a much earlier stage. As noted in connection with gratuitous alienations, however, a creditor may be reluctant to incur the expense of making a challenge, since the result of any successful challenge is not to transfer anything recovered to the creditor, but to restore it to the debtor's estate where it is subject to the diligence of all creditors, including the challenging creditor: any other result would simply result in the creation of a preference in favour of the challenging creditor in place of the earlier preference.²⁶⁸

- 14–72** As noted at para.14–11, another advantage of the common law is that there is no requirement that the transaction must have taken place within specific time limits, which may be particularly important in light of the very short time limits under statute.

ORDERS ON DIVORCE OR DISSOLUTION OF CIVIL PARTNERSHIP

- 14–73** The relevant provisions are contained in s.100 of the Bankruptcy (Scotland) Act 2016. By their nature, they apply only in the case of individual debtors. Special provisions apply in pension-sharing cases.²⁶⁹

Application of provisions

- 14–74** The provisions apply where the debtor's estate has been sequestrated (other than on the death of the debtor)²⁷⁰; the debtor has granted a trust deed which has become protected²⁷¹; the estate of a deceased debtor has been sequestrated within 12 months of their death²⁷²; or a judicial factor has been appointed to the estate of a deceased debtor under s.11A of the Judicial Factors (Scotland) Act 1889 within 12 months of the debtor's death.²⁷³

Persons who may challenge

- 14–75** The challenge may be made by the trustee in sequestration, the trustee under the protected trust deed or the judicial factor as the case may be.²⁷⁴

What may be challenged

- 14–76** The provisions allow the challenge of certain orders which may be made by a court under s.8(2) of the Family Law (Scotland) Act 1985 on divorce or the dissolution of a civil partnership.²⁷⁵ These are: an order for the payment by the

²⁶⁶ See *McLaren's Trustee v National Bank of Scotland Ltd* (1897) 24 R. 920.

²⁶⁷ See, for example, *Grant v Grant* (1748) Mor 949.

²⁶⁸ See *Cook v Sinclair & Co* (1896) 23 R. 925; *McLaren's Trustee v National Bank of Scotland Ltd* (1897) 24 R. 920.

²⁶⁹ The relevant provisions are contained in ss.104–106 of the Bankruptcy (Scotland) Act 2016. As noted at para.14–04, they also apply in the case of gratuitous alienations and unfair preferences and are therefore discussed separately at para.14–93.

²⁷⁰ Bankruptcy (Scotland) Act 2016 s.100(1)(c)(i).

²⁷¹ Bankruptcy (Scotland) Act 2016 s.100(1)(c)(ii). Protected trust deeds are dealt with in Ch.22.

²⁷² Bankruptcy (Scotland) Act 2016 s.100(1)(c)(iii).

²⁷³ Bankruptcy (Scotland) Act 2016 s.100(1)(c)(iv). Judicial factors are discussed in Ch.23.

²⁷⁴ Bankruptcy (Scotland) Act 2016 s.100(2).

²⁷⁵ Bankruptcy (Scotland) Act 2016 s.100(1)(a).

debtor of a capital sum; an order for the transfer of property by the debtor or a pension-sharing order.²⁷⁶

On the date the order was made, the debtor must have been *either* absolutely insolvent *or* rendered absolutely insolvent by the implementation of the order.²⁷⁷ 14-77

Time limits

The order must have been made within five years prior to the sequestration, granting of the trust deed or appointment of the judicial factor as the case may be.²⁷⁸ In the case of a protected trust deed, it is the date of granting of the trust deed which is important, not the date of protection.²⁷⁹ In the case of a sequestration, the date to be used for calculating the five year period is not entirely clear. In contrast to the statutory provisions on gratuitous alienations, unfair preferences and extortionate credit transactions, which refer to the date of sequestration, a term which has a defined meaning, these provisions refer only to the debtor's estate being sequestrated within five years after the making of the order. This could be read as meaning that the relevant date is the date on which sequestration is awarded, which is not always the same as the date of sequestration. This could usefully be clarified. 14-78

Onus of proof

The onus is on the trustee to establish that the debtor was absolutely insolvent at the time the order was made or rendered absolutely insolvent by the implementation of the order. 14-79

Remedy

On a successful challenge, the court may make an order for recall of the relevant order and for the repayment of all or part of any sum already paid *or* the return of all or part of any property already transferred *or*, where any property transferred has been sold, payment of all or part of the proceeds of sale, as appropriate.²⁸⁰ The making of an order is, therefore, discretionary. In exercising its discretion, the court is directed to have regard to all the circumstances including, without prejudice to that generality, the financial and other circumstances, so far as made known to the court, of the person against whom the order would be made.²⁸¹ 14-80

A trustee in sequestration must insert a copy of any decree granted under these provisions affecting the sequestrated estate in the sederunt book.²⁸² 14-81

There appear to be no reported cases on these provisions.²⁸³ 14-82

²⁷⁶ Bankruptcy (Scotland) Act 2016 s.100(1)(a). Absolute insolvency is discussed in Ch.1.

²⁷⁷ Bankruptcy (Scotland) Act 2016 s.100(1)(b).

²⁷⁸ Bankruptcy (Scotland) Act 2016 s.100(1)(c).

²⁷⁹ Bankruptcy (Scotland) Act 2016 s.100(1)(c)(ii).

²⁸⁰ Bankruptcy (Scotland) Act 2016 s.100(2).

²⁸¹ Bankruptcy (Scotland) Act 2016 s.100(3).

²⁸² Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.19.

²⁸³ For a discussion of financial provision on divorce and sequestration, see McBryde, WW, "Financial Provision on Divorce and Sequestration", 1996 S.L.T. (News) 389.

EXCESSIVE PENSION CONTRIBUTIONS

14–83 The relevant provisions are contained in ss.101–103 of the Bankruptcy (Scotland) Act 2016. As previously noted, they were introduced as part of changes to the law on the vesting of the debtor's pension in sequestration.²⁸⁴ They have, however, a somewhat convoluted history. Provisions for the challenge of excessive pension contributions were first inserted in the Bankruptcy (Scotland) Act 1985 by the Pensions Act 1995²⁸⁵ as a corollary of the provisions in the Pensions Act 1995 which provided that an occupational pension was not to be regarded as part of the debtor's estate for the purposes of, *inter alia*, sequestration.²⁸⁶ However, none of these provisions ever came fully into force.²⁸⁷ The Welfare Reform and Pensions Act 1999 repealed the provisions of the Pensions Act 1995 excluding an occupational pension from the debtor's estate and replaced them with provisions giving more extensive protection to the debtor's pension²⁸⁸ and at the same time replaced the provisions for the challenge of excessive pension contributions in the Bankruptcy (Scotland) Act 1985 with new provisions²⁸⁹ which are now contained in ss.101–103 of the Bankruptcy (Scotland) Act 2016. As part of these reforms, the Welfare Reform and Pensions Act 1999 also inserted into the Bankruptcy (Scotland) Act 1985 new provisions regulating the challenge of gratuitous alienations, unfair preferences and orders on divorce in cases involving pension-sharing.²⁹⁰ These provisions are now contained in ss.104–106 of the Bankruptcy (Scotland) Act 2016 and are discussed separately at para.14–93 onwards.

14–84 By their nature, these provisions apply only in the case of individual debtors.

Application of provisions

14–85 The provisions apply only where the debtor's estate has been sequestered.²⁹¹

Persons who may challenge

14–86 A challenge may be made only by the trustee in sequestration.²⁹² The trustee has a right, on making a written request, to obtain from specified persons such information as they may reasonably require for or in connection with the making of such a challenge.²⁹³

What may be challenged

14–87 A challenge may be made where the debtor has rights under an approved pension arrangement or excluded rights under an unapproved pension scheme,²⁹⁴ these

²⁸⁴ See above and Ch.11.

²⁸⁵ See Bankruptcy (Scotland) Act 1985 ss.36A–36C as added by the Pensions Act 1995.

²⁸⁶ See further Ch.11.

²⁸⁷ See further Ch.11.

²⁸⁸ See further Ch.11.

²⁸⁹ See Bankruptcy (Scotland) Act 1985 ss.36A–36C as added by the Welfare Reform and Pensions Act 1999.

²⁹⁰ See Bankruptcy (Scotland) Act 1985 ss.36D–36F as added by the Welfare Reform and Pensions Act 1999.

²⁹¹ Bankruptcy (Scotland) Act 2016 s.101(1).

²⁹² Bankruptcy (Scotland) Act 2016 s.101(1).

²⁹³ Bankruptcy (Scotland) Act 2016 s.103(1). The time for compliance with such a request is nine weeks: Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 (SI 2002/836) reg.19(1)(c)(i).

²⁹⁴ Bankruptcy (Scotland) Act 2016 s.101(1). “Approved pension arrangement” has the same meaning as in s.11 of the Welfare Reform and Pensions Act 1999 and “unapproved pension

rights are to any extent, directly or indirectly, the fruits of relevant contributions²⁹⁵ and the making of any of the relevant contributions (“the excessive contributions”) has unfairly prejudiced the debtor’s creditors.²⁹⁶

“Relevant contributions” are contributions to the arrangement or any other pension arrangement which have been made at any time by or on behalf of the debtor²⁹⁷ and, in determining whether the making of the excessive contributions has unfairly prejudiced the debtor’s creditors, the court must consider in particular whether any of the contributions were made for the purpose of putting assets beyond the reach of the debtor’s creditors or any of them *and* whether the total amount of any contributions made by or on behalf of the debtor to pension arrangements and represented (directly or indirectly) by rights under approved pension arrangements or excluded rights under unapproved pension arrangements is excessive in view of the debtor’s circumstances when the contributions were made.²⁹⁸ Special provisions apply where the court is satisfied that the value of the rights under the arrangement is less than it would otherwise have been as a result of the rights of the debtor under the arrangement or any other pension arrangement having at any time become subject to a debit under s.29(1)(a) of the Welfare Reform and Pensions Act 1999 (debts giving effect to pension-sharing).²⁹⁹ **14–88**

Onus of proof

The onus is on the trustee to satisfy the court that the debtor’s rights are the fruits of relevant contributions and that the making of the excessive contributions has unfairly prejudiced the debtor’s creditors.³⁰⁰ **14–89**

Remedy

On a successful challenge, the court may make such order as it thinks fit for restoring the position to what it would have been if the excessive contributions had not been made.³⁰¹ The making of an order is, therefore, discretionary. Without prejudice to that generality, an order may include: **14–90**

- (a) provision requiring the person responsible for the arrangement to pay an amount to the trustee.³⁰² The maximum amount which the court may require to be so paid is the lesser of: (a) the amount of the excessive contributions; and (b) the value of the debtor’s rights under the

arrangement” has the same meaning as in s.12 of that Act: Bankruptcy (Scotland) Act 2016 s.101(9). Excluded rights under an unapproved pension scheme are rights which are excluded from the debtor’s estate by virtue of regulations made under s.12 of the Welfare Reform and Pensions Act 1999: Bankruptcy (Scotland) Act 2016 s.101(8). Sections 11 and 12 of the Welfare Reform and Pensions Act 1999 are applied to Scotland with specified modifications by s.13 of that Act. The relevant regulations are the Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002. Pension rights are discussed further in Ch.11.

²⁹⁵ Bankruptcy (Scotland) Act 2016 s.101(2)(a).

²⁹⁶ Bankruptcy (Scotland) Act 2016 s.101(2)(b).

²⁹⁷ Bankruptcy (Scotland) Act 2016 s.101(6). It may be noted that the original provisions inserted in the Bankruptcy (Scotland) Act 1985 by the Pensions Act 1995 applied only to contributions made within the period of five years preceding the date of sequestration.

²⁹⁸ Bankruptcy (Scotland) Act 2016 s.101(7).

²⁹⁹ Bankruptcy (Scotland) Act 2016 s.101(4), (5).

³⁰⁰ Bankruptcy (Scotland) Act 2016 s.101(2).

³⁰¹ Bankruptcy (Scotland) Act 2016 s.101(3).

³⁰² Bankruptcy (Scotland) Act 2016 s.102(1)(a). For the purposes of these provisions, the person responsible for a pension arrangement is the trustees, managers or provider of the arrangement or the person having corresponding functions in relation to the arrangement: Bankruptcy (Scotland) Act 2016 s.103(6).

arrangement (in the case of an approved pension arrangement) or excluded rights under the arrangement (in the case of an unapproved pension arrangement).³⁰³ Where provision for payment is made, the order must provide for the liabilities of the arrangement to be correspondingly reduced³⁰⁴; for this purpose, the liabilities of the arrangement are correspondingly reduced if the difference between the amount of the liabilities immediately before the reduction and the amount of the liabilities immediately after the reduction is equal to the amount paid to the trustee.³⁰⁵ Any sum which is required to be paid to the trustee forms part of the debtor's estate.³⁰⁶ An order for payment must be complied with before the end of the period of 17 weeks beginning with the date of service of the order³⁰⁷;

- (b) adjusting the liabilities of the arrangement in respect of the debtor.³⁰⁸ An adjustment includes, in particular, reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement³⁰⁹;
- (c) adjusting any liabilities of the arrangement in respect of any other person which derive directly or indirectly from the rights of the debtor under the arrangement,³¹⁰ with the exception of any liabilities which result from giving effect to an order or provision falling within s.28(1) of the Welfare Reform and Pensions Act 1999 (pension sharing orders and agreements).³¹¹ An adjustment includes, in particular, reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement³¹²; and
- (d) for the recovery of costs incurred by the person responsible for the arrangement in providing information to the trustee as mentioned above or giving effect to an order of the court.³¹³

14-91 In making an order, the court is not affected by statutory provisions or provisions of an arrangement which prevent assignation,³¹⁴ and an order in respect of an arrangement is binding on the person responsible for the arrangement and overrides any provisions of the arrangement to the extent that they conflict with the provisions of the order.³¹⁵

14-92 There is no provision for the trustee in sequestration to insert a copy of any order made under these provisions in the sederunt book.

³⁰³ Bankruptcy (Scotland) Act 2016 s.102(4). The calculation and verification of the value of the debtor's rights or excluded rights is provided for in regulations; see Bankruptcy (Scotland) Act 2016 s.102(4), (5) and the Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.16.

³⁰⁴ Bankruptcy (Scotland) Act 2016 s.102(5).

³⁰⁵ Bankruptcy (Scotland) Act 2016 s.102(6). Provision is made for the calculation and verification of these amounts to be provided for in regulations, but the relevant regulations do not in fact contain any such provision: see Bankruptcy (Scotland) Act 2016 s.103(4), (5) and the Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002.

³⁰⁶ Bankruptcy (Scotland) Act 2016 s.103(3).

³⁰⁷ Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.17.

³⁰⁸ Bankruptcy (Scotland) Act 2016 s.102(1)(b).

³⁰⁹ Bankruptcy (Scotland) Act 2016 s.102(2).

³¹⁰ Bankruptcy (Scotland) Act 2016 s.102(1)(c).

³¹¹ Bankruptcy (Scotland) Act 2016 s.102(3). There are separate provisions for dealing with pension-sharing cases: these are discussed at para.14-93 onwards.

³¹² Bankruptcy (Scotland) Act 2016 s.102(2).

³¹³ Bankruptcy (Scotland) Act 2016 s.102(1)(d).

³¹⁴ Bankruptcy (Scotland) Act 2016 s.103(2).

³¹⁵ Bankruptcy (Scotland) Act 2016 s.102(7).

PENSION-SHARING CASES

As noted above, there are special provisions for pension-sharing cases in ss.104–106 of the Bankruptcy (Scotland) Act 2016. In terms of these provisions, a pension-sharing transaction is challengeable under the statutory provisions for challenge of gratuitous alienations, unfair preferences and orders on divorce or dissolution of a civil partnership only to the extent provided for. For the purposes of these provisions, a pension-sharing transaction is defined as an order or provision falling within s.28(1) of the Welfare Reform and Pensions Act 1999 (orders and agreements which activate pension sharing).³¹⁶ **14–93**

A trustee in sequestration has a right, on making a written request, to obtain from specified persons such information as they may reasonably require for or in connection with the making of a challenge under the statutory provisions for challenge of gratuitous alienations, unfair preferences and orders on divorce or dissolution of a civil partnership.³¹⁷ **14–94**

For the purposes of the statutory provisions for the challenge of gratuitous alienations, a pension-sharing transaction is taken to be one entered into by the transferor with the transferee by which the appropriate amount is transferred by the transferor to the transferee and to be capable of being challenged only so far as it is a transfer of so much of the appropriate amount as is recoverable.³¹⁸ For the purposes of the statutory provisions for the challenge of unfair preferences, a pension-sharing transaction is taken to be a transfer of the appropriate amount to the transferee by the transferor, and is capable of being an unfair preference given to the transferee only so far as it is a transfer of so much of the appropriate amount as is recoverable.³¹⁹ For the purposes of the statutory provisions for the challenge of orders on divorce and dissolution of a civil partnership, a pension-sharing transaction is taken to be a pension sharing order made by the court under s.8(2) of the Family Law (Scotland) Act 1985 and to be capable of being recalled only so far as it is a payment or transfer of so much of the appropriate amount as is recoverable.³²⁰ **14–95**

In this context, the transferor is the person to whose rights the transaction relates, the transferee is the person for whose benefit the transfer is made and the appropriate amount is the appropriate amount in relation to that transaction for the purposes of s.29(1) of the Welfare Reform and Pensions Act 1999 (creation of pension credits and debits).³²¹ **14–96**

The amount of the appropriate amount which is recoverable is determined in accordance with the provisions of s.104(6)–104(9).³²² In terms of these provisions, the court must first determine the extent, if any, to which the transferor's rights under the shared arrangement at the time of the transaction appear to have been, directly or indirectly, the fruits of contributions to that arrangement or any other pension arrangement made at any time by or on behalf of the **14–97**

³¹⁶ Bankruptcy (Scotland) Act 2016 s.104(11).

³¹⁷ Bankruptcy (Scotland) Act 2016 s.106(1). The time for compliance with such a request is nine weeks: Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.19(1)(c)(ii).

³¹⁸ Bankruptcy (Scotland) Act 2016 s.104(1).

³¹⁹ Bankruptcy (Scotland) Act 2016 s.104(2).

³²⁰ Bankruptcy (Scotland) Act 2016 s.104(3).

³²¹ Bankruptcy (Scotland) Act 2016 s.104(11).

³²² Bankruptcy (Scotland) Act 2016 s.104(4), (5).

transferor (referred to as “personal contributions”).³²³ For this purpose, the shared arrangement is the pension arrangement to which the pension-sharing transaction in question relates.³²⁴ Where it does appear to the court that the relevant rights were to any extent the fruits of personal contributions, the court must then determine the extent, if any, to which they appear to have been the fruits of personal contributions the making of which has unfairly prejudiced the transferor’s creditors (“unfair contributions”).³²⁵ In making this determination, it must consider in particular whether any of the personal contributions were made for the purpose of putting assets beyond the reach of the transferor’s creditors or any of them *and* whether the total amount of any personal contributions represented by rights under pension arrangements at the time the pension sharing arrangement was made is an excessive amount in view of the transferor’s circumstances when the contributions were made.³²⁶ Thereafter, if it appears to the court that the transfer of the appropriate amount could have been made out of rights under the shared arrangement which were not the fruits of unfair contributions, the appropriate amount is not recoverable,³²⁷ but if it appears to the court that the transfer could not have been wholly made out of rights under the shared arrangement which were not the fruits of unfair contributions, the appropriate amount is recoverable to the extent to which it appears to the court that the transfer could not have been so made.³²⁸

14–98 Where there is a successful challenge of a pension-sharing transaction under any of the statutory provisions referred to, then without prejudice to the generality of those provisions,³²⁹ the decree or order made by the court (referred to as a recovery order)³³⁰ may include:

- (a) provision requiring the person responsible for a pension arrangement in which the transferee has acquired rights derived directly or indirectly from the pension-sharing transaction to pay an amount to the trustee.³³¹ The maximum amount which the court may require to be so paid is the smallest of: (a) so much of the appropriate amount as is recoverable in accordance with s.104; (b) so much, if any, of the unfair contributions as is not recoverable by way of an appropriate order under s.101; and (c) the value of the debtor’s rights under the arrangement acquired by the transferee as a result of the transfer of the appropriate amount.³³² Where provision for payment is made, the recovery order must provide for the liabilities of the arrangement to be correspondingly reduced³³³; for this purpose, the liabilities of the

³²³ Bankruptcy (Scotland) Act 2016 s.104(6).

³²⁴ Bankruptcy (Scotland) Act 2016 s.104(11).

³²⁵ Bankruptcy (Scotland) Act 2016 s.104(7).

³²⁶ Bankruptcy (Scotland) Act 2016 s.104(10).

³²⁷ Bankruptcy (Scotland) Act 2016 s.104(8).

³²⁸ Bankruptcy (Scotland) Act 2016 s.104(9).

³²⁹ Bankruptcy (Scotland) Act 2016 s.105(3).

³³⁰ Bankruptcy (Scotland) Act 2016 s.105(1).

³³¹ Bankruptcy (Scotland) Act 2016 s.105(2)(a). For the purposes of these provisions, the person responsible for a pension arrangement is the trustees, managers or provider of the arrangement or the person having corresponding functions in relation to the arrangement: Bankruptcy (Scotland) Act 2016 s.106(6).

³³² Bankruptcy (Scotland) Act 2016 s.105(5). The calculation and verification of the value of the debtor’s rights under the arrangement acquired by the transferee as a result of the transfer of the appropriate amount is provided for in regulations: see Bankruptcy (Scotland) Act 2016 s.106(4), (5) and the Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.18.

³³³ Bankruptcy (Scotland) Act 2016 s.105(6).

arrangement are correspondingly reduced if the difference between the amount of the liabilities immediately before the reduction and the amount of the liabilities immediately after the reduction is equal to the amount paid to the trustee.³³⁴ In contrast to the provisions on recovery of excessive pension contributions discussed above, there is no specific provision that any sum which is required to be paid to the trustee forms part of the debtor's estate. An order for payment must be complied with before the end of the period of 17 weeks beginning with the date of service of the order³³⁵;

- (b) adjusting the liabilities of the pension arrangement in respect of the transferee.³³⁶ An adjustment includes, in particular, reducing the amount of any benefit or future benefit to which the transferee is entitled under the arrangement³³⁷;
- (c) adjusting any liabilities of the pension arrangement in respect of any other person which derive directly or indirectly from the rights of the transferee under the arrangement.³³⁸ An adjustment includes, in particular, reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement³³⁹; and
- (d) provision for the recovery of costs incurred by the person responsible for the arrangement in providing information to the trustee as mentioned above or giving effect to a recovery order of the court.³⁴⁰

In making a recovery order, the court is not affected by statutory provisions or provisions of an arrangement which prevent assignment,³⁴¹ and an order in respect of an arrangement is binding on the person responsible for the arrangement and overrides any provisions of the arrangement to the extent that they conflict with the provisions of the order.³⁴² 14–99

There is no provision for the trustee in sequestration to insert a copy of any order made under these provisions in the sederunt book. 14–100

EXTORTIONATE CREDIT TRANSACTIONS

The relevant statutory provisions are contained in s.209 of the Bankruptcy (Scotland) Act 2016.³⁴³ 14–101

³³⁴ Bankruptcy (Scotland) Act 2016 s.105(7). Provision is made for the calculation and verification of these amounts to be provided for in regulations, but the relevant regulations do not contain any such provision: see Bankruptcy (Scotland) Act 2016 s.106(4), (5) and the Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002.

³³⁵ Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 reg.17.

³³⁶ Bankruptcy (Scotland) Act 2016 s.105(2)(b).

³³⁷ Bankruptcy (Scotland) Act 2016 s.105(4).

³³⁸ Bankruptcy (Scotland) Act 2016 s.105(2)(c).

³³⁹ Bankruptcy (Scotland) Act 2016 s.105(4).

³⁴⁰ Bankruptcy (Scotland) Act 2016 s.105(2)(d).

³⁴¹ Bankruptcy (Scotland) Act 2016 s.106(2), (3).

³⁴² Bankruptcy (Scotland) Act 2016 s.105(8).

³⁴³ The corresponding section in the Insolvency Act 1986 is s.244. It may be noted that s.244(1) states that the section applies "as does s.238", which applies only in England and Wales. However s.244(5) contains provisions relating to Scotland which would not make sense unless the whole section was meant to apply in Scotland. Section 244(1) is therefore generally accepted as meaning that the section "applies as does s.238" only in so far as s.238 restricts its application to specified types of insolvency proceedings rather than in so far as it restricts its application only to England and Wales, and the section is therefore treated as applying in Scotland. The provisions on extortionate credit transactions are not so nearly identical in their terms as the provisions on gratuitous alienations and unfair preferences: their structure differs slightly and s.209 of the Bankruptcy

Application of provisions

- 14-102** The provisions apply only where the debtor's estate has been sequestrated.³⁴⁴

Persons who may challenge

- 14-103** The challenge may be made only by the trustee in sequestration.³⁴⁵

What may be challenged

- 14-104** A challenge may be made where the debtor is or has been a party to a transaction for or involving the provision of credit to the debtor.³⁴⁶ A challenge may therefore be made in respect of both an ongoing and completed transaction. "Credit" is defined as having the same meaning as it does in the Consumer Credit Act 1974.³⁴⁷

- 14-105** A challenge may be made where a transaction is or was extortionate.³⁴⁸ A transaction is defined as extortionate if, having regard to the risk accepted by the credit provider, the agreement required grossly exorbitant payments to be made or otherwise grossly contravened the ordinary principles of fair dealing.³⁴⁹ These concepts are not, however, further defined.

Time limits

- 14-106** The transaction must have been entered into not more than three years before the date of sequestration.³⁵⁰

Onus of proof

- 14-107** A transaction is presumed to be extortionate unless the contrary is proved.³⁵¹ The onus is therefore on the defender to establish that the transaction was not extortionate.

Remedy

- 14-108** On a successful challenge, the sheriff may make an order with respect to the transaction.³⁵² The making of an order is therefore discretionary. Where an order is made, this may include one or more of the following provisions as the sheriff sees fit:

- (a) provision setting aside all or part of any obligation created by the transaction³⁵³;
- (b) provision otherwise varying the terms of the transaction or the terms on which any security for the transaction is held³⁵⁴;

(Scotland) Act 2016 contains a number of additional provisions. In substantive terms, however, the sections are virtually identical in their effect.

³⁴⁴ Bankruptcy (Scotland) Act 2016 s.209(1)(b).

³⁴⁵ Bankruptcy (Scotland) Act 2016 s.209(2).

³⁴⁶ Bankruptcy (Scotland) Act 2016 s.209(1)(a).

³⁴⁷ Bankruptcy (Scotland) Act 2016 s.209(8). The Consumer Credit Act 1974 defines "credit" as including a cash loan and any other form of financial accommodation: Consumer Credit Act 1974 s.9(1).

³⁴⁸ Bankruptcy (Scotland) Act 2016 s.209(2)(a).

³⁴⁹ Bankruptcy (Scotland) Act 2016 s.209(3).

³⁵⁰ Bankruptcy (Scotland) Act 2016 s.209(2)(b).

³⁵¹ Bankruptcy (Scotland) Act 2016 s.209(4).

³⁵² Bankruptcy (Scotland) Act 2016 s.209(2).

³⁵³ Bankruptcy (Scotland) Act 2016 s.209(5)(a).

³⁵⁴ Bankruptcy (Scotland) Act 2016 s.209(5)(b).

- (c) provision requiring any party to the transaction to pay any sums paid to that party by the debtor to the trustee³⁵⁵;
- (d) provision requiring any person to surrender to the trustee any property held as security for the purposes of the transaction³⁵⁶; and
- (e) provision for an accounting.³⁵⁷

Any sums or property returned to a trustee under these provisions vest in the trustee.³⁵⁸ **14–109**

There is no provision for the trustee in sequestration to insert a copy of any order made under these provisions in the sederunt book. **14–110**

There appear to be no reported cases on these provisions, which may be regarded as somewhat surprising given current concerns about payday lending and, in particular, the rates of interest charged by payday lenders. **14–111**

³⁵⁵ Bankruptcy (Scotland) Act 2016 s.209(5)(c).

³⁵⁶ Bankruptcy (Scotland) Act 2016 s.209(5)(d).

³⁵⁷ Bankruptcy (Scotland) Act 2016 s.209(5)(e).

³⁵⁸ Bankruptcy (Scotland) Act 2016 s.209(6).

CHAPTER 15

DILIGENCE

INTRODUCTION

Diligence has been defined as

15-01

“the legal procedure by which a creditor attaches the property or person of his debtor, with the object of forcing him either (1) to appear in Court to answer an action at the creditor’s insistence, or (2) to find security for implement of the judgment which may be pronounced against him in such an action, or (3) to implement a judgment already pronounced”.¹

It is with the last two of these categories that the law of bankruptcy is concerned. 15-02

As noted previously, the law on diligence has been reformed extensively in recent years by the Scottish Parliament, in particular by the Bankruptcy and Diligence etc. (Scotland) Act 2007.² As a result, some forms of diligence were replaced or abolished and others were reformed to a greater or lesser extent. Some of the reforms have not yet been brought into force at the time of writing, however, most notably the replacement of adjudication for debt (hereafter referred to simply as adjudication) by land attachment and residual attachment. In 2016, Accountant in Bankruptcy (AiB) embarked on a review of the changes brought about by the Bankruptcy and Diligence etc. (Scotland) Act 2007. As part of that review, it issued a consultation *Diligence Review—Consultation 2016* in September 2016 which sought views on the current provisions on diligence.³ The consultation closed on 30 November 2016, but the results are still awaited at the time of writing. 15-03

At the time of writing, the main forms of diligence, all of which are regulated in the context of bankruptcy, are: arrestment, which may be used on the dependence or in execution; interim attachment, which may be used on the dependence; attachment, which may be used in execution; money attachment, which may be used in execution; inhibition, which may be used on the dependence or in execution; and adjudication, which may be used in security or in execution.⁴ There are special forms of arrestment in the form of earnings and current maintenance arrestments and in certain circumstances conjoined arrestment orders may be made in relation to these forms of arrestment. A detailed 15-04

¹ Stewart, JG, *A Treatise on the Law of Diligence* (Edinburgh: W. Green, 1898), p.1.

² See Ch.2.

³ See Accountant in Bankruptcy, *Diligence Review—Consultation 2016* (September 2016), available at <https://www.aib.gov.uk/news/releases/16161616/0909/diligence-review-2016> [Accessed 18 September 2017].

⁴ The use of adjudication in security is prospectively abolished by s.172 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, but this provision is not in force at the time of writing.

consideration of diligence is, however, beyond the scope of this work and reference should be made to relevant specialist texts.⁵

- 15-05** In cases involving multiple instances of diligence against a particular asset, the general principle is that the competing diligences are ranked in date order, a principle often referred to as the “first come, first served” principle or “priority in time” principle.⁶ This principle is, however, modified in the context of bankruptcy in order to ensure that some creditors do not thereby gain an unfair advantage over others. The rationale for this was succinctly summarised in the preamble to the Bills of Exchange (Scotland) Act 1772, which explained that

“the personal estates of such debtors as become insolvent are generally carried off by the diligences . . . executed by a few creditors who . . . get the earliest notice of their insolvency, to the great prejudice of creditors more remote and unconnected . . . to the disappointment of that equality which ought to take place in the distribution of estates of insolvent debtors amongst their creditors”.⁷

There are currently rules regulating diligence both outwith sequestration and on sequestration and these rules form the subject matter of this chapter. The regulation of diligence in the context of the debt arrangement scheme and trust deeds is discussed in Chs 21 and 22 respectively. In certain circumstances, a moratorium on commencing or continuing diligence may be obtained where a debtor intends to apply for sequestration or a debt payment programme or to grant a trust deed for creditors that is intended to become protected. The provisions relating to the regulation of diligence in this context are discussed in Ch.5.

REGULATION OF DILIGENCE OUTWITH SEQUESTRATION

- 15-06** Certain types of diligence are regulated outwith sequestration. There are two sets of provisions to be considered here, the first relating to arrestments and attachments and the second relating to adjudications for debt.

Arrestments and attachments

- 15-07** The provisions which regulate arrestments and attachments outwith sequestration are contained in Sch.7 of the Bankruptcy (Scotland) Act 2016, which re-enacts certain provisions of the Bankruptcy (Scotland) Act 1913.⁸ They do not apply to earnings arrestments, current maintenance arrestments or conjoined arrestment orders,⁹ but they do appear to apply to arrestments of ships.¹⁰

⁵ The most up to date detailed work is the Stair Memorial Encyclopaedia, “Diligence and Enforcement of Judgements”, Vol.8; see also Maher, G and Cusine, DJ, *The Law and Practice of Diligence* (London: Bloomsbury, 2008). Stewart, JG, *A Treatise on the Law of Diligence* (Edinburgh: W. Green, 1898) and Wilson, WA, *The Scottish Law of Debt* (Edinburgh: W. Green, 1991), although out of date, are still often referred to in practice.

⁶ See, for example, Scottish Law Commission, *Equalisation of Diligences* (Discussion Paper No.79, 1988), para.1.3.

⁷ Bills of Exchange (Scotland) Act 1772. See also Ch.2.

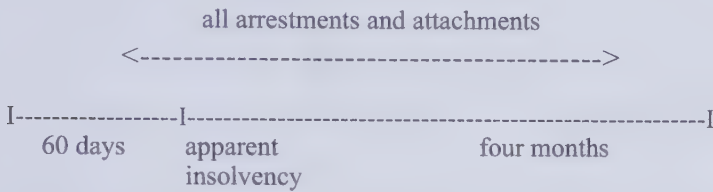
⁸ See Bankruptcy (Scotland) Act 2016 s.233.

⁹ Bankruptcy (Scotland) Act 2016 Sch.7 para.1(8). These diligences are relevant only to individual debtors.

¹⁰ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.13.2, Discussion Paper No.79, *Equalisation of Diligences* (1988), para.5.14 and *Report on Diligence on the Dependence and Admiralty Arrestments* (Scot. Law Com. No.164, 1998), para.9.29 and the cases there cited which apply the corresponding provisions of the Bankruptcy (Scotland) Act 1913 and its predecessor. The Scottish

The provisions apply where a debtor is apparently insolvent.¹¹ They are commonly said to bring about the equalisation of diligence. Strictly speaking, this is not entirely accurate since, as will be seen below, they also encompass creditors who have not in fact carried out diligence, but it is a convenient expression for describing the main effect of the provisions and is used here accordingly. 15-08

All arrestments and attachments executed within 60 days prior to the constitution of the debtor's apparent insolvency or within four months after it rank *pari passu* as if they had been executed on the same date, subject to the proviso that any such arrestment which was executed on the dependence of an action must be followed up without undue delay.¹² Thus, no creditor obtains an advantage over others as a result of being swifter in the race to execute diligence. This can be illustrated diagrammatically as follows: 15-09



In addition, any creditor judicially producing in a process relating to the subject of such an arrestment or attachment¹³ liquid grounds of debt or a decree for payment within the specified period is entitled to rank *as if* they had executed an arrestment or attachment.¹⁴ Thus, the creditor is not disadvantaged by not having carried out diligence. 15-10

Where a creditor who has carried out an arrestment obtains a decree of forthcoming and recovers payment, or a creditor who has carried out an attachment carries through an auction or receives payment in respect of an attached article on its redemption, they are accountable for the sum recovered to such other creditors as may be found to have a right to rank *pari passu* by virtue of the provisions discussed above.¹⁵ The creditor is liable to pay such other creditors proportionately out of the sums recovered under deduction of the costs of recovery.¹⁶ Thus, the recovery of payment in any of the ways referred to by one creditor does not defeat the rights of other creditors who are entitled to rank *pari passu* by virtue of these provisions. It may be noted that the provisions do 15-11

Law Commission recommended that, for the avoidance of doubt, it should be expressly provided that these provisions apply to the arrestment and sale of ships: Discussion Paper No.79, *Equalisation of Diligences* (1988), para.5.14. This recommendation has not, however, been implemented.

¹¹ A debtor is defined in s.228(1) of the Bankruptcy (Scotland) Act 2016 as including, without prejudice to the expression's generality, an entity whose estate may be sequestrated by virtue of s.6 of the Act, a deceased debtor or their executor or a person entitled to be appointed as executor to a deceased debtor. For the purpose of para.1(1)–(5) of Sch.7, however, any reference to a debtor is to be construed as including a reference to an entity whose apparent insolvency may be constituted by virtue of s.16(6) of the Bankruptcy (Scotland) Act 2016: Bankruptcy (Scotland) Act 2016 Sch.7, para.1(6). Thus, para.1(1)–(5) of Sch.7 also apply to debtors which are companies registered under the Companies Act 2006, limited liability partnerships and any other entities in respect of which an enactment provides expressly or by implication that sequestration is not competent. Apparent insolvency is discussed in Ch.1.

¹² Bankruptcy (Scotland) Act 2017 Sch.7, para.(1), (2).

¹³ For example, an action of multiplepounding.

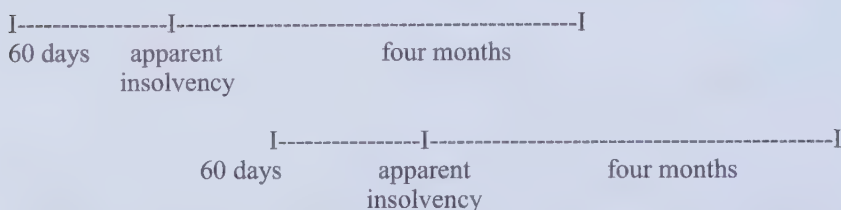
¹⁴ Bankruptcy (Scotland) Act 2016 Sch.7, para.1(3).

¹⁵ Bankruptcy (Scotland) Act 2016 Sch.7, para.1(4).

¹⁶ Bankruptcy (Scotland) Act 2016 Sch.7, para.1(4).

not, however, apply where an arresting creditor obtains payment by virtue of a mandate granted by the debtor or the statutory provisions for the automatic release of arrested sums now contained in the Debtors (Scotland) Act 1987.¹⁷

- 15-12** It is specifically provided that arrestments executed after the period of four months subsequent to the constitution of the debtor's apparent insolvency do not compete with arrestments executed within the periods prior or subsequent thereto, but may rank with each other on any reversion of the fund.¹⁸ It appears to be accepted that although this provision does not expressly refer to attachments (formerly poindings), these are included by implication¹⁹; the Scottish Law Commission recommended that an express reference should be included,²⁰ but this recommendation has not been implemented. This provision does not, however, address the situation where the apparent insolvency of a debtor is constituted more than once and the resulting periods for the equalisation of diligence overlap. This can, for example, be illustrated diagrammatically as follows:



- 15-13** Such a situation causes difficult problems where there is competing diligence both within and outwith the overlap period. These problems were analysed in an article by Gretton²¹ and subsequently by the Scottish Law Commission.²² Having identified a number of possible methods of resolving the problem in relation to competing arrestments, Gretton concluded that only true method of doing so was to calculate the sums due to the relevant creditors in such a way that each creditor would be neither prejudiced nor benefitted by any equalisation period within which their diligence did not fall. The Scottish Law Commission, however, considered that there were some difficulties with this approach and suggested a different approach.²³ McBryde also argued that a court might be more attracted to an approach which did not, as Gretton's method did, ignore an earlier apparent insolvency in calculating what was due to a creditor whose arrestment was outwith the equalisation period surrounding that earlier apparent insolvency but within a later overlapping equalisation period.²⁴ The correct approach has not been the subject of legislative provision or judicial decision and must therefore be regarded as remaining uncertain.

- 15-14** Ultimately, the Scottish Law Commission, while recognising that the issue was not an easy one, recommended that the provisions for regulating arrestments

¹⁷ See Debtors (Scotland) Act 1987 s.73J. These provisions are discussed further at para.15-27.

¹⁸ Bankruptcy (Scotland) Act 2016 Sch.7, para.1(5).

¹⁹ See Scottish Law Commission's Discussion Paper No.79, *Equalisation of Diligences* (1988), para.5.40 and commentators there referred to.

²⁰ Scottish Law Commission's Discussion Paper No.79, *Equalisation of Diligences* (1988).

²¹ See Gretton, GL, "Multiple Notour Bankruptcy" 1983 JLSS 18.

²² See the Scottish Law Commission Discussion Paper No.79, *Equalisation of Diligences* (1988).

²³ Scottish Law Commission's Discussion Paper No.79, *Equalisation of Diligences* (1988), para.5.50 onwards.

²⁴ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.13-14.

and attachments on apparent insolvency be abolished, on the basis that their complications outweighed their benefits.²⁵ It also recommended that if, contrary to that recommendation, the provisions were retained, provision should be made to eliminate overlapping equalisation periods and possible ways of achieving this were suggested.²⁶ Regrettably, however, neither recommendation has been implemented.

Adjudications

The provisions which regulate adjudications outwith sequestration are 15–15 contained in the Diligence Act 1661 read with the Adjudications Act 1672.

The application of the provisions does not depend on apparent insolvency. The 15–16 provisions bring about the equalisation of certain adjudications.

All adjudications for personal debts before, or within one year and a day after, 15–17 the first effectual adjudication rank *pari passu* as if one adjudication had been obtained for the whole of the sums in the several adjudications, the first effectual adjudication being that in which the first real right and infeftment is completed.²⁷ Thus, the affected diligences are equalised and no creditor obtains an advantage over others as a result of being swifter in the race to execute diligence. The subsequent adjudgers are required to indemnify the first adjudger for their expenses.²⁸

The Scottish Law Commission recommended that these provisions be abolished 15–18 and, subsequently, that no similar provision be made for the equalisation of the replacement diligences of land attachment or residual attachment.²⁹ That recommendation has, in essence, been prospectively given effect to by the Bankruptcy and Diligence etc. (Scotland) Act 2007, which makes provision for the replacement of adjudication by land attachment and residual attachment but makes no provision for the equalisation of these diligences outwith sequestration.³⁰ As noted above, however, at the time of writing these reforms are not yet in force.³¹

REGULATION OF DILIGENCE ON SEQUESTRATION

The provisions which regulate diligence on sequestration are contained principally in ss.24 and 25 of the Bankruptcy (Scotland) Act 2016, which contain 15–19 provisions relating to inhibitions, arrestments, money attachments, interim attachments, attachments, adjudications and confirmations as executor-creditor,

²⁵ See Scottish Law Commission Discussion Paper No.79, *Equalisation of Diligences* (1988) and *Report on Diligence on the Dependence and Admiralty Arrestments* (Scot. Law Com. No.164, 1998), Pt 9.

²⁶ Scottish Law Commission Discussion Paper No.79, *Equalisation of Diligences* (1988), paras 5.55–5.56.

²⁷ Diligence Act 1661 read with the Adjudications Act 1672.

²⁸ Diligence Act 1661 read with the Adjudications Act 1672.

²⁹ See Scottish Law Commission Discussion Paper No.79, *Equalisation of Diligences* (1988), para.2.29; Scottish Law Commission Discussion Paper No.107, *Diligence against Land* (1998), para.1.11; Scottish Law Commission, *Report on Diligence on the Dependence and Admiralty Arrestments* (Scot. Law Com. No.164, 1998), Pt 9 (where it was noted that the matter would be considered further in the forthcoming report on adjudications); and Scottish Law Commission, *Report on Diligence* (Scot. Law Com. No.183, 2001), Pt 7. A similar recommendation was made in respect of money attachment: Scottish Law Commission, *Report on Diligence* (Scot. Law Com. No.183, 2001), Pt 7.

³⁰ Similarly, no such provision is made in relation to money attachment.

³¹ The reforms in relation to money attachment are, however, in force.

although the nature of the last may be regarded as a moot point.³² Arrestments would seem to include arrestments of ships.³³ The provisions do not apply to earnings arrestments, current maintenance arrestments, conjoined arrestment orders or deductions from earnings orders under the Child Support Act,³⁴ but earnings arrestments, current maintenance arrestments, conjoined arrestment orders and deductions from earnings orders under the Child Support Act do, however, cease to have effect on the date of sequestration.³⁵

15–20 The provisions apply on sequestration and, in certain circumstances, on the appointment of a judicial factor under s.11A of the Judicial Factors (Scotland) Act 1889. In the case of a deceased debtor, they apply where, within 12 months of the debtor's death, the deceased debtor's estate has *either* been sequestered *or* it was absolutely insolvent at the date of death and a judicial factor has been appointed under s.11A of the Judicial Factors (Scotland) Act 1889.³⁶ In any such case, any reference to the date of sequestration is to be read as a reference to the date of death and any reference to the debtor is to be read as a reference to the deceased debtor.³⁷

15–21 The provisions are commonly said to cut down affected diligences, although in most cases it is more accurate to say that they result in the diligences losing any preference which they might have had but for the sequestration: they are not rendered invalid for other purposes. The expression is, however, a convenient shorthand and is therefore used accordingly in the discussion that follows.

Inhibitions

15–22 Where an inhibition on the estate of the debtor takes effect within the period of 60 days before the date of sequestration, any relevant right of challenge and any right of the inhibitor to receive payment for the discharge of the inhibition vests in the trustee in sequestration as at the date of sequestration.³⁸ This does not, however, entitle the trustee to receive any payment made to the inhibitor before the date of sequestration or affect the validity of anything done before the date of sequestration in consideration of any such payment.³⁹ For this purpose, "any relevant right of challenge" means any right to challenge a deed voluntarily granted by the debtor which is a right which vested in the inhibitor by virtue of the inhibition.⁴⁰ It has been argued that this must be intended to include not only the right to reduce such a deed, but also the right to adjudge, without which a reduction would be worthless.⁴¹ The issue may be unlikely to arise in practice, however. The trustee is unlikely to have to seek to exercise

³² In the Stair Memorial Encyclopaedia, "Diligence and Enforcement of Judgements", Vol.8, para.350, confirmation as executor-creditor is treated as a diligence, citing Lord Curriehill in *Smith's Trustees v Grant* (1862) 24 D. 1142 at 1169 where he states that "[i]t is, no doubt, of the nature of a confirmation; but its true legal character is, that it is legal diligence or execution", but it is acknowledged that other texts on diligence do not deal with it as such.

³³ See discussion on this point in para.15–07 in relation to the provisions for regulation of diligence outwith sequestration.

³⁴ Bankruptcy (Scotland) Act 2016 s.24(9).

³⁵ Debtors (Scotland) Act 1987 s.72; see also Debtors (Scotland) Act 1987 s.66. As indicated at para.15–07, these diligences are relevant only to individual debtors.

³⁶ Bankruptcy (Scotland) Act 2016 s.25(1).

³⁷ Bankruptcy (Scotland) Act 2016 s.25(1), (2).

³⁸ Bankruptcy (Scotland) Act 2016 s.24(3).

³⁹ Bankruptcy (Scotland) Act 2016 s.24(4).

⁴⁰ Bankruptcy (Scotland) Act 2016 s.24(5).

⁴¹ See Gretton, GL, *The Law of Inhibition and Adjudication*, 2nd edn (London: LexisNexis, 1996), p.161.

any relevant right of challenge which has vested in them because it is likely that a party whose deed is challengeable as a result of the inhibition will simply make payment of the sum required to discharge it and the trustee will therefore be exercising the right to receive payment for the discharge of the inhibition rather than the right to challenge the deed.

Prior to changes made by the Bankruptcy and Diligence etc. (Scotland) Act 2007, it was also provided that an inhibition on the estate of the debtor taking effect within the period of 60 days before the date of sequestration was not effectual to create a preference for the inhibitor.⁴² It was, in other words, cut down. An inhibition taking effect prior to that period was, however, effectual to create a preference for the inhibitor which was given effect to by ranking the inhibition on the debtor's heritable estate as if post-inhibition creditors did not exist. However, the Bankruptcy and Diligence etc. (Scotland) Act 2007 abolished the creation of any preference for any inhibiting creditor in inter alia any sequestration or other process in which there is a ranking.⁴³ The provision that an inhibition on the estate of the debtor taking effect within the period of 60 days before the date of sequestration was not effectual to create a preference for the inhibitor therefore became unnecessary and was repealed.⁴⁴ The complex problems of ranking which previously arose where the inhibition was effectual to create a preference for the inhibiting creditor but there were post-inhibition debts therefore no longer arise.⁴⁵ As previously noted, the exercise by the trustee of any power conferred on them by the Bankruptcy (Scotland) Act 2016 in respect of any heritable estate vested in them by virtue of their appointment is not challengeable on the ground of any prior inhibition.⁴⁶ 15-23

There is no provision for an inhibiting creditor whose rights have vested in the trustee to recover the expenses of the inhibition from the trustee.⁴⁷ 15-24

Arrestments, money attachments, interim attachments and attachments

Any arrestment, money attachment, interim attachment or attachment of the estate of the debtor, including any estate vesting in the trustee as *acquirenda* under s.86(5) of the Bankruptcy (Scotland) Act 2016, which is executed within the period of 60 days before the date of sequestration or on or after the date of sequestration is not effectual to secure any preference for the arresting or attaching creditor.⁴⁸ 15-25

⁴² See Bankruptcy (Scotland) Act 1985 s.37(2) as enacted.

⁴³ Bankruptcy and Diligence etc. (Scotland) Act 2007 s.154(1), subject to the savings provision in s.154(2). Diligence which is not cut down by the sequestration is discussed further below.

⁴⁴ Bankruptcy and Diligence etc. (Scotland) Act 2007 s.226 and Sch.5, para.13(3)(b) and Sch.6. The reforms and consequential amendments took effect on 22 April 2009 subject to specified savings: see the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No.4, Savings and Transitions) Order 2009 (SSI 2009/67).

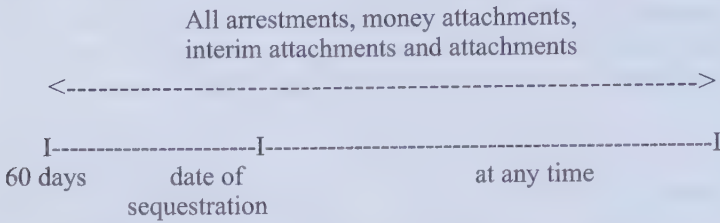
⁴⁵ For a discussion of the previous complexities, see Gretton, GL, *The Law of Inhibition and Adjudication*, 2nd edn (London: LexisNexis, 1996), pp.162–164.

⁴⁶ See Ch.12.

⁴⁷ This is in contrast to the position of creditors who have carried out arrestments, money attachments, interim attachments or attachments prior to sequestration which are cut down by s.24: see further at para.15–29 for a discussion of the relevant provisions and the rationale for the different position in relation to inhibitions.

⁴⁸ Bankruptcy (Scotland) Act 2016 s.24(6). *Acquirenda* are discussed in Ch.11.

15-26 The effect of the provisions can be illustrated diagrammatically:



15-27 Where an arrestment, money attachment, interim attachment or attachment is cut down as a result of these provisions, the arrested or attached estate, any funds released under s.73J(2) of the Debtors (Scotland) Act 1987 or any proceeds of sale of the relevant estate must be handed over to the trustee.⁴⁹ Section 73J(2) of the Debtors (Scotland) Act 1987 makes provision for the release of specified sums from arrested funds on the expiry of a specified period or earlier if a mandate has been granted authorising the release of the arrested funds. The requirement to hand over arrested or attached estate would appear to apply even if the estate in question has in the meantime been transferred to a third party, even if the third party has acquired the estate in good faith and for value, since no exception is made for such a case.

15-28 In the case of arrestments, money attachments, interim attachments and attachments executed within the period of 60 days before the date of sequestration, the provisions apply to the diligence “whether or not subsisting at that date”.⁵⁰ In *Johnston v Cluny Estates Trustees*,⁵¹ a case decided under a predecessor of this provision which did not include these words, it was held that a creditor who had arrested within the 60 day period prior to the date of sequestration and thereafter obtained a decree of furthcoming as a result of which he had been paid before the date of sequestration could keep the monies received and did not require to hand them over to the trustee. It has been said that the inclusion of these words in the immediate predecessor of the current provision, i.e. s.37(4) of the Bankruptcy (Scotland) Act 1985, altered the effect of the decision in *Johnston v Cluny Estates Trustees* where the diligence has been withdrawn or superseded by payment or further procedure with the result that any monies which have been paid to the creditor as a result of the diligence must be handed over to the trustee.⁵² It has also been argued, however, that in some cases where payment has been received by the creditor following the execution of the diligence but without further procedure, the creditor is still not obliged to hand over the monies so received to the trustee.⁵³ There is, therefore, some debate over the precise effect of this provision and exactly when monies received by a creditor as a result of diligence must be handed over to the trustee.

⁴⁹ Bankruptcy (Scotland) Act 2016 s.24(7).

⁵⁰ Bankruptcy (Scotland) Act 2016 s.24(6).

⁵¹ *Johnston v Cluny Estates Trustees*, 1957 S.L.T. 293.

⁵² See McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.13-21.

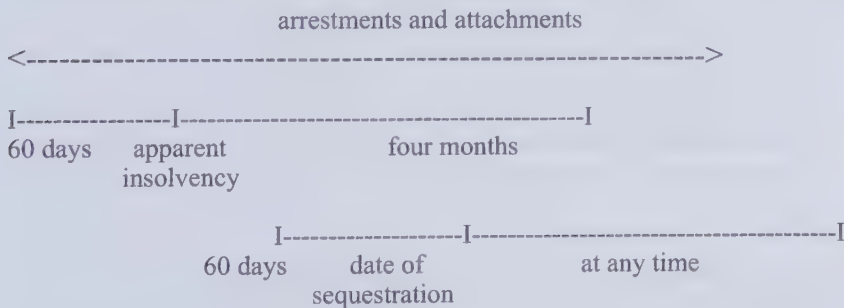
⁵³ See Palmer's *Company Insolvency in Scotland*, para.499; St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland*, 4th edn (Edinburgh: W. Green, 2011), para.19-9. Although the discussion in each case relates to liquidation, the provisions which apply in liquidation are a modified version of the provisions which apply on sequestration. It should be noted that further procedure in this context would, now, include the operation of s.73J(2) of the Debtors (Scotland) Act 1987.

An arrester or attacher whose arrestment, money attachment, interim attachment or attachment was executed within the 60 day period prior to the date of sequestration is entitled to the payment of specified expenses out of the arrested or attached estate or the proceeds of sale thereof.⁵⁴ The specified expenses are those incurred in obtaining the warrant for interim attachment or the extract of the decree or other document on which the arrestment, money attachment or attachment proceeded; those incurred in executing the arrestment, money attachment, interim attachment or attachment; and those incurred in taking any further action in respect of the diligence.⁵⁵ As noted at para.15–24, there is no corresponding provision in relation to inhibitions affected by s.24(2). This is because an inhibition does not attach to specific property out of which payment could be made.

15–29

In some cases, arrestments and attachments may be ineffectual to secure a preference for the arrester or attacher even where executed before the beginning of the period of 60 days prior to the date of sequestration because of the interaction of the provisions of s.24 with the provisions regulating arrestments and attachments outwith sequestration discussed at para.15–07 onwards. Although sequestration is not of itself a diligence,⁵⁶ it is provided that the order of the sheriff or the determination of the debtor application by AiB (as the case may be) has, as from the date of sequestration, the effect in relation to diligence done (whether before or after the date of sequestration) of, inter alia, an arrestment in execution and decree of furthcoming, an arrestment in execution and warrant for sale, and an attachment.⁵⁷ Consequently, where sequestration is preceded by the debtor's apparent insolvency and the date of sequestration is within four months of it, the sequestration as the equivalent of an arrestment/attachment will be equalised with all other arrestments and attachments carried out within the equalisation period around apparent insolvency. Any such arrestments and attachments are, therefore, effectively cut down even where executed before the beginning of the period of 60 days prior to the date of sequestration.⁵⁸ This can be illustrated diagrammatically:

15–30



⁵⁴ Bankruptcy (Scotland) Act 2016 s.24(8).

⁵⁵ Bankruptcy (Scotland) Act 2016 s.24(8).

⁵⁶ See *Sinclair v Edinburgh Parish Council*, 1909 S.C. 1353; *G & A Barnie v Stevenson*, 1993 S.C.L.R. 318.

⁵⁷ Bankruptcy (Scotland) Act 2016 s.24(1), (2)(b), (c) and (d). The Scottish Law Commission recommended, consequent on its recommendation (discussed at para.15–14) that the rules relating to equalisation of diligence on apparent insolvency be abolished, that the corresponding provision in the Bankruptcy (Scotland) Act 1985 be repealed: Scottish Law Commission, *Report on Diligence on the Dependence and Admiralty Arrestments*, para.9.53. As noted at para.15–14, however, the recommendation to abolish the rules relating to equalisation of diligence on apparent insolvency has not been implemented, with the result that these provisions also remain.

⁵⁸ See *Stewart v Jarvie*, 1938 S.C. 309.

- 15-31** It is the overlap of the date of sequestration and the equalisation period around apparent insolvency which is important. If the date of sequestration is after the end of the four month period following apparent insolvency, then the diligences affected by the apparent insolvency will be equalised with each other, but will not be affected by the sequestration. There will often be such an overlap, however, at least where the award of sequestration results from a petition by a creditor, since a petition for sequestration by a creditor which relies on the debtor's apparent insolvency must be presented within four months of the constitution of apparent insolvency.⁵⁹
- 15-32** The Scottish Law Commission recommended, consequent on the effect of its recommendation to abolish the provisions for equalisation of arrestments and poindings (now attachments) outwith sequestration, that the period for cutting down these diligences on sequestration should be extended to six months prior to sequestration.⁶⁰ Since the recommendation to abolish the provisions for equalisation of arrestments and poindings (now attachments) outwith sequestration has not been implemented, however, this recommendation has also not been implemented, and the provisions discussed above which equate sequestration to an arrestment in execution and decree of furthcoming, an arrestment in execution and warrant of sale, and an attachment have been retained.
- 15-33** An arrestment which is not cut down on sequestration constitutes a security over the arrested subjects.⁶¹ The arrested subjects vest in the trustee and must be handed over to them, but they remain subject to the security created by the arrestment with the result that the trustee is required to give effect to the preference thereby secured by the arrestment.⁶² The creditor will be required to value the security for the purposes of calculating their claim.⁶³ An arrestment on the dependence will be effectual to secure a preference provided it is followed up without undue delay, even where this is after sequestration.⁶⁴
- 15-34** A money attachment, interim attachment or attachment which is not cut down on sequestration should, by analogy, be regarded in the same way as an arrestment which is not cut down on sequestration. In the case of poindings, now replaced by attachments, it was held that a poinding which was not cut down on sequestration but which had not been carried through to a sale was not effectual to secure a preference for the poinding creditor,⁶⁵ but it is arguable that the same should not necessarily be held to apply to attachment.

Adjudications

- 15-35** No specific provision is made in s.24 for cutting down adjudications within a specified period prior to the date of sequestration, but an adjudication prior to the date sequestration may be ineffectual to secure a preference for the adjudging creditor as a result of the rules on equalisation of adjudications discussed at para.15-15 onwards. This is because although, as noted above,

⁵⁹ See further Ch.7.

⁶⁰ Scottish Law Commission, *Report on Diligence* (Scot. Law Com. No.183, 2001), para.7.11.

⁶¹ *Gibson v Greig* (1853) 16 D. 233; *Berry v Taylor*, 1993 S.L.T. 718.

⁶² *Berry v Taylor*, 1993 S.L.T. 718.

⁶³ *Gibson v Greig* (1853) 16 D. 233 and see further Ch.16.

⁶⁴ *Mitchell v Scott* (1881) 8 R. 875, followed in *James Gilmour (Crossford) Ltd v John Williams (Wishaw) Ltd*, 1970 S.L.T. (Sh Ct) 6.

⁶⁵ *Wm S Yuile Ltd v Gibson*, 1952 S.L.T. (Sh Ct) 22.

sequestration is not itself a diligence,⁶⁶ it is provided that the order of the sheriff or the determination of the debtor application by AiB (as the case may be) has the effect in relation to diligence done (whether before or after the date of sequestration) of, inter alia, a decree of adjudication of the heritable estate of the debtor for payment of debts which has been duly recorded in the register of inhibitions on the date of sequestration.⁶⁷ Thus, where there is an adjudication or adjudications and a sequestration within the period for equalisation of adjudications discussed above, the relevant adjudication(s) and the sequestration will be equalised and the adjudication(s) will be ineffectual to secure a preference for the adjudging creditor(s).

It is specifically provided that it is not competent for a creditor to raise or insist in an adjudication against the debtor's estate, including estate vesting in the trustee as *acquirenda* under s.86(5) of the Bankruptcy (Scotland) Act 2016, on or after the date of sequestration.⁶⁸ 15–36

As discussed above, the Scottish Law Commission recommended that the provisions for equalisation of adjudications should be abolished and it subsequently recommended that no similar provision should be made for the equalisation of the replacement diligences of land attachment and residual attachment; instead, it recommended that specific provision should be made for the cutting down of adjudications, and subsequently land attachments and residual attachments, within a certain period prior to sequestration.⁶⁹ The period initially recommended was 60 days, mirroring the provisions for cutting down arrestments and poindings (now attachments); subsequently, it became six months.⁷⁰ These recommendations have largely been given effect to by the Bankruptcy and Diligence etc. (Scotland) Act 2007 in relation to the prospective new diligences of land attachment and residual attachment in so far as there is no provision for the equalisation of these diligences outwith sequestration and there is specific provision for the cutting down of land attachments (but not residual attachments) within a specified period prior to sequestration. As noted above, at the time of writing these reforms are not yet in force, but they are considered here in anticipation of their being brought into force in due course. 15–37

⁶⁶ See *Sinclair v Edinburgh Parish Council*, 1909 S.C. 1353; *G & A Barnie v Stevenson*, 1993 S.C.L.R. 318.

⁶⁷ Bankruptcy (Scotland) Act 2016 s.24(1), (2)(a). The Scottish Law Commission recommended, consequent on its recommendation (discussed at para.15–18) that the rules relating to equalisation of adjudication be abolished, that the corresponding provision in the Bankruptcy (Scotland) Act 1985 be repealed: Scottish Law Commission, *Report on Diligence on the Dependence and Admiralty Arrestments*, para.2.32; Scottish Law Commission, *Report on Diligence* (Scot. Law Com. No.183, 2001), para.7.10. This recommendation has prospectively been given effect to by the Bankruptcy and Diligence etc. (Scotland) Act 2007 but the provisions are not yet in force: see further below.

⁶⁸ Bankruptcy (Scotland) Act 2016 s.25(3). *Acquirenda* are discussed in Ch.11.

⁶⁹ See Scottish Law Commission Discussion Paper No.79, *Equalisation of Diligences* (1988), paras 2.30–2.31; Scottish Law Commission Discussion Paper No.107, *Diligence against Land* (1998), para.1.11 and Pt 2; Scottish Law Commission, *Report on Diligence on the Dependence and Admiralty Arrestments* (Scot. Law Com. No.164, 1998), Pt 9 (where it was noted that the matter would be considered further in its forthcoming report on adjudications); and Scottish Law Commission, *Report on Diligence* (Scot. Law Com. No.183, 2001), paras 7.9–7.11.

⁷⁰ See Scottish Law Commission Discussion Paper No.79, *Equalisation of Diligences* (1988), paras 2.30–2.31; Scottish Law Commission Discussion Paper No.107, *Diligence against Land* (1998), para.1.11 and Pt 2; Scottish Law Commission, *Report on Diligence on the Dependence and Admiralty Arrestments* (Scot. Law Com. No.164, 1998), Pt 9 (where it was noted that the matter would be considered further in its forthcoming report on adjudications); and Scottish Law Commission, *Report on Diligence* (Scot. Law Com. No.183, 2001), paras 7.9–7.11.

- 15-38** The new provisions do not provide for sequestration to be the equivalent of a land attachment.⁷¹
- 15-39** No land attachment of heritable property of the debtor created within the period of six months before the date of sequestration, whether or not subsisting at that date, is effectual to create a preference for the creditor.⁷² It is therefore effectively cut down. A creditor whose land attachment was created within that period is, however, entitled to the payment of specified expenses out of the attached land or the proceeds of sale thereof.⁷³ The specified expenses are those incurred in obtaining the extract of the decree or other document containing the warrant for land attachment⁷⁴ and those incurred in serving the necessary charge for payment, registering the notice of land attachment, serving a copy of the notice of land attachment and registering the certificate of service of the copy of the notice of land attachment.⁷⁵
- 15-40** A notice of land attachment registered on or after the date of sequestration against land forming part of the debtor's heritable estate, including any such estate vesting in the trustee as *acquirenda* under s.86(5) of the Bankruptcy (Scotland) Act 2016, is of no effect.⁷⁶ A notice of land attachment registered before the date of sequestration but in respect of which no land attachment has been created by that date, is similarly of no effect.⁷⁷
- 15-41** Even where a land attachment is not cut down under these provisions, the rights of the creditor may be affected. Subject to certain exceptions, it is not competent for a creditor to insist in a land attachment created over the heritable estate of the debtor prior to the beginning of the period of six months before the date of sequestration and subsisting at the date of sequestration.⁷⁸ Where a contract to sell the land has been concluded in execution of a warrant for sale, the trustee in sequestration is required to concur in and ratify the deed implementing the contract and the appointed person is required to account for and pay to the trustee any balance of the proceeds of sale which, but for the sequestration, would be due to the debtor after the disbursement of the sale proceeds in accordance with the relevant statutory provisions.⁷⁹ This applies, however, only if the deed implementing the contract is registered within the period of 28 days beginning with the day on which *either* the certified copy of the warrant to cite *or* the certified copy of AiB's determination awarding sequestration (as the case may be) is recorded in the register of inhibitions.⁸⁰ In addition, where a decree of foreclosure has been granted but an extract of it has not been registered, the creditor may proceed to complete title by registering the extract

⁷¹ The provisions discussed above which make sequestration the equivalent of a decree of adjudication of the heritable estate of the debtor for payment of debts which has been recorded in the register of inhibitions on the date of sequestration are prospectively repealed by Bankruptcy and Diligence etc. (Scotland) Act 2007 s.226, Sch.6, Pt 1 and are not replaced with an equivalent provision for land attachment.

⁷² Bankruptcy (Scotland) Act 2016 s.23A(1) as prospectively added by Bankruptcy and Diligence etc. (Scotland) Act 2007 s.127A as inserted by Bankruptcy (Scotland) Act 2016 s.234(1), Sch.8, para.24(1), (2).

⁷³ Bankruptcy (Scotland) Act 2016 s.23A(2) as so added.

⁷⁴ Bankruptcy (Scotland) Act 2016 s.23A(2)(a) as so added.

⁷⁵ Bankruptcy (Scotland) Act 2016 s.23A(2)(b) as so added.

⁷⁶ Bankruptcy (Scotland) Act 2016 s.23A(3)(a) as so added.

⁷⁷ Bankruptcy (Scotland) Act 2016 s.23A(3)(b) as so added.

⁷⁸ Bankruptcy (Scotland) Act 2016 s.23A(4), (5) as so added.

⁷⁹ Bankruptcy (Scotland) Act 2016 s.23A(6) as so added.

⁸⁰ Bankruptcy (Scotland) Act 2016 s.23A(7) as so added. A different period may be prescribed: Bankruptcy (Scotland) Act 2016 s.23A(9) as so added.

provided that it is registered within the period of 28 days beginning with the day on which *either* the certified copy of the warrant to cite *or* the certified copy of AiB's determination awarding sequestration (as the case may be) is recorded in the register of inhibitions.⁸¹

Confirmations as executor creditor

It is not competent for a creditor to be confirmed as executor-creditor on a deceased debtor's estate on or after the date of sequestration.⁸² 15-42

Furthermore, where within 12 months of a debtor's death the debtor's estate is sequestrated or a judicial factor is appointed under s.11A of the Judicial Factors (Scotland) Act 1889 in a case where the estate is absolutely insolvent, no confirmation as executor-creditor on the estate at any time after the debtor's death is effectual in a question with the trustee or judicial factor as the case may be.⁸³ 15-43
The executor-creditor is, however, entitled to payment of the expenses incurred in obtaining the confirmation out of the estate or the proceeds of sale thereof.⁸⁴

Poidings of the ground

The Bankruptcy (Scotland) Act 1985 provided that a poiding of the ground (a process for giving a heritable credit security over moveables on the security subjects) in respect of the estate of the debtor, including estate vesting in the trustee as *acquirenda* under s.32(6) of that Act, which was executed within the period of 60 days before the date of sequestration *or* on or after the date of sequestration was not effectual in a question with the trustee, except in relation to specified interest on the debt of the secured creditor.⁸⁵ 15-44

These provisions have been omitted from the Bankruptcy (Scotland) Act 2016 on the basis that they are spent as a result of s.58 of the Debt Arrangement and Attachment (Scotland) Act 2002. Section 58(1) of that Act provides that, subject to certain savings, it is not competent to enforce payment of a debt by poiding or warrant sale and any enactment or rule of law allowing such enforcement shall cease to have effect. This has been interpreted as including poiding of the ground. It may be noted, however, that poiding of the ground, sometimes referred to as real poiding, is a process for enforcing a security which has been described as "a real right sui generis"⁸⁶ and distinct from the type of poiding, sometimes referred to as personal poiding, which was the focus of the reforms ultimately embodied in the Debt Arrangement and Attachment (Scotland) Act 2002, with the result that provisions relating to poiding in earlier bankruptcy legislation were held to encompass only personal poiding and not poiding of the ground.⁸⁷ It is not therefore entirely 15-45

⁸¹ Bankruptcy (Scotland) Act 2016 s.23A(8). A different period may be prescribed: Bankruptcy (Scotland) Act 2016 s.23A(9) as so added.

⁸² Bankruptcy (Scotland) Act 2016 s.25(3).

⁸³ Bankruptcy (Scotland) Act 2016 s.25(4), (5).

⁸⁴ Bankruptcy (Scotland) Act 2016 s.25(6).

⁸⁵ Bankruptcy (Scotland) Act 1985 s.37(6).

⁸⁶ See *Bell v Cadell* (1831) 10 S. 100 per the Lord Ordinary, affirmed on appeal. The nature of poiding of the ground, like the nature of confirmation of an executor-creditor, has also been a moot point: in the Stair Memorial Encyclopaedia, "Diligence and Enforcement of Judgements", Vol.8, para.360, it is treated as a diligence, but it has also been said that, strictly speaking, it is not: see St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland*, 4th edn (Edinburgh: W. Green, 2011), para.9-13.

⁸⁷ *Bell v Cadell* (1831) 10 S. 100. See also Scottish Law Commission Discussion Paper, *Adjudications for Debt and Related Matters* (Discussion Paper No.78, 1988), para.8.4-8.5.

clear that s.58(1) can in fact be regarded as including poinding of the ground, although the Scottish Law Commission had previously recommended its abolition.⁸⁸

Maills and duties

- 15–46** Maills and duties (the process that allows a creditor to attach rents due by tenants of the security subjects) are unaffected by sequestration.⁸⁹
- 15–47** The Bankruptcy and Diligence etc. (Scotland) Act 2007 provides for the abolition of maills and duties, but the relevant provisions are not yet in force.⁹⁰

Sequestration for rent

- 15–48** The Bankruptcy and Diligence etc. (Scotland) Act 2007 abolished sequestration for rent, previously used to enforce the landlord's hypothec.⁹¹ Sequestration for rent was, in any event, unaffected by sequestration. The landlord's hypothec itself remains in restricted form.⁹²

⁸⁸ Scottish Law Commission Discussion Paper, *Adjudications for Debt and Related Matters* (Discussion Paper No.78, 1988), para.8.10–8.11.

⁸⁹ This was not always the case: see Stair Memorial Encyclopaedia, "Diligence and Enforcement of Judgements", Vol.8, para.399, fn 2 and references there cited.

⁹⁰ Bankruptcy and Diligence etc. (Scotland) Act 2007 s.207.

⁹¹ Bankruptcy and Diligence etc. (Scotland) Act 2007 s.208(1).

⁹² Bankruptcy and Diligence etc. (Scotland) Act 2007 s.208(2)–208(4). The landlord's hypothec is discussed further in Ch.11.

CHAPTER 16

CREDITORS' CLAIMS AND DISTRIBUTION OF THE ESTATE

INTRODUCTION

Creditors must submit claims to the trustee if they wish to be able to vote at creditors' meetings and obtain payment of a dividend from the debtor's estate. **16-01**

This chapter deals with the submission of creditors' claims, adjudication, the amount of the claim, the liabilities and rights of co-obligants, the balancing of accounts in bankruptcy and the distribution of the estate. **16-02**

SUBMISSION OF CLAIMS

There are separate provisions for the submission of claims for the purpose of voting at the statutory meeting (if called)¹ and for the submission of claims for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend,² but where a claim is submitted for the purpose of voting at the statutory meeting and wholly or partly accepted for that purpose, it is deemed to be resubmitted for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend and the creditor is not required to submit a further claim for these purposes.³ **16-03**

Where the EU insolvency proceedings regulation applies, there are specific requirements in Ch.IV of that regulation in relation to creditors' claims, including the information to be provided to creditors. These are discussed separately in Ch.25. **16-04**

Time limits for submission of claims

For the purpose of voting at the statutory meeting (if called), a creditor must submit their claim to the trustee at or before the meeting.⁴ **16-05**

For the purpose of voting at a meeting other than the statutory meeting, a creditor must submit their claim to the trustee at or before the relevant meeting.⁵ **16-06**

For the purpose of obtaining payment of a dividend in respect of any accounting period, a creditor must submit their claim not later than the relevant day.⁶ The relevant day depends on whether or not notice of the trustee's intentions regarding the calling of the statutory meeting was given to the creditor: if it was, **16-07**

¹ See Bankruptcy (Scotland) Act 2016 s.46. The statutory meeting is discussed in Ch.8.

² See Bankruptcy (Scotland) Act 2016 s.122.

³ Bankruptcy (Scotland) Act 2016 s.122(7), (8).

⁴ Bankruptcy (Scotland) Act 2016 s.46(1).

⁵ Bankruptcy (Scotland) Act 2016 s.122(1)(a) and 2(a).

⁶ Bankruptcy (Scotland) Act 2016 s.122(1)(b), 2(b) and (4). Accounting periods are discussed at para.16-113.

the relevant day is the day which is 120 days after the day on which that notice was given; if it was not, it is the day which is 120 days after the day on which the trustee gives notice to the creditor inviting the submission of claims.⁷ Prior to changes made by the Bankruptcy and Debt Advice (Scotland) Act 2014, the creditor was required to submit their claim not later than eight weeks before the end of the relevant accounting period.⁸ However, the Scottish Government in its *Consultation on Bankruptcy Law Reform* issued in February 2012 noted that there were different timescales for the submission of claims in different debt relief processes and sought views on the introduction of a uniform timescale for the submission of claims, the appropriate timescale and the penalty for failing to submit a claim within that timescale.⁹ There was almost unanimous support among consultees for the introduction of such a timescale, with the largest number in favour of a timescale of 120 days.¹⁰ The Scottish Government therefore intimated its intention to proceed with the proposal in both sequestration and protected trust deeds¹¹ and in the case of sequestration, this was duly implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014 with the result described above. If a creditor submits a claim after the relevant day, the trustee may provide an adjudication as to the creditor's entitlement to a dividend in respect of any accounting period if the claim is submitted not later than eight weeks before the end of the accounting period *and* there were exceptional circumstances which prevented the claim from being submitted before the relevant day.¹² What constitutes exceptional circumstances for this purpose will no doubt be a matter for debate. If the trustee considers that there were no exceptional circumstances and refuses to provide an adjudication, it would appear that the creditor will not be entitled to a dividend from the debtor's estate. There is no provision for review or appeal of the trustee's decision to refuse to provide an adjudication, and it is thought that the provisions for review and appeal where the trustee has carried out an adjudication but rejected the creditor's claim in whole or in part, discussed further below, will not apply since the trustee has not adjudicated on the claim but rather refused to do so. This appears to be a lacuna in the legislation. It may be possible in those circumstances for the creditor to have resort to the provisions for curing defects in procedure discussed in Ch.12.

- 16–08** As noted above, where a claim is submitted for the purpose of voting at the statutory meeting and wholly or partly accepted for that purpose, it is deemed to be resubmitted for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend and the creditor is not required to submit a further claim for these purposes.¹³ Similarly, where a claim is submitted for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend and is not wholly rejected, it is deemed to be resubmitted for the purposes of voting at future meetings and obtaining payment of a dividend in subsequent accounting periods.¹⁴

⁷ Bankruptcy (Scotland) Act 2016 s.122(5). The notice of the trustee's intentions regarding the calling of the statutory meeting is discussed further in Ch.8. A creditor might not have been given that notice if, for example, the creditor was not known to the trustee at that time.

⁸ See Bankruptcy (Scotland) Act 1985 s.48(1)(ii) as enacted.

⁹ See Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.14.3.

¹⁰ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: Report of the Summary of Responses* (August 2012), para.9.4.

¹¹ See Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (November 2012). As to protected trust deeds, see further Ch.22.

¹² Bankruptcy (Scotland) Act 2016 s.122(6).

¹³ Bankruptcy (Scotland) Act 2016 s.122(7), (8).

¹⁴ Bankruptcy (Scotland) Act 2016 s.122(7), (8).

Form of claim

Creditors must submit their claims to the trustee on the prescribed form together with an account or voucher appropriate to the nature of the debt which constitutes *prima facie* evidence of the debt.¹⁵ This will vary according to the circumstances: examples might include contractual documents, invoices, agreements or court decrees. The trustee may dispense with any of these requirements in relation to any debt or class of debt, but in the case of a claim submitted for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend, this is subject to the proviso that they may do so only with the consent of the commissioners (if any).¹⁶ It is not entirely clear whether this applies to a claim submitted for the purpose of voting at the statutory meeting and deemed to be resubmitted for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend. If it does, this would appear to give rise to the possibility that a dispensation by the trustee for the purpose of voting at the statutory meeting would not apply for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend if the commissioners refuse to consent to the dispensation.

There is separate provision enabling the trustee to allow a creditor who neither resides nor has a place of business in the UK to submit an informal claim in writing.¹⁷ Where the trustee knows where such a creditor resides or has a place of business and no notice of the trustee's intentions regarding the calling of the statutory meeting has been given to the creditor, the trustee must write to the creditor informing them of their right to submit a claim.¹⁸

Claims in foreign currency

A creditor may state their claim in foreign currency in prescribed circumstances.¹⁹ These are where the claim is constituted by a decree or other court order for payment in a foreign currency or, where it is not so constituted, it arises from a contract or bill of exchange in terms of which payment is or may be required to be made in foreign currency.²⁰

Claims in a foreign currency are converted into sterling at a single exchange rate for the relevant currency determined by the trustee with reference to the exchange rates prevailing at the close of business on the date of sequestration.²¹

Submission of different claim

A creditor who has submitted a claim for the purposes of voting at the statutory meeting may replace it with another specifying a different amount for their claim at any time before the statutory meeting.²²

¹⁵ Bankruptcy (Scotland) Act 2016 ss.46(2) (claim for purposes of voting at statutory meeting) and 122(9) (claim for purposes of voting at other meetings and obtaining payment of a dividend). The prescribed form is Form 11 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

¹⁶ Bankruptcy (Scotland) Act 2016 ss.46(3) and 122(10).

¹⁷ Bankruptcy (Scotland) Act 2016 ss.46(4)(b) and 122(11)(b).

¹⁸ Bankruptcy (Scotland) Act 2016 ss.46(4)(a) and 122(11)(a).

¹⁹ Bankruptcy (Scotland) Act 2016 ss.46(6) and 125(1).

²⁰ Bankruptcy (Scotland) Regulations 2016 reg.21.

²¹ See Bankruptcy (Scotland) Act 2016 ss.48(1)(a) and 126(5) and Bankruptcy (Scotland) Regulations 2016 reg.22.

²² Bankruptcy (Scotland) Act 2016 s.46(5).

- 16–14** A creditor who has submitted a claim for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend, or who has submitted a claim for the purpose of voting at the statutory meeting which is deemed to be resubmitted for the purposes voting at meetings other than the statutory meeting and obtaining payment of a dividend, may submit a further claim specifying a different amount for his claim at any time,²³ subject to the proviso that a secured creditor may not submit a further claim specifying a different value for their security at any time after they have been required to discharge, convey or assign the security to the trustee under the provisions of para.4(3) of Sch.2 to the Bankruptcy (Scotland) Act 2016.²⁴

False claims

- 16–15** It is an offence for a creditor to submit a statement of claim, account, voucher or other evidence which is false unless they can show that they neither knew nor had reason to believe it was false.²⁵
- 16–16** It is also an offence for a debtor who knew or became aware that a creditor's statement of claim, account, voucher or other evidence was false to fail to report this to the trustee as soon as practicable after acquiring the relevant knowledge.²⁶

Recording of claims

- 16–17** In the case of a claim submitted for the purpose of voting at the statutory meeting, the trustee must initial any document submitted to them in connection with the claim and keep a record of it stating the date when it was produced to them.²⁷ In the case of a claim submitted for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend, the trustee must initial any document submitted to them in connection with the claim²⁸ and make an appropriate entry relating to it in the sederunt book stating the date when it was produced to them.²⁹ The trustee must return any document other than the statement of claim itself to the sender on request.³⁰

Further evidence relating to claims

- 16–18** In order to satisfy themselves as to the validity or amount of a claim, the trustee may require the creditor to produce further evidence³¹ and they may also require any other person the trustee believes can produce relevant evidence to produce that evidence.³² If the creditor or other person refuses or delays, the trustee may apply to the sheriff for an order for them to attend for private examination before the sheriff.³³ The trustee may appear on their own behalf at such an examination or be represented by a solicitor or counsel³⁴ and the

²³ Bankruptcy (Scotland) Act 2016 s.122(12).

²⁴ Bankruptcy (Scotland) Act 2016 s.122(13). The requirement for a secured creditor to value their security and the circumstances in which they may be required to discharge, convey or assign it are discussed at para.16–56 onwards.

²⁵ Bankruptcy (Scotland) Act 2016 ss.47(1), (2) and 124(1), (2).

²⁶ Bankruptcy (Scotland) Act 2016 ss.47(1), (3) and 124(1), (3).

²⁷ Bankruptcy (Scotland) Act 2016 s.46(7)(a), (b).

²⁸ Bankruptcy (Scotland) Act 2016 s.125(2)(a).

²⁹ Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.3, para.25.

³⁰ Bankruptcy (Scotland) Act 2016 ss.46(7)(c) and 125(2)(b).

³¹ Bankruptcy (Scotland) Act 2016 s.123(1)(a).

³² Bankruptcy (Scotland) Act 2016 s.123(1)(b).

³³ Bankruptcy (Scotland) Act 2016 s.123(2).

³⁴ Bankruptcy (Scotland) Act 2016 s.123(3).

examination will be similar to the private examination of a relevant person.³⁵ It is specifically provided that where the creditor is an entity mentioned in s.6(1) of the Bankruptcy (Scotland) Act 2016, references to the creditor are to be construed as references to a person representing the entity.³⁶ Curiously, however, no corresponding provision is made in relation to any other person the trustee believes can produce relevant evidence.

Effect of submission of claim on prescription and limitation

The submission of a claim for the purpose of voting at the statutory meeting or for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend bars the effect of any enactment or rule of law relating to the limitation of actions in all parts of the UK.³⁷ In this context, the reference to the submission of a claim barring the effect of any enactment or rule of law relating to the limitation of actions is to be construed as a reference to the submission of a claim having the same effect, for the purposes of the enactment or rule of law, as an effective acknowledgement of the creditor's claim³⁸ and the reference to an enactment does not include reference to an enactment which implements or gives effect to any international agreement or obligation.³⁹ 16–19

In addition, it is provided that the submission of a claim for the purpose of voting at the statutory meeting or for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend is a relevant claim which interrupts the running of negative prescription in specified cases.⁴⁰ It is a moot point whether a relevant claim is continuous in nature and subsists until it is disposed of or is an instantaneous event which happens on the day it takes place. However, it is specifically provided that the interruption of prescription caused by the submission of such a claim is not affected by any subsequent recall of the sequestration,⁴¹ which would tend to suggest that it is continuous in nature, and in the case of *Donnelley v Royal Bank of Scotland Plc*,⁴² the sheriff took the view that the submission of a claim to a trustee under a trust deed continuously interrupted the running of prescription for as long as the claim subsisted before the trustee and up to the date of the final, formal adjudication of the claim.⁴³ The Scottish Law Commission has, however, recommended that the law should be clarified to make it clear that a relevant claim is continuous in nature and subsists until it is disposed of.⁴⁴ 16–20

³⁵ Bankruptcy (Scotland) Act 2016 s.123(4), applying ss.118(4)–118(7) and 121(1) of the Bankruptcy (Scotland) Act 2016 subject to any necessary modifications. Private examinations are discussed further in Ch.13.

³⁶ Bankruptcy (Scotland) Act 2016 s.123(5).

³⁷ See Bankruptcy (Scotland) Act 2016 ss.46(8) and 125(3) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.6(1)(c) and (4).

³⁸ See Bankruptcy (Scotland) Act 2016 s.228(8) and (9)(c) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.6(2). The effect of this provision in relation to the provisions relating to the limitation of actions in the Prescription and Limitation (Scotland) Act 1973 is uncertain, because the concept of an effective acknowledgement of a creditor's claim is not referred to in those provisions.

³⁹ Bankruptcy (Scotland) Act 2016 s.228(10) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.6(3).

⁴⁰ Prescription and Limitation (Scotland) Act 1973 s.9(1)(b).

⁴¹ Bankruptcy (Scotland) Act 2016 s.38(3)(a)(iii). Recall of sequestration is discussed in Ch.9.

⁴² *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13.

⁴³ The sheriff's reasoning on this point was not challenged on appeal.

⁴⁴ Scottish Law Commission, *Report on Prescription* (Scot. Law Com. No.247, 2017), paras 7.27–7.30 and recommendation 22.

Other effects of submission of claims

- 16–21** Where a creditor submits a claim in a Scottish sequestration, they will be subject to the jurisdiction of the Scottish court *ex reconventionem*.⁴⁵

ADJUDICATION OF CLAIMS

- 16–22** Adjudication is the process whereby creditors' claims are accepted or rejected in whole or in part.

Claims submitted for the purposes of voting at the statutory meeting

- 16–23** For the purpose of determining entitlement to vote at the statutory meeting, the trustee must, at the commencement of that meeting, accept or reject each claim in whole or in part and, where the claim is stated in a foreign currency, convert the claim into sterling.⁴⁶ The acceptance of a claim in whole or in part determines the creditor's entitlement to vote at the meeting provided they are not otherwise disqualified from doing so.⁴⁷ There is no provision for appeal against the trustee's decision.

Claims submitted (or deemed to be resubmitted) for the purposes of voting at meetings other than the statutory meeting and obtaining payment of a dividend

- 16–24** For the purpose of determining entitlement to vote at meetings other than the statutory meeting, the trustee must, at the commencement of each meeting, accept or reject each claim in whole or in part.⁴⁸ A creditor who has had their claim accepted in whole or in part for this purpose by the trustee or on review or appeal is entitled to vote on any matter at a meeting for the purpose of voting at which their claim has been accepted, provided they are not otherwise disqualified from doing so.⁴⁹
- 16–25** For the purpose of determining entitlement to payment of a dividend in an accounting period where there are funds available for that purpose, the trustee must accept or reject each claim in whole or in part and decide the amount of the claim accepted, the category of the debt and the value of any security not later than four weeks before the end of the relevant accounting period.⁵⁰ As soon as is reasonably practicable thereafter, the trustee must send to the debtor and every creditor known to them a list of every claim accepted or rejected including details of the amount of each claim and whether it has been accepted or rejected in whole or in part.⁵¹ A creditor who has had their claim accepted in whole or in part for this purpose by the trustee or on review or appeal is entitled to payment of a dividend in respect of the accounting period for the purposes

⁴⁵ See *Ord v Barton* (1847) 9 D. 541; *Barr v Smith & Chamberlain* (1879) 7 R. 247; *Wilson's (Glasgow and Trinidad) Ltd v Dresdner Bank*, 1913 2 S.L.T. 437.

⁴⁶ Bankruptcy (Scotland) Act 2016 s.48(1)(a). The provisions for the conversion of claims in foreign currency are discussed at para.16–11.

⁴⁷ Bankruptcy (Scotland) Act 2016 ss.48(3) and 49(6), (7). Voting at the statutory meeting is discussed further in Ch.8.

⁴⁸ Bankruptcy (Scotland) Act 2016 s.126(1).

⁴⁹ Bankruptcy (Scotland) Act 2016 s.128(1)(a), (2)(a). Review and appeal are discussed further at para.16–30 onwards.

⁵⁰ Bankruptcy (Scotland) Act 2016 s.126(2), (3).

⁵¹ Bankruptcy (Scotland) Act 2016 s.126(4).

of which the claim is accepted in so far as the estate has funds available to make that payment.⁵²

In adjudicating on a claim stated in a foreign currency, the trustee must convert the claim into sterling.⁵³ 16–26

In most cases, adjudication will be straightforward, but some claims may raise complex issues.⁵⁴ Claims with a foreign element may raise particular issues. 16–27 While the classification and ranking of claims in a Scottish sequestration is exclusively a matter for Scots law,⁵⁵ the subsistence and validity of claims is determined by the proper law applicable to them⁵⁶ and where the claim is governed by a foreign law, the trustee may have to take advice on the applicable law. The classification of a claim may give rise to difficulties, particularly in relation to secured claims: if the security claimed is valid according to the *lex situs* of the property at the time of creation of the security, it will be a valid security for the purpose of the sequestration, but if it is a type of security that is not known to Scots law, it may be difficult to classify. Issues may also arise where a creditor has been partially paid out of foreign assets of the debtor or has claimed in any foreign insolvency proceedings. In the former case, the hotchpot rule applies with the result that where a creditor makes a claim in the sequestration, they must account for any property or money recovered by virtue of diligence or proceedings abroad to which the trustee would otherwise have been entitled⁵⁷ and they may be required to surrender such property or money to the trustee before the trustee admits their claim. Where such property or money is recovered by virtue of the enforcement of a valid security, however, it is thought that the creditor will not need to account for the property or money, but may claim the outstanding balance due to them in full. In the latter case, where the creditor has received a dividend in foreign insolvency proceedings, they must account for it to the trustee or will not be paid any dividend in the sequestration until the other creditors have received an equalising dividend.⁵⁸ At common law, revenue claims by foreign public authorities were not admitted in Scottish insolvency proceedings,⁵⁹ but this rule has effectively been superseded by the various statutory provisions on cross-border insolvency.⁶⁰

In difficult cases, it may be appropriate for the trustee to seek directions from the sheriff prior to adjudicating on the claim.⁶¹ In the case of *McNaught*, 16–28

⁵² Bankruptcy (Scotland) Act 2016 s.128(1)(b) and (2)(b). Review and appeal are discussed at para.16–30 onwards.

⁵³ Bankruptcy (Scotland) Act 2016 s.126(5). The provisions for the conversion of claims in foreign currency are discussed at paras 16–11–16–12 onwards.

⁵⁴ See, for example, *Job Construction Ltd v Kennedy* unreported 11 June 2003 Elgin Sheriff Court, which involved a question of law relating to the rights of co-obligants; *Burton, Noter* [2010] CSOH 174, a liquidation case involving the Merchant Navy Officers' Pension Fund. In the latter case, it was noted that the trustee might require to obtain actuarial evidence in order to adjudicate on the claim. For a useful discussion of how a trustee might approach the adjudication process, see Aird, "The Liquidator, the Permanent Trustee and the Adjudication of Complicated Claims" 1997 JLS 229, subject to subsequent statutory changes and the later decisions cited here.

⁵⁵ *Lusk v Elder* (1843) 5 D. 1279; *Phosphate Sewage Co Ltd v Molleson* (1878) 5 R. 1125. Ranking is discussed at para.16–90 onwards.

⁵⁶ *Williamson v Taylor* (1845) 8 D. 156.

⁵⁷ See, for instance, *Lindsay v Paterson* (1840) 2 D. 1373; *Clydesdale Bank v Anderson* (1890) 27 S.L. Rep. 493.

⁵⁸ *Stewart v Auld* (1851) 13 D. 1337.

⁵⁹ *Government of India v Taylor*, 1955 A.C. 491. Revenue in this context was given a wide meaning: see, for example, *Metal Industries (Salvage) Ltd v Owners of ST Harle*, 1962 S.L.T. 114.

⁶⁰ See further Ch.25.

⁶¹ See *Burton, Noter* [2010] CSOH 174.

Noter,⁶² it was said that where there is a statutory procedure for resolving issues such as the procedure for appeal against the trustee's adjudication, it was difficult to envisage circumstances in which an application for directions would be appropriate, although it could not be said that there were no circumstances in which it would be appropriate to determine the rights and liabilities of the parties in the sequestration in the context of an application for directions. In that case, the sheriff considered that it would not be appropriate for him to make, or be thought to make, any order finally determining the rights and liabilities of any party, but gave the trustee directions in relation to administrative matters. The trustee also has power to refer any claim to arbitration or to compromise any claim against the estate.⁶³

- 16–29** The trustee must record their decision on the claim, including the amount of the claim accepted, the category of the debt and the value of any security as decided by the trustee and, where the claim has been rejected in whole or in part, the reasons for rejection,⁶⁴ and enter their decision, including that information, in the sederunt book.⁶⁵ Where the trustee has rejected a claim in whole or in part, they must also notify the creditor forthwith giving reasons for rejection.⁶⁶
- 16–30** The trustee's decision is subject to review and appeal. The debtor or any creditor may apply to Accountant in Bankruptcy (AiB) for a review of the trustee's decision on the acceptance or rejection of any claim in whole or in part, the category of the debt or the value of any security.⁶⁷ It has been held, however, that a debtor has no legitimate right or interest to challenge a decision of the trustee to reject a claim.⁶⁸ The provision for review by AiB prior to any appeal was originally introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 as part of the policy to move the making of certain decisions from the sheriff to AiB. The debtor may, however, apply for a review only if they satisfy AiB that they have, or are likely to have, a pecuniary interest in the outcome of the review.⁶⁹ Provision to this effect was added to then provisions for appeal against the trustee's decision on adjudication by the Bankruptcy and Diligence etc. (Scotland) Act 2007 in order to ensure that the debtor had a proper interest in any appeal and has now been included also in the new provisions for review prior to appeal. The time limit for the making of an application for review of the trustee's decision varies depending on whether the decision is made for the purposes of voting at a meeting of creditors or for the purpose of determining entitlement to payment of a dividend: in the former case, the application must be made with 14 days beginning with the day of the decision and in the latter case, it must be made within 28 days beginning with that day.⁷⁰ Where such an application is made, AiB must without delay send a copy of the application to

⁶² *McNaught, Noter*, 2009 W.L. 3398632.

⁶³ Bankruptcy (Scotland) Act 2016 s.216. These provisions are discussed in detail in Ch.12.

⁶⁴ Bankruptcy (Scotland) Act 2016 s.126(7).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.26.

⁶⁶ Bankruptcy (Scotland) Act 2016 s.126(6). For a case in which the trustee failed to comply with this requirement, resulting in the matter being remitted back to the trustee on appeal, see *Job Construction Ltd v Kennedy* unreported 11 June 2003 Elgin Sheriff Court.

⁶⁷ Bankruptcy (Scotland) Act 2016 s.127(1). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(p).

⁶⁸ See *Robertson v Robertson's Trustee* (1885) 13 R. 424; *McGuinness v McGuinness's Trustee*, 1993 S.C.L.R. 755.

⁶⁹ Bankruptcy (Scotland) Act 2016 s.127(2).

⁷⁰ Bankruptcy (Scotland) Act 2016 s.127(3).

the debtor and the creditors and advise them of the right to make representations within 21 days.⁷¹ AiB must then: (i) take into account any representations made by an interested party and confirm, amend or revoke the decision within 28 days beginning with the day on which the application is made⁷²; and (ii) notify their decision to the debtor and the creditors.⁷³ The debtor or any creditor may appeal to the sheriff against AiB's decision within 14 days beginning with the day of AiB's decision.⁷⁴ The debtor may, however, appeal only if they satisfy the sheriff that they have or are likely to have a pecuniary interest in the outcome of the appeal.⁷⁵ As noted above, this provision was introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 in order to ensure that the debtor had a proper interest in any appeal.

Prior to the introduction of the review process, it was held that it was not open 16-31
to the trustee to waive the statutory time limits for an appeal under these provisions.⁷⁶ It is thought that the same would apply to the statutory time limits for review as well as appeal under the current provisions. That case left open the question of whether the failure to lodge an appeal timeously could be waived under the statutory provisions for curing defects in procedure, no such application having been made in that case, but the view has subsequently been expressed, albeit obiter, that it cannot.⁷⁷ By analogy, the same would apply in relation to an application for review.

Prior to the introduction of the review process, the sheriff in determining an 16-32
appeal under these provisions was not required to look at the material presented to the trustee, decide whether their decision was right or wrong and interfere only if it was manifestly wrong, but rather to look at the matter afresh and decide, on the material before them, which might include material which was not available to the trustee, whether the creditor's claim was well-founded.⁷⁸ It is thought that the same approach should apply in relation to a review prior to appeal where appropriate. It was also open to the sheriff on an appeal to remit the matter back to the trustee in an appropriate case rather than deciding the claim on its merits, for example, where the trustee had failed to give reasons for rejecting the claim or where there was insufficient information before the court to allow the matter to be determined.⁷⁹ Again, it is thought that the same approach might be taken on a review prior to appeal where appropriate. Where a claim has been rejected as a result of a failure by the creditor to produce further evidence to the trustee on request, however, it may be too late to offer to produce it if the matter is remitted back to the trustee.⁸⁰ In some cases, the proper course where a claim has been rejected would be for the claimant to raise an action to constitute the claim.⁸¹

⁷¹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

⁷² Bankruptcy (Scotland) Act 2016 s.127(4).

⁷³ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

⁷⁴ Bankruptcy (Scotland) Act 2016 s.127(5). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(o).

⁷⁵ Bankruptcy (Scotland) Act 2016 s.127(6).

⁷⁶ *Patullo v Accountant in Bankruptcy*, 2010 W.L. 1608631.

⁷⁷ *Liu v Hastings* unreported 28 March 2014 Glasgow Sheriff Court.

⁷⁸ *Japan Leasing (Europe) Plc v Weir's Trustee (No.2)*, 1998 S.L.T. 973. See also *Pilling v Drake* (1857) 19 D. 938; *Oliver v Wallace* (1869) 7 M. 407; *Job Construction Ltd v Kennedy* unreported 11 June 2003 Elgin Sheriff Court; *Purewell, Applicant* (2017) SAC (Civ) 28.

⁷⁹ *Oliver v Wallace* (1869) 7 M. 407; *Job Construction Ltd v Kennedy* unreported 11 June 2003 Elgin Sheriff Court.

⁸⁰ *Japan Leasing (Europe) Plc v Weir's Trustee (No.2)*, 1998 S.L.T. 973.

⁸¹ See *Crawford, Petitioner*, 1909 S.C. 1063, *Knoll Spinning Co Ltd v Brown*, 1977 S.C. 291, both liquidation cases.

- 16–33 It has been held that an action against the trustee for negligence in carrying out an adjudication is competent, even if the adjudication in question has not been challenged in accordance with the statutory procedures.⁸²
- 16–34 The trustee must insert in the sederunt book a copy of any decision of AiB on review and any decision of the sheriff on appeal.⁸³

AMOUNT OF CLAIM

- 16–35 The amount in respect of which a creditor is entitled to claim is determined in accordance with the provisions of Sch.2 of the Bankruptcy (Scotland) Act 2016.⁸⁴

The general rule

- 16–36 The general rule is that a creditor is entitled to claim the accumulated sum of principal and any interest due at the date of sequestration.⁸⁵ The creditor must be legally entitled to any interest claimed, for example, under a contract or court decree or by virtue of the Late Payment of Commercial Debts (Interest) Act 1998: the sequestration does not confer a right to claim interest where none previously existed. Post-sequestration interest is discussed further below.
- 16–37 The debt must be due as at the date of sequestration. A debt which was incurred after that date cannot be claimed in the sequestration, even though the creditor might have been justifiably unaware of the sequestration or pending sequestration when the debt was incurred. This is a particular issue where the award of sequestration is made following a petition to the sheriff, where the date of sequestration is the date of the (first) warrant to cite, especially if there is a delay before an award of sequestration is ultimately made, for example, because of continuation of the sequestration petition. It is less of an issue in the case of a debtor application, where the date of sequestration is the date of the award of sequestration, but even then, there may be a delay in a creditor becoming aware of the award of sequestration. The Scottish Executive in its consultation paper *Personal Bankruptcy Reform in Scotland: A Modern Approach* issued in November 2003 considered that as a result, creditors transacting with the debtor in the period between the date of the warrant to cite and the date of the award of sequestration were unfairly discriminated against, and sought views on allowing the claims of such creditors to be included in the sequestration.⁸⁶ Consultees were almost unanimously in favour of this proposal and the Scottish Executive indicated its intention to allow creditor claims to be formulated as at the date of the award of sequestration in all cases.⁸⁷ This was not, however, implemented, perhaps because of fears of unintended consequences if the date of sequestration was changed to the date of the award in all cases in order to achieve this, although in fact changing the definition of the date of sequestration would not necessarily have been the only option. The

⁸² *Liu v Hastings* unreported 28 March 2014 Glasgow Sheriff Court.

⁸³ Bankruptcy (Scotland) Act 2016 s.210(3) and Sch.5, para.27.

⁸⁴ Bankruptcy (Scotland) Act 2016 ss.46(9) and 125(4).

⁸⁵ Bankruptcy (Scotland) Act 2016 Sch.2, para.1(1). The date of sequestration is discussed further in Ch.8.

⁸⁶ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 5.4–5.7.

⁸⁷ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (July 2004), para.5.66.

Scottish Government in its *Consultation on Bankruptcy Law Reform* issued in February 2012 again acknowledged the difficulties caused by the definition of the date of sequestration, although focusing this time mainly on issues other than creditor claims, and it sought views on whether the date of sequestration should be changed to make the date of sequestration the date on which sequestration was awarded in all cases or, if not, whether the debtor's discharge in particular should be linked to the date of the award rather than the date of sequestration.⁸⁸ The majority of consultees were in favour of the proposed changes,⁸⁹ but they were not specifically mentioned in the Scottish Government's response to the consultation, and ultimately the Bankruptcy and Debt Advice (Scotland) Act 2014 did not change the definition of the date of sequestration although it did make provision for the debtor's discharge to be linked to the date of the award of sequestration rather than the date of sequestration.⁹⁰ Once again, perhaps, there was a fear of unintended consequences if the date of sequestration was changed to the date of the award in all cases. The result is, however, that creditors transacting with the debtor after the date of the (first) warrant to cite in petition cases remain unable to claim in the sequestration. Creditors in respect of debts incurred after the date of sequestration may take steps to enforce these debts in the normal way, including by means of a further sequestration, but will not be able to enforce such debts against any estate vesting in the trustee.⁹¹

Although the debt must be due at the date of sequestration, the amount, or full amount, of the debt may not be known at that date, for example, where a claim is disputed and expenses are incurred after the date of sequestration in the course of constituting the creditor's claim.⁹² The creditor should not, however, delay in submitting their claim: as discussed at para.16–07, there is now a time limit for the submission of claims, and in any event the creditor will not be able to vote until their claim is submitted,⁹³ risks missing out on any dividend which is paid prior to their claim being submitted⁹⁴ and risks their debt being discharged if the debtor is discharged before their claim is submitted.⁹⁵ Where the amount of the claim as ultimately determined differs from that included in the creditor's claim as submitted, the creditor will be able to submit a further claim in accordance with the provisions discussed at para.16–13 onwards. **16–38**

The creditor is entitled to claim only for the amount of the debt existing at the date of sequestration: thus, where part payment of the debt has been made by a co-obligant or cautioner prior to the sequestration, the creditor is entitled to submit a claim only for the outstanding balance.⁹⁶ **16–39**

Where the basis of the creditor's claim is a court decree, the trustee is not bound to accept the claim if the decree is a decree in absence unless they have **16–40**

⁸⁸ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), paras 14.10.1–14.10.4.

⁸⁹ See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), paras 9.29–9.31.

⁹⁰ The debtor's discharge is discussed further in Ch.17.

⁹¹ See further Ch.11.

⁹² See *Miller v McIntosh* (1884) 11 R. 729.

⁹³ See paras 16–05 and 16–06.

⁹⁴ See further para.16–120.

⁹⁵ See *Grimshaw v Bruce* [2011] CSOH 212.

⁹⁶ *Hamilton v Cuthbertson* (1841) 3 D. 494; *Mackinnon's Trustee v Bank of Scotland*, 1915 S.C.

411. Payments by co-obligants and cautioners as well as other payments after sequestration are discussed further below.

been given an opportunity to enter the process and declined to do so⁹⁷: the trustee should adjudicate on the claim in the normal way. By implication, the trustee would be bound to accept a claim where the basis of the claim was a decree *in foro*.

- 16-41** If a debt is not contingent but would not be payable but for the sequestration until after the date of sequestration, for example, where a contract provides for all future instalments to become payable on a party's sequestration, the amount of the claim must be calculated as if the debt were payable on the date of sequestration but subject to the deduction of interest at the rate specified in s.129(10) of the Bankruptcy (Scotland) Act 2016 from the date of sequestration until the original date for payment of the debt.⁹⁸ The rate specified in s.129(10) is the greater of the prescribed rate at the date of sequestration and the rate otherwise applicable to the debt. The prescribed rate is set out in reg.26 of the Bankruptcy (Scotland) Regulations 2016 and at the time of writing is 8 per cent per annum. Where the original date for payment of the debt is some time after the date of sequestration, the effect of this provision may be to reduce the value of the claim to little or nothing.
- 16-42** In calculating the amount of their claim, the creditor must deduct any discount (other than a discount for payment in cash) allowable by virtue of any contract or course of dealing between himself and the debtor or usage of trade.⁹⁹

Special rules

Aliment and periodical allowance

- 16-43** A person entitled to aliment from a living debtor as at the date of sequestration, or from a deceased debtor immediately before the debtor's death, may claim for unpaid aliment for any period before the date of sequestration only if the amount of the aliment has been quantified by a court decree or legally binding obligation supported by evidence in writing.¹⁰⁰ In the case of spouses (or in the case of aliment payable to a former spouse for a child, former spouses) and civil partners (or in the case of aliment payable to a former civil partner for a child after dissolution of a civil partnership, former civil partners), the parties must also have been living apart during the relevant period.¹⁰¹ The claim may not include any aliment due after the date of sequestration.¹⁰²
- 16-44** In the same way, a person entitled to periodical allowance payable on divorce or the dissolution of a civil partnership from a living debtor as at the date of sequestration, or from a deceased debtor immediately before the debtor's death, may claim for any unpaid periodical allowance for any period before the date of sequestration only if the periodical allowance is payable by virtue of a court order or legally binding obligation supported by evidence in writing and the payer and payee were living apart during the relevant period.¹⁰³ The claim may not include any periodical allowance due after the date of sequestration.¹⁰⁴

⁹⁷ See *WF Dow & Co v Union Bank* (1875) 2 R. 459; *Miller v McIntosh* (1884) 11 R. 729; *Dow v Pennell's Trustee*, 1929 S.L.T. 674.

⁹⁸ Bankruptcy (Scotland) Act 2016 Sch.2, para.1(2). Contingent debts are discussed further at para.16-47 onwards.

⁹⁹ Bankruptcy (Scotland) Act 2016 Sch.2, para.1(3).

¹⁰⁰ Bankruptcy (Scotland) Act 2016 Sch.2, para.2(1)(a).

¹⁰¹ Bankruptcy (Scotland) Act 2016 Sch.2, para.2(1)(a).

¹⁰² Bankruptcy (Scotland) Act 2016 Sch.2, para.2(1)(b).

¹⁰³ Bankruptcy (Scotland) Act 2016 Sch.2, para.2(2).

¹⁰⁴ Bankruptcy (Scotland) Act 2016 Sch.2, para.2(2).

No specific provision is made for claims relating to child support maintenance payable under the Child Support Act 1991, but a claim for any unpaid child support maintenance for any period before the date of sequestration may be submitted on the basis that it is a debt due as at the date of sequestration. The claim should not include any unpaid child support maintenance due after the date of sequestration. **16-45**

The debtor will remain liable to make payment of any aliment, periodical allowance or child support maintenance due after the date of sequestration, although the debtor may seek to vary the amount payable in the light of the sequestration. Any such liability will be taken into account in assessing the debtor's liability to make a debtor contribution.¹⁰⁵ **16-46**

Contingent debts

The amount which a creditor may claim does not include any debt in so far as its existence or amount depends on a contingency.¹⁰⁶ **16-47**

It has been said that the concept of a contingent obligation is in its essence relatively simple: it is an obligation whose enforceability is dependent on the occurrence of a future event which may or may not occur.¹⁰⁷ In this respect, it must be distinguished from a "pure" obligation, i.e. one that is presently subsisting and enforceable, and a future obligation, i.e. one that will definitely be enforceable at a future date; it must also be distinguished from a mere *spes obligationis*, the hope or expectancy of an obligation yet to emerge.¹⁰⁸ The critical point is that some sort of obligation, normally either contractual or statutory, is required.¹⁰⁹ A contingency may arise from the existence of a liability to the exercise of a power by another person.¹¹⁰ A contingent debt should not be regarded as having any special meaning in the context of insolvency legislation.¹¹¹ **16-48**

A claim for damages for personal injury sustained before the sequestration is not a contingent debt even if the amount of the debt is not known at the date of sequestration: it is a debt which is presently subsisting.¹¹² It has been held, however, that a claim for a capital sum on divorce where the action for divorce was raised prior to the sequestration but decree was not granted until after the sequestration was a contingent debt at the date of sequestration, the debtor's liability being contingent on: (i) decree of divorce being granted; and (ii) a capital sum being awarded.¹¹³ **16-49**

If a creditor wishes to claim for a contingent debt, they may apply to the trustee or, where there is no trustee, to AiB, to have a value put on the claim.¹¹⁴ The **16-50**

¹⁰⁵ See further Ch.11.

¹⁰⁶ Bankruptcy (Scotland) Act 2016 Sch.2, para.3(1).

¹⁰⁷ See *Burton, Noter* [2010] CSOH 174 at [24] and the authorities therein cited.

¹⁰⁸ *Burton, Noter* [2010] CSOH 174 at [25].

¹⁰⁹ *Burton, Noter* [2010] CSOH 174.

¹¹⁰ *Burton, Noter* [2010] CSOH 174 at [26].

¹¹¹ *Burton, Noter* [2010] CSOH 174 at [38].

¹¹² *Miller v McIntosh* (1884) 11 R. 729; *Grimshaw v Bruce* [2011] CSOH 212.

¹¹³ *Crichton v Crichton's Trustee*, 1999 S.L.T. (Sh Ct) 113.

¹¹⁴ Bankruptcy (Scotland) Act 2016 Sch.2, para.3(3). There may be no trustee, for example, in cases where the trustee has died or resigned and has not yet been replaced: see further Ch.10. Where the application is made to AiB, the application must be in Form 1 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1)(i). As to the procedure in such an application, see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 regs 6–8.

creditor's claim is then limited to the value so put on it¹¹⁵ and, where the contingent debt is an annuity, a cautioner may not be sued for more than that value.¹¹⁶

16–51 Where a creditor has applied to have a value put on their claim under these provisions, any interested person may apply to AiB for a review of the trustee's valuation within 14 days beginning with the day of the valuation.¹¹⁷ Where such an application is made, AiB must without delay send a copy of the application to any interested person and advise them of the right to make representations within 21 days.¹¹⁸ AiB must then: (i) take into account any representations made by an interested person and confirm or vary the valuation within 28 days beginning with the day on which the application is made¹¹⁹; and (ii) notify their decision to any interested person.¹²⁰ AiB may, however, refer a case to the sheriff for a direction before making a decision to confirm or vary the valuation.¹²¹ An interested person may appeal to the sheriff against AiB's decision to confirm or vary the valuation within 14 days beginning with the day of AiB's decision,¹²² subject to the proviso that an appeal may not be made in relation to a matter on which AiB applied to the sheriff for a direction.¹²³ Curiously, there is no provision for review or appeal of a decision of AiB on valuation where the creditor applied to AiB to have a value put on their claim in the absence of a trustee.

16–52 The principles to be applied in valuing a contingent debt were summarised by Lord Drummond Young in the case of *Burton, Noter*¹²⁴ as follows:

"The valuation of contingent debts is normally carried out as at the date of winding up or sequestration, because that is the most satisfactory way of ensuring that the distribution among creditors is truly *pari passu*; the value of their debts must be compared at a single date. This is, however, subject to one important exception, the hindsight principle. If during the course of the winding up or sequestration events occur which indicate that the contingency would either have been satisfied or have failed, or which indicate the value that would have been payable in satisfaction of the contingent debt, those events are taken into account in valuing the debt: *Wight v Eckhardt Marine GmbH*, [2004] 1 A.C. 147, at paragraphs 29–33 per Lord Hoffman. The reason is that in such a case it is actually known what would have happened, and it would be wholly artificial to fail to take that into consideration; rigid logic must give way to practical sense. A simple example of this principle is found in *Re Northern Counties of England Fire Insurance Co*, (1880) 17 Ch D. 337, where a building was insured under a fire policy with an insolvent company. It burned down

¹¹⁵ Bankruptcy (Scotland) Act 2016 Sch.2, para.3(4).

¹¹⁶ Bankruptcy (Scotland) Act 2016 Sch.2, para.3(5).

¹¹⁷ Bankruptcy (Scotland) Act 2016 Sch.2, para.3(6), (7). The application must be in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(w).

¹¹⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹¹⁹ Bankruptcy (Scotland) Act 2016 Sch.2, para.3(8).

¹²⁰ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹²¹ Bankruptcy (Scotland) Act 2016 Sch.2, para.3(10).

¹²² Bankruptcy (Scotland) Act 2016 Sch.2, para.3(9). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(v).

¹²³ Bankruptcy (Scotland) Act 2016 Sch.2, para.3(11).

¹²⁴ *Burton, Noter* [2010] CSOH 174 at [23]. See also *Crichton v Crichton's Trustee*, 1999 S.L.T. (Sh Ct) 113.

during the course of the winding up, and the insured was held entitled to prove for the full loss of the building; that was, with hindsight, the value that would have been attributed at the date of the winding up had it been known that the fire would occur: see *Wight* at paragraph 31. It is essential, however, that the contingent obligation that is so valued should originate in a contract (or other source such as a statute) that was in existence as at the date of the winding up. The hindsight principle applies to the valuation of the obligation, but not to its source."

It is up to the creditor to decide whether or not to have a value put on a contingent debt in order to allow him to claim in the sequestration: they may prefer to wait until the contingency is purified and submit a claim thereafter.¹²⁵ As discussed at para.16–07, however, there is now a time limit for the submission of claims, and for so long as no claim is submitted, the creditor will not be able to vote at meetings,¹²⁶ risks missing out on any dividend which is paid prior to a claim being submitted¹²⁷ and risks their debt being discharged if the debtor is discharged before their claim is submitted. Where the creditor does not have a value put on their claim but waits until the contingency is purified, they will be entitled to submit a claim for the value of the debt as ultimately ascertained in the normal way.¹²⁸

Debts due under composition contracts

Prior to the abolition of judicial composition by the Bankruptcy and Debt Advice (Scotland) Act 2014, it was provided that where in the course of a sequestration a debtor had been discharged following the approval of an offer of composition but the sequestration was subsequently revived, the amount which a creditor was entitled to claim was the same amount as if there had been no such composition less any sums paid under the composition.¹²⁹

This provision was repealed by the Bankruptcy and Debt Advice (Scotland) Act 2014 following the abolition of judicial composition by that Act, subject to savings and transitional provisions.¹³⁰

Secured debts

In calculating the amount of their claim, a secured creditor must deduct the value of any security as estimated by them, unless they surrender the security or undertake in writing to surrender it for the benefit of the debtor's estate.¹³¹

As already noted,¹³² a secured creditor is defined as "a creditor who holds a security for a debt over any part of the debtor's estate"¹³³ and "security" is defined very widely as "any security, heritable or moveable, or any right of lien, retention

¹²⁵ See *Burton, Noter* [2010] CSOH 174.

¹²⁶ See paras 16–05 and 16–06.

¹²⁷ See further para.16–121.

¹²⁸ See *Burton, Noter* [2010] CSOH 174; *Crighton v Crighton's Trustee*, 1999 S.L.T. (Sh Ct) 113.

¹²⁹ Bankruptcy (Scotland) Act 1985 Sch.1, para.4. Judicial compositions are discussed further in Ch.17.

¹³⁰ See Bankruptcy and Debt Advice (Scotland) Act 2014 s.56(2), Sch.4 and Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No.2, Savings and Transitionals) Order 2014 (SSI 2014/261).

¹³¹ Bankruptcy (Scotland) Act 2016 Sch.2, para.4(1), (2).

¹³² See Ch.11.

¹³³ Bankruptcy (Scotland) Act 2016 s.228(1).

or preference".¹³⁴ A secured creditor does not, therefore, include a creditor who holds a security which is not over part of the debtor's estate, such as a security over property of a third party or a security in the form of a cautionary obligation, and the value of any such securities does not therefore require to be deducted from the creditor's claim. A secured creditor does, however, include a landlord in respect of their hypothec¹³⁵ and a creditor who has done diligence which has not been cut down by the sequestration,¹³⁶ and the value of the security created by the hypothec or diligence must therefore be deducted from the creditor's claim.

- 16-58** At any time after the expiry of 12 weeks after the date of sequestration, the trustee may require a secured creditor to discharge a security or convey or assign it to the trustee on payment of its value as estimated by the creditor.¹³⁷ Where this has been done, the amount the creditor is then entitled to claim is any remaining balance of the creditor's debt.¹³⁸
- 16-59** A creditor whose security has been realised must deduct the amount they have received or are entitled to receive from the realisation, less the expenses of realisation, from their claim.¹³⁹ This applies even where the realisation takes place after the date of sequestration.¹⁴⁰
- 16-60** As noted above, a creditor who has submitted a claim may submit a further claim specifying a different amount for their claim at any time,¹⁴¹ which would include specifying a different value for a security, but a secured creditor may not submit a further claim specifying a different value for their security at any time after they have been required to discharge, convey or assign the security to the trustee.¹⁴² Subject to that proviso, a secured creditor may submit a different claim specifying a different value for their security at any time when the trustee remains undischarged and holds undistributed funds, even if the creditor has already received payment in full of their previous claim.¹⁴³
- 16-61** The cumulative effect of these provisions is that a secured creditor is entitled to claim only for any unsecured balance of their debt unless they surrender the security in accordance with the provisions described above. Where there is no unsecured balance, i.e. the creditor is fully secured, the creditor may effectively remain outside the sequestration process.

Claims against partners for debts of partnership

- 16-62** Where a creditor claims in the sequestration of the estate of a partner in a firm for a debt due by the partnership, they must deduct from the amount of their claim the value, as estimated by them, of the debt to the creditor from the firm's estate (where it has not been sequestrated) *or* the creditor's claim against

¹³⁴ Bankruptcy (Scotland) Act 2016 s.228(1).

¹³⁵ See Ch.11.

¹³⁶ See Ch.15.

¹³⁷ Bankruptcy (Scotland) Act 2016 Sch.2, para.4(3).

¹³⁸ Bankruptcy (Scotland) Act 2016 Sch.2, para.4(4).

¹³⁹ Bankruptcy (Scotland) Act 2016 Sch.2, para.4(5).

¹⁴⁰ *Royal Bank of Scotland v Commercial Bank of Scotland* (1881) 8 R. 805 per Lord President Inglis at 817.

¹⁴¹ Bankruptcy (Scotland) Act 2016 s.122(12).

¹⁴² Bankruptcy (Scotland) Act 2016 s.122(13). The requirement for a secured creditor to value their security and the circumstances in which they may be required to discharge, convey or assign it are discussed further above.

¹⁴³ *Commercial Bank of Scotland v Speedie's Trustee* (1885) 13 R. 257; *Wood v Mackay's Trustee*, 1936 S.C. 93.

the firm's estate (where it has been sequestered).¹⁴⁴ The amount of their claim is the balance remaining after such deduction.¹⁴⁵

These provisions reflect the principle that although the partners of a firm are jointly and severally liable for the debts of the partnership,¹⁴⁶ a creditor of the partnership has neither title nor interest to claim against the estate of a partner of the firm if the partnership is solvent and able to pay the debt in full.¹⁴⁷ 16-63

Student loans

It has already been noted that where a student receives or is entitled to receive sums by way of loan before, on or after the date of sequestration, these are not treated as a debt or liability for the purpose of the sequestration.¹⁴⁸ No claim in respect of these sums may therefore be made in the sequestration. 16-64

LIABILITIES AND RIGHTS OF CO-OBLIGANTS

A creditor may be entitled to look to someone other than the debtor for payment of their debt, for example, where the debtor is jointly and severally liable for the debt or a third party has given caution for the debt. Where a cautioner or other person bound to the creditor along with the debtor (hereafter referred to as a co-obligant) has paid the creditor, the co-obligant has a right of relief against the debtor, in the case of a cautioner for the full amount paid to the creditor¹⁴⁹ and in any other case for anything in excess of their proportionate share of the debt.¹⁵⁰ Where the debtor's estate has been sequestered, however, the co-obligant may find that they are unable to enforce that right of relief. 16-65

The Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* in 1982 said that: 16-66

“The Scottish rules relating to voting and ranking are somewhat complicated where a creditor has a personal security—in the form of a cautioner or a ‘true’ co-obligant bound with the bankrupt—rather than a real security over the debtor's estate.”¹⁵¹

This may be regarded as something of an understatement. It considered, however, that the common law rule against double-ranking, discussed further at para.16-68, operated satisfactorily in practice.¹⁵² It also considered that it would be inadvisable to express it in statutory form, and recommended only that, subject to certain exceptions, nothing in the legislation should derogate from the common law rules relating to the valuation of claims by or involving co-obligants in a sequestration.¹⁵³ These recommendations were reflected in 16-67

¹⁴⁴ Bankruptcy (Scotland) Act 2016 Sch.2, para.5(1).

¹⁴⁵ Bankruptcy (Scotland) Act 2016 Sch.2, para.5(2).

¹⁴⁶ Partnership Act 1890 s.9.

¹⁴⁷ See *Brickmann's Trustee v Commercial Bank* (1901) 9 S.L.T. 145.

¹⁴⁸ See Ch.11.

¹⁴⁹ See *Smithy's Place Ltd v Blackadder & McMonagle*, 1991 S.L.T. 790.

¹⁵⁰ *Stair, Institutions* I, 8, 9; *Erschine, Institute* III, 3, 74.

¹⁵¹ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.16.26.

¹⁵² Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

¹⁵³ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

the terms of s.60 of the Bankruptcy (Scotland) Act 1985 as enacted, the substance of which, so far as still relevant, is retained in the current provisions in s.206 of the Bankruptcy (Scotland) Act 2016.

- 16–68** The common law rule against double-ranking can be expressed as the rule that where a creditor has claimed for the debt in the sequestration and also claimed against a co-obligant of the debtor, the co-obligant cannot exercise their right of relief by also claiming in the sequestration.¹⁵⁴ The rationale for the rule is that the same debt (or part of it) would thereby be claimed twice in the sequestration (once by the creditor and once by the co-obligant in terms of their right of relief) to the prejudice of other creditors.¹⁵⁵ It has been said that where a co-obligant has paid the whole amount of the debt after the creditor has claimed in the sequestration and received certain dividends, they will be entitled to receive payment from the creditor of any such dividends, and further that where a co-obligant has paid the outstanding balance of the debt after deduction of any dividends received by the creditor, they will be entitled to stand in the creditor's place and receive any future dividends.¹⁵⁶ If this is correct, it would seem to be equitable since the creditor should not receive more than full payment of his debt.
- 16–69** The provisions of s.206 of the Bankruptcy (Scotland) Act 2016 reflect the recommendations of the Scottish Law Commission referred to above. Section 206(1) provides that an obligant bound to the creditor along with the debtor for the whole or part of the creditor's debt, including a cautioner,¹⁵⁷ is not freed or discharged from liability for the debt *either* by the debtor's discharge *or* by the creditor voting or drawing a dividend or assenting to (or not opposing) the debtor's discharge.¹⁵⁸ There are a number of ways in which a co-obligant can be freed from liability at common law: this provision makes it clear that none of the matters mentioned will have that effect.
- 16–70** Section 206(2) and 206(3) provide for the particular case where a co-obligant has a security over any part of the debtor's estate. In such a case, a problem arose at common law because if the creditor chose to claim in the sequestration rather than claim against the co-obligant, the rule against double-ranking was effectively subverted because the creditor was entitled to receive a dividend out of the debtor's estate and the estate was also subject to the co-obligant's security. In order to address this problem, a provision requiring the co-obligant to account to the trustee for their security was introduced by the Bankruptcy (Scotland) Act 1913 on the recommendation of the Cullen Committee.¹⁵⁹ The Scottish Law Commission noted that that provision had been the subject of criticism and accepted that it presented certain problems, but in the absence of any alternative formula for better achieving the desired result of ensuring that the burden on the debtor's estate remained the same whatever course was adopted

¹⁵⁴ See Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.561. See also *Harvie's Trustee v Bank of Scotland* (1885) 12 R. 1141.

¹⁵⁵ See *Mackinnon v Monkhouse* (1881) 9 R. 393.

¹⁵⁶ See Gloag and Irvine, *Law of Rights in Security* (Edinburgh: W. Green, 1897), pp.831–832 citing certain old English authority: there does not appear to be any modern Scottish authority.

¹⁵⁷ Bankruptcy (Scotland) Act 2016 s.206(6).

¹⁵⁸ Prior to the abolition of judicial composition by the Bankruptcy and Debt Advice (Scotland) Act 2014, the provisions also included a reference to the creditor consenting to (or not opposing) any composition, but this reference was repealed following the abolition of judicial composition by that Act.

¹⁵⁹ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.16.28.

by the creditor, it recommended the retention of the provision subject to certain drafting amendments.¹⁶⁰ The substance of the provision was therefore retained in s.60(2) of the Bankruptcy (Scotland) Act 1985, now s.206(2) and 206(3) of the Bankruptcy (Scotland) Act 2016, which provide that where the creditor has had a claim accepted in whole or in part and the obligant has a security over any part of the debtor's estate, the obligant must account to the trustee in the sequestration so as to put the estate in the same position as if the obligant had paid the debt to the creditor and thereafter had their claim accepted in whole or in part in the sequestration under deduction of the value of the security.

Finally s.206(4) and 206(5) provide that on payment of the debt, an obligant may require and obtain at their own expense from the creditor an assignation of the debt, and may then submit a claim, and vote and draw a dividend, in respect of the debt if otherwise legally entitled to do so. This provision is expressly stated to be without prejudice to any right of a co-obligant who has paid the debt under rule of law. Since the common law rule against double-ranking remains intact, however, the obligant will not be legally entitled to submit a claim, vote and draw a dividend if to do so would violate the rule against double-ranking. It has been held that these provisions are permissive and that obtaining an assignation of the debt is not a necessary pre-requisite of a cautioner obtaining a ranking on the debtor's estate.¹⁶¹ 16-71

THE BALANCING OF ACCOUNTS IN BANKRUPTCY

Where a creditor of the debtor is also a debtor to the debtor, the creditor will not wish to have to pay their debt in full and submit a claim in the sequestration for the debt due to them. They will wish to set off the debts against one another so that they can *either* contribute only the balance due by them to the debtor's estate *or* claim the balance due to them by the debtor in the sequestration. Where the statutory requirements for compensation under the Compensation Act 1592 are not met, for example, because both debts are not liquid, the common law rules on the balancing of accounts in bankruptcy may nonetheless provide the creditor with a remedy. These rules provide an equitable extension of the rules on compensation on the basis that it is 16-72

“inequitable that the debtor of a bankrupt should be forced to pay in full, while he could only get a dividend for the debt due to him”,¹⁶²

The rules on the balancing of accounts in bankruptcy do not apply only on sequestration. They also apply where there is a trust deed for creditors,¹⁶³ and in the case of *Paul and Thain v Royal Bank of Scotland*,¹⁶⁴ it was contemplated that they would apply where a party was bankrupt, insolvent, *vergens ad inopiam* or their pecuniary responsibility and circumstances had materially altered to the worse.¹⁶⁵ The view has accordingly been expressed that apparent 16-73

¹⁶⁰ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

¹⁶¹ *Job Construction Ltd v Kennedy* unreported 11 June 2003 Elgin Sheriff Court.

¹⁶² Goudy, *A Treatise on the law of bankruptcy in Scotland*, 4th edn (Edinburgh: T&T Clark, 1914), p.550.

¹⁶³ See, for example, *Mill v Paul* (1825) 4 S. 219; *Donnelly v Royal Bank of Scotland* [2017] SAC (Civ) 1.

¹⁶⁴ *Paul and Thain v Royal Bank of Scotland* (1869) 7 M. 361.

¹⁶⁵ *Paul and Thain v Royal Bank of Scotland* (1869) 7 M. 361 at 365, applied in *Busby Spinning Co Ltd v BMK Ltd*, 1988 S.C. 70.

insolvency in terms of what is now s.16 of the Bankruptcy (Scotland) Act 2016 or absolute insolvency would be sufficient to allow the rules on balancing of accounts in bankruptcy to apply.¹⁶⁶

16-74 The rules were set out by Bell as follows:¹⁶⁷

"2. In compensation the debts must both be due at the same time. One who is due money presently payable, cannot defend himself against the demand by setting off money due to him six months after, or the payment of which depends on a condition.

But this is a rule which holds strictly only while the parties are solvent. If one of them becomes bankrupt, the other may defend himself against a present demand, by setting off a debt that is future or contingent, although the term be after the bankruptcy. He cannot so plead, however, on a debt arising after bankruptcy.

3. In compensation the debts must both be liquid, or capable of immediate liquidation. A debt is deemed liquid when it is actually due and the amount ascertained, 'Cum certum an et quantum debeatur.' But if the debt itself be contested, and the creditor has not his proof ready; or if the amount is disputed, and it depend on a long discussion what is to be adjudged due; the debtor will not be allowed to avoid the payment of what is liquid and due till that litigation be terminated.

This, however, does not hold as to the balancing of accounts on bankruptcy. If one party have failed, and a demand be made on the other, he will not be obliged to pay the liquid debt, and come in as a creditor only for the dividend. The immediate necessity for payment of the liquid debt is taken away by the bankruptcy; and there is no impediment to the equity which holds the one debt an extinction of the other."

16-75 It is clear that a debt arising after insolvency cannot be set off against a debt arising before insolvency, although two debts arising after insolvency may be set off against each other.¹⁶⁸ Both debts must therefore exist at the date of insolvency. In *Asphaltic Limestone Co Ltd v Corporation of Glasgow*,¹⁶⁹ the position was succinctly described as follows:

"This principle of bankruptcy law presupposes reciprocal obligations which are both existing at the time of the declaration of insolvency, although only one of them is, it may be, immediately exigible. It has no application to the case of a new obligation arising after bankruptcy or declaration of insolvency when the rights of the parties are irrevocably fixed."

16-76 The question of whether both debts do exist at the date of insolvency may not be easy to determine in practice, however. In *Asphaltic Limestone Co Ltd v Corporation of Glasgow*¹⁷⁰ itself, which involved two contracts, one of which was adopted by a liquidator and completed by him, the other of which was refuted by him leaving the other party with a claim for damages, the court held that the claim for the contract price and the claim for damages could not be set

¹⁶⁶ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.16-57. Apparent insolvency and absolute insolvency are discussed in Ch.1.

¹⁶⁷ Bell, *Commentaries on the Law of Scotland*, 7th edn (1870), ii, 122.

¹⁶⁸ See *Mill v Paul* (1825) 4 S. 219.

¹⁶⁹ *Asphaltic Limestone Co Ltd v Corporation of Glasgow*, 1907 S.C. 463 per Lord McLaren at 474.

¹⁷⁰ *Asphaltic Limestone Co Ltd v Corporation of Glasgow*, 1907 S.C. 463.

off against each other because they did not both arise prior to the liquidation. The decision has been accepted as straightforward by some commentators¹⁷¹ but regarded as suspect by others on the basis that both debts arose from obligations which existed prior to the liquidation.¹⁷² Particular issues may also arise with contingent debts.¹⁷³

It has been said that any kind of debt will do for the purposes of the balancing of accounts on bankruptcy, provided it is capable of being ranked for, and the question of how the debt arose is not material, so that a debt arising under statute rather than as a result of contract or other similar relationship may be set off.¹⁷⁴ The debts need not be of the same nature: it has been held, for example, that a claim for the return of plant could be set off against a claim for breach of contract.¹⁷⁵ There must, however, be *concursum debiti et crediti*.¹⁷⁶ So, for example, a creditor who was due a debt to the insolvent estate could not set off against it a debt being claimed by them from the insolvent estate in their capacity as executor.

It is clear that the rules on the balancing of accounts on bankruptcy apply where the insolvent is the creditor in the liquid debt, but the position is less clear where the insolvent is the debtor in the liquid debt. The rules were regarded as applicable in the latter situation in *Powdrill v Murrayhead Ltd*,¹⁷⁷ where the debt owed by the insolvent company was pure and liquid at the date of liquidation while the debt claimed by the liquidators was contingent at the date of liquidation. Lord Prosser noted that very often the situation was the other way round, but nothing had been made of the distinction between the two situations, and he held, albeit with some hesitation, that the rules applied. The rules were also regarded as applicable in the same situation in *Donnelly v Royal Bank of Scotland Plc*,¹⁷⁸ without any discussion of the point, although it may be noted that in both cases the contingency affecting the debt due by the creditor had been purified by the time the court came to consider the matter, so that in fact it might more properly have been regarded as a question of compensation rather than the balancing of accounts in bankruptcy. There is also the rather difficult case of *Borthwick v Scottish Widows Fund and Life Assurance Society*.¹⁷⁹ In that case, the defenders were the creditors in a liquid debt due by a debtor whose estate had been sequestrated. Prior to the sequestration, the debtor had taken out a number of life policies with the defenders, three of which were subsisting at the date of sequestration. The defenders' obligations

¹⁷¹ See St Clair and Drummond Young, *The Law of Corporate Insolvency in Scotland*, 4th edn (Edinburgh: W. Green, 2011), para. 17–22.

¹⁷² See Wilson, WA, *The Scottish Law of Debt*, 2nd edn (Edinburgh: W. Green, 1991) at para. 13–10.

¹⁷³ See *Secretary of State for Trade and Industry v Frid* [2004] UKHL 24 and *Donnelly v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13 which both involved contingent liability under statutory provisions. The decision in the latter case was overturned on appeal, but on a different point: the reasoning of the sheriff on this point was not challenged.

¹⁷⁴ *Secretary of State for Trade and Industry v Frid* [2004] UKHL 24. See also *Ross v Ross*, 1895 22 R. 461 per Lord McLaren at 465: "it is practically settled that anyone who has a claim against an insolvent estate is entitled to keep back money which he owes to the estate, and cannot be compelled to pay in full while he only receives a dividend". As noted above, *Donnelly v Royal Bank of Scotland Plc*, 2017 SAC (Civ) 1 also involved a debt arising under statute.

¹⁷⁵ *Myles J Callaghan Ltd (In Receivership) v City of Glasgow District Council*, as above.

¹⁷⁶ Bell, *Commentaries*, ii, 124; *Secretary of State for Trade and Industry v Frid* [2004] UKHL 24.

¹⁷⁷ *Powdrill v Murrayhead Ltd*, 1997 S.L.T. 1223.

¹⁷⁸ *Donnelly v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13. The decision in this case was overturned on appeal, but on a different point: the decision of the sheriff on this point was not challenged.

¹⁷⁹ *Borthwick v Scottish Widows Fund and Life Assurance Society* (1862) 2 M. 595.

under these policies were future and contingent. It was held by a majority of 4:3 that the defenders were entitled to withhold payment of any sums due under the policies for so long as a debt of equal amount was due to them by the debtor, and that their right to do so was a security which had to be valued and deducted from their claim in the sequestration. The case is difficult because although the majority gave effect to a right on the part of the defenders, they do not specifically categorise it as one of either retention or the balancing of accounts in bankruptcy, while the minority reject it specifically on the ground that it cannot be either and there is no other ground for it.

16-79 In contrast to these cases, there are two cases in which the balancing of accounts in bankruptcy has been specifically rejected where the insolvent is the debtor in the liquid debt. In *Unity Trust Bank Plc v Frost*,¹⁸⁰ Lord Eassie held that an insolvent debtor's counterclaim did not constitute a valid defence to the pursuer's claim for payment of a liquid debt on the principle of the balancing of accounts in bankruptcy, because that principle operates where the debtor in the illiquid claim is bankrupt, the justification being that the creditor in the illiquid claim should not require to pay their liquid debt, without set off, in the insolvency. The application of the rules on the balancing of accounts in bankruptcy where the insolvent was the debtor in the liquid debt was also rejected in the earlier case of *Campbell v Carphin*.¹⁸¹ It is notable that the decision in *Borthwick* was not cited or considered in *Campbell v Carphin* and neither of these cases were referred to in any of the later decisions. The application of the rules on the balancing of accounts in bankruptcy in this situation may therefore be regarded as remaining in some doubt. This is not without practical importance, since if the decision in *Borthwick* is good law, then a creditor claiming in the sequestration should treat his right to withhold payment as a security and value and deduct it from his claim in the sequestration. There are also implications for the creditor's rights where the debtor is discharged. The effect of the debtor's discharge on the balancing of accounts in bankruptcy has the subject of recent consideration in the case law and is discussed further below. The equities of allowing the balancing of accounts in bankruptcy where the insolvent is the debtor in the liquid debt are perhaps not as straightforward as in the case where the insolvent is the creditor in the liquid debt, but it is arguable that the equities favour the same approach in both cases. It may be noted that this would also be consistent with the position in England and Wales.¹⁸²

16-80 A debtor to the insolvent may not set off against the debt due by them to the insolvent a claim against the insolvent which they have acquired after the insolvency for the purpose of obtaining set off.¹⁸³ In addition, a co-obligant of a debtor may not set off sums due by them to the debtor against any right of relief they may have against the debtor if the creditor in the obligation has also claimed in the debtor's insolvency because this would violate the rule against double-ranking.¹⁸⁴

¹⁸⁰ *Unity Trust Bank Plc v Frost* [2005] CSOH 33.

¹⁸¹ *Campbell v Carphin*, 1925 S.L.T. (Sh Ct) 30.

¹⁸² See Insolvency Act 1986 s.323.

¹⁸³ *Hannay and Sons' Trustee v Armstrong & Co* (1875) 2 R. 399. Cf *Smith v Lord Advocate* (No.2), 1981 S.L.T. 19, where there was a statutory assignation of the debt so it could not be said that the debt had been acquired for the purpose of obtaining set off.

¹⁸⁴ *Anderson v Mackinnon* (1876) 3 R. 608; cf. *Christie v Keith* (1838) 16 S. 1224. Co-obligants are discussed at para.16-65 onwards.

The application of the rules on the balancing of accounts in bankruptcy is not excluded in a case involving the enforcement of a decision of an adjudicator under the Housing Grants, Construction and Regeneration Act 1996,¹⁸⁵ even where the issue is not raised before the adjudicator,¹⁸⁶ but in such a case, absent a formal insolvency process, clear or uncontested evidence of insolvency will be required to justify the application of the principle.¹⁸⁷ 16-81

The rules on the balancing of accounts in bankruptcy will not apply where one of the debts has been extinguished, for example, by prescription.¹⁸⁸ Whether or not the discharge of a debtor following sequestration or a trust deed extinguishes the debtor's debts depends on the nature of the debtor's discharge. If the debtor has been discharged on composition or the discharge is held to have the equivalent effect, the debtor's debts will be extinguished with the result that a creditor will not be entitled to invoke the rules on the balancing of accounts in bankruptcy in response to a claim against the creditor by the discharged debtor.¹⁸⁹ 16-82

The application of the rules on the balancing of accounts on bankruptcy may be excluded by agreement where the agreement excludes their application either expressly or by clear implication, at least where the agreement is concluded after the insolvency.¹⁹⁰ It may also be excluded where money is held for a specific purpose.¹⁹¹ 16-83

The balancing of accounts in bankruptcy must be pled,¹⁹² but the plea is open at any stage, even after decree, because it is an equitable remedy.¹⁹³ It is thought that a creditor may choose to set off sums due to them by the insolvent debtor first against any non-preferred or unsecured element of their claim.¹⁹⁴ 16-84

It may be noted that the exact nature of the principle involved in the balancing of accounts in bankruptcy is not entirely clear. As Lord Hodge said in the case of *Integrated Building Services Engineering Consultants Ltd v Pihl UK Ltd*¹⁹⁵: 16-85

“There is no consensus as to whether the principle of balancing of accounts in bankruptcy is a species of retention, by which the enforcement on behalf of the bankrupt of payment of a liquid debt to him is suspended to allow the defender the opportunity to make his claim against the bankrupt liquid and thereby plead compensation of debts. The alternative view is that it is an extension of compensation by which

¹⁸⁵ *Integrated Building Services Engineering Consultants Ltd v Pihl Ltd* [2010] CSOH 80; *Administrators of Connaught Partnerships Ltd v Perth and Kinross Council* [2013] CSOH 149; *J & A Construction (Scotland) Ltd v Windex Ltd* [2013] CSOH 170.

¹⁸⁶ *Administrators of Connaught Partnerships Ltd v Perth and Kinross Council* [2013] CSOH 149.

¹⁸⁷ *Integrated Building Services Engineering Consultants Ltd v Pihl Ltd* [2010] CSOH] 80; *J & A Construction (Scotland) Ltd v Windex Ltd* [2013] CSOH 170.

¹⁸⁸ Bell, *Commentaries*, ii, 124 and see *Donnelly v Royal Bank of Scotland Plc*, 2017 SAC (Civ) 1.

¹⁸⁹ *Donnelly v Royal Bank of Scotland Plc*, 2017 SAC (Civ) 1.

¹⁹⁰ *Melville Dundas Ltd v Hotel Corporation of Edinburgh Ltd* [2006] CSOH 136.

¹⁹¹ *Melville Dundas Ltd v Hotel Corporation of Edinburgh Ltd* [2006] CSOH 136.

¹⁹² Bell, *Commentaries*, ii, 124 and see, for example, *Integrated Building Services Engineering Consultants Ltd v Pihl Ltd* [2010] CSOH 80; *Donnelly v Royal Bank of Scotland Plc* [2017] SAC (Civ) 1.

¹⁹³ See *Highland Council, Petitioners*, 2004 S.C. 480; *Integrated Building Services Engineering Consultants Ltd v Pihl Ltd* [2010] CSOH 80.

¹⁹⁴ See *Turner v IRC*, 1994 S.L.T. 811. That case concerned the Crown (for which see further at para. 16-87) and compensation, but it is thought that the principle applies equally here. Preferred debts are discussed further below.

¹⁹⁵ *Integrated Building Services Engineering Consultants Ltd v Pihl UK Ltd* [2010] CSOH 80.

illiquid debts owed by the bankrupt may extinguish liquid debts owed to the bankrupt leaving only a balance due.”

- 16–86 On balance, it seems more likely that the principle should be regarded as a species of retention. As Lord Hodge went on to note, however, the correct characterisation will often be of limited practical importance.¹⁹⁶

Balancing of accounts in bankruptcy and the Crown

- 16–87 In a case involving the Crown, regard must be had to the provisions of the Crown Proceedings Act s.35(2) as applied to Scotland by s.50 of that Act, the provisions of which have been held to encompass set off in the form of the balancing of accounts in bankruptcy.¹⁹⁷ The provisions apply to proceedings in the Court of Session or sheriff court. In broad terms, a person is not entitled to avail themselves of the balancing of accounts in bankruptcy in any proceedings of specified types brought against them by the Crown,¹⁹⁸ while in any other proceedings, the leave of the court must be sought where either the debtor (in the case of proceedings by the Crown against the debtor) or the Crown (in the case of proceedings against the Crown) seeks to invoke the balancing accounts in bankruptcy and the debts in question relate to different government departments.¹⁹⁹ In the case of the Crown at least, however, leave will normally be granted.²⁰⁰

DISTRIBUTION

- 16–88 The functions of the trustee include the distribution of the estate among the debtor’s creditors according to their respective entitlements.²⁰¹
- 16–89 It has been noted that it is a basic principle of insolvency law that all creditors should be treated equally.²⁰² It has been said, however, that the proposition that creditors are to be paid *pari passu* is “a piece of wishful ideology which is nowhere honoured”²⁰³ and, in practice, this principle is indeed imperfectly applied in so far as some categories of creditors are given priority over others when it comes to the distribution of the debtor’s assets. It does apply, however, to ensure the equal treatment of creditors within a particular category.²⁰⁴

Order of priority

- 16–90 The order of priority for distribution of the debtor’s estate is set out in s.129(1) of the Bankruptcy (Scotland) Act 2016. It is specifically provided, however, that this is without prejudice to: (i) any right of a secured creditor which is preferable to that of the trustee; and (ii) any preference of the holder of a lien over a title deed or other document which was delivered to the trustee in

¹⁹⁶ See also the comments of Lord Hope in *Joint Administrators of Heritable Bank Plc v The Winding-Up Board of Landsbanki Islands hf* [2013] UKSC 13 at [40].

¹⁹⁷ *Laing v Lord Advocate*, 1973 S.L.T. (Notes) 81.

¹⁹⁸ Crown Proceedings Act 1947 s.35(2)(b).

¹⁹⁹ Crown Proceedings Act 1947 s.35(2)(c) and (d).

²⁰⁰ *Smith v Lord Advocate (No.2)*, 1981 S.L.T. 19.

²⁰¹ Bankruptcy (Scotland) Act 2016 s.50(1)(b) and see further Ch.10.

²⁰² See Ch.3.

²⁰³ Wood, PR, *Principles of International Insolvency*, 2nd edn (London: Sweet & Maxwell, 2007), para.1–002.

²⁰⁴ See further below.

accordance with a requirement under s.108(5) of the Bankruptcy (Scotland) Act 2016.²⁰⁵

The rights of secured creditors have already been discussed.²⁰⁶ In general, a secured creditor may enforce their security without reference to the sequestration, subject to the trustee's right to require them to discharge the security or convey or assign it to the trustee on payment of its value as estimated by the creditor²⁰⁷ and the trustee's right to intimate their intention to sell heritable property subject to a security.²⁰⁸ Where the property subject to the security is realised by the creditor, the creditor will require to account to the trustee for any balance remaining after payment of the secured creditor's debt which would be due to the debtor; where the property subject to the security is realised by the trustee, the secured creditor will have first claim on the proceeds of that property up to the value of their debt. As discussed above, a secured creditor may claim in the sequestration for the unsecured balance of their debt after deduction of either the value of their security or the proceeds thereof or they may surrender their security and claim for the whole amount of their debt.²⁰⁹ **16-91**

The rights of the holder of a lien over title deeds or documents delivered to the trustee, including the difficulties regarding ranking, have also been discussed already.²¹⁰ **16-92**

Section 129(1) of the Bankruptcy (Scotland) Act 2016 provides that the debtor's estate must be distributed to meet the following debts in the order mentioned: **16-93**

- (a) The outlays and remuneration of any interim trustee.²¹¹
- (b) The outlays and remuneration of the trustee.²¹²
- (c) Where the debtor has died, deathbed and funeral expenses reasonably incurred and expenses reasonably incurred in administering the deceased's estate.²¹³
- (d) The expenses reasonably incurred by a creditor in petitioning for sequestration or concurring in a debtor application for sequestration.²¹⁴
- (e) Ordinary preferred debts, excluding any interest which has accrued on those debts to the date of sequestration.²¹⁵
- (f) Secondary preferred debts, excluding any interest which has accrued on those debts to the date of sequestration.²¹⁶
- (g) Ordinary debts.²¹⁷

²⁰⁵ Bankruptcy (Scotland) Act 2016 s.129(9).

²⁰⁶ See Chs 11 and 12 and para.16-65 onwards.

²⁰⁷ See para.16-58.

²⁰⁸ See Ch.12.

²⁰⁹ See para.16-61.

²¹⁰ See Ch.13.

²¹¹ Bankruptcy (Scotland) Act 2016 s.129(1)(a). The procedure for fixing the outlays and remuneration of an interim trustee is discussed in Ch.8.

²¹² Bankruptcy (Scotland) Act 2016 s.129(1)(b). The procedure for fixing the outlays and remuneration of the trustee is discussed at para.16 123 onwards (trustee not AiB) and para.16 130 onwards (trustee AiB).

²¹³ Bankruptcy (Scotland) Act 2016 s.129(1)(c). This is discussed further at para.16 94-16 97.

²¹⁴ Bankruptcy (Scotland) Act 2016 s.129(1)(d). This is discussed further at para.16 96-16 97.

²¹⁵ Bankruptcy (Scotland) Act 2016 s.129(1)(e). Preferred debts are discussed further at para.16-98 onwards.

²¹⁶ Bankruptcy (Scotland) Act 2016 s.129(1)(f). Preferred debts are discussed further at para.16-98 onwards.

²¹⁷ Bankruptcy (Scotland) Act 2016 s.129(1)(g). Ordinary debts are discussed further at para.16-106.

- (h) Interest on ordinary preferred debts, secondary preferred debts and ordinary debts between the date of sequestration and the date of payment of the debt.²¹⁸
- (i) Postponed debts.²¹⁹

Deathbed and funeral expenses

16–94 The provision for payment of deathbed and funeral expenses does not refer to the timing of the debtor's death. It is therefore possible that it could be argued that deathbed and funeral expenses fall within this provision even where the debtor has died after the date of sequestration and the debts are therefore post-sequestration debts. It is thought, however, that the better view is that deathbed and funeral expenses fall within this provision only where the debtor has died prior to the date of sequestration and the debts are pre-sequestration debts, sequestration generally being concerned only with claims existing at the date of sequestration. This is the view taken by AiB in the *Notes for Guidance for Trustees*.²²⁰ The *Notes for Guidance for Trustees* go on to state, however, that if the debtor had a life insurance policy which has vested in the trustee, the trustee should consider releasing reasonable funds from the policy proceeds to meet the debtor's funeral costs on the application of a person or persons who can demonstrate responsibility for those costs.²²¹ It is not clear what the basis for this advice is: if the estate has no liability for such costs where the debtor dies after the date of sequestration, then there does not seem to be any basis for the trustee using funds which would otherwise form part of the estate to defray costs which would not otherwise form claims on the estate. It may be, however, that the creditors would be prepared to consent to such an approach on humanitarian grounds.

16–95 It should be noted that the provision applies only to expenses which are reasonably incurred.²²² Any expenses which are not reasonably incurred would fall to be treated as ordinary debts.

Expenses of petitioning or concurring creditor

16–96 The provision for payment of the expenses of a petitioning or concurring creditor refers only to expenses incurred by a creditor and does not, therefore, extend to expenses incurred by any other petitioner for sequestration, for example, a trustee under a trust deed. Any such expenses would fall to be treated as an ordinary debt.

16–97 The provision applies only to expenses which are reasonably incurred. Any expenses which are not reasonably incurred would fall to be treated as ordinary debts.

Preferred debts

16–98 Preferred debts are those listed in Pt I of Sch.3 of the Bankruptcy (Scotland) Act 2016. They are divided into two subcategories, namely ordinary preferred

²¹⁸ Bankruptcy (Scotland) Act 2016 s.129(1)(h). Post-sequestration interest is discussed further at para.16–107–16–108.

²¹⁹ Bankruptcy (Scotland) Act 2016 s.129(1)(i). Postponed debts are discussed further at para.16–109–16–110.

²²⁰ Accountant in Bankruptcy, *Notes for Guidance for Trustees* (2016), para.6.18.

²²¹ Accountant in Bankruptcy, *Notes for Guidance for Trustees* (2016).

²²² For a case in which issues were raised as to the reasonableness of certain items in relation to funeral expenses, see *Peter v Munro* (1749) Mor 11852.

debts, which are those listed in paras 1–6 of that Part,²²³ and secondary preferred debts, which are those listed in paras 7 and 8 of that Part.²²⁴ Part 2 of Sch.3 provides rules for the interpretation of Pt 1.²²⁵

Preferred debts are controversial. The Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* in 1982 traced the history of preferred debts in sequestration, including the Crown preference for taxes and other charges,²²⁶ and noted that there had been

“a great expansion of the category of preferred debts during the present century ... Preferences have been created in respect of many new taxes and other imposts without, it is thought, adequate consideration of the cumulative effects of such preferences in the distribution of insolvent estates”.²²⁷

It examined in detail the justifications for Crown preference and the counter-vailing arguments and concluded that bankruptcy law should adhere to the principle that there should be equality of treatment among the unsecured creditors except where the case for departure from that principle was clearly made out.²²⁸ Having examined the existing preferences in turn, it recommended that almost all of them, including all Crown preferences, should be abolished. Its recommendations in this respect were not, however, accepted, although the list of preferred debts and the periods for which they applied were reduced to some extent during the parliamentary progress of the Bankruptcy (Scotland) Act 1985.²²⁹

Crown preference was, however, to be abolished just under 20 years later by the Enterprise Act 2002. In the White Paper, *Productivity and Enterprise: Insolvency—A Second Chance* published in July 2001,²³⁰ the Government announced its intention to abolish Crown preference in all insolvencies, stating somewhat laconically:

“Preferential claims in insolvency originated in the late 19th century, but in recent years the trend in other jurisdictions has been towards restricting or abolishing Crown or State preference as, for instance, in Germany and Australia. We believe that this is more equitable.”²³¹

Section 251 of the Enterprise Act 2002 duly abolished Crown preference for specified debts due to the Inland Revenue (as it then was), specified debts due to Customs and Excise (as it then was) and specified social security contributions in, inter alia, sequestrations.

²²³ Bankruptcy (Scotland) Act 2016 s.129(2).

²²⁴ Bankruptcy (Scotland) Act 2016 s.129(2).

²²⁵ Bankruptcy (Scotland) Act 2016 s.129(3).

²²⁶ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), Ch 15.

²²⁷ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.15.2.

²²⁸ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.15.5.

²²⁹ See annotations to the Bankruptcy (Scotland) Act 1985 by McBryde, WW, in particular General Note to Sch.3.

²³⁰ *Productivity and Enterprise: Insolvency—A Second Chance* (Cm 5234, July 2001).

²³¹ *Productivity and Enterprise: Insolvency—A Second Chance* (Cm 5234, July 2001), para.2.19.

16–103 More recently, certain debts have been added to the list of preferred debts and the original undivided category of preferred debts has been divided into two subcategories in the form of ordinary preferred debts and secondary preferred debts. The provisions relating to secondary preferred debts and the distinction between ordinary and secondary preferred debts were introduced by the Banks and Building Societies (Depositor Preference and Priorities) Order 2014,²³² which implemented an obligation to make such provision under Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms. By their nature, however, these are likely to affect very few sequestrations.

16–104 Ordinary preferred debts are:

- (i) Contributions to occupational pension schemes, etc.²³³ Such contributions comprise any sum owed by the debtor which is a sum to which Sch.4 of the Pension Schemes Act 1993 (contributions to occupational pension scheme and state pension scheme) applies.
- (ii) Remuneration of employees, etc.²³⁴ This comprises:
 - (1) any remuneration owed by the debtor to any employee or former employee of the debtor for the whole or part of the period of four months immediately prior to the date of sequestration or, in the case of a deceased debtor, the date of death, subject to a prescribed limit.²³⁵ The current prescribed limit is £800.²³⁶ Where the sums due to the employee or former employee exceed the prescribed limit, the balance will be an ordinary debt;
 - (2) any accrued holiday remuneration owed in respect of any period of employment prior to the date of sequestration or, in the case of a deceased debtor, the date of death, which is owed to a person whose employment by the debtor has been terminated, whether before, on after that date²³⁷;
 - (3) any amount owed in respect of money advanced to the debtor which was used by the debtor for the purpose of paying remuneration or accrued holiday remuneration which would otherwise have been a preferred debt in accordance with the above provisions, provided the money was advanced to the debtor for that purpose.²³⁸ The lender is effectively substituted for the employee(s); and
 - (4) any amount which is ordered to be paid by the debtor under the Reserve Forces (Safeguard of Employment) Act 1985 in respect of a default by the debtor in their obligations under that Act occurring before the date of sequestration or, in the case of a deceased debtor, the date of death, subject to a prescribed limit.²³⁹ Although the default must have taken place before the date of sequestration or, in the case of a deceased debtor, the date of death, the order may be made before or after that date.²⁴⁰ The

²³² Banks and Building Societies (Depositor Preference and Priorities) Order 2014 (SI 2014/3486).

²³³ Bankruptcy (Scotland) Act 2016 Sch.3, para.1.

²³⁴ Bankruptcy (Scotland) Act 2016 Sch.3, para.2.

²³⁵ Bankruptcy (Scotland) Act 2016 Sch.3, para.2(1), 9.

²³⁶ See Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225) reg.21.

²³⁷ Bankruptcy (Scotland) Act 2016 Sch.3, para.2(2), 9.

²³⁸ Bankruptcy (Scotland) Act 2016 Sch.3, para.2(3).

²³⁹ Bankruptcy (Scotland) Act 2016 Sch.3, paras 3, 9.

²⁴⁰ Bankruptcy (Scotland) Act 2016 Sch.3, paras 3, 9.

current prescribed limit is £800.²⁴¹ Where the sums due by the debtor exceed the prescribed limit, the balance will be an ordinary debt.

Remuneration and holiday remuneration are defined in para.10 in Pt 2 of Sch.3 of the Bankruptcy (Scotland) Act 2016.

Employees or former employees may be owed other employment-related sums which do not fall within these provisions. Such sums would be ordinary debts.

As previously noted,²⁴² certain debts due to employees are guaranteed by the state and fall to be paid out of the National Insurance Fund where the estate of the employer is sequestrated²⁴³ and certain employer and employee contributions to an occupational or personal pension scheme are guaranteed by the state and fall to be paid out of the National Insurance Fund where the estate of the employer is sequestrated.²⁴⁴ Where the Secretary of State has made a payment under any of the provisions referred to, they stand in the shoes of the employee for the purpose of claiming the relevant debt(s) in the sequestration and, if the payment is made in respect of an ordinary preferred debt as described here, is entitled to rank as an ordinary preferred creditor.²⁴⁵ Furthermore, any liability to pay statutory sick pay to an employee for any day on which the employer was insolvent, which includes where the estate of the employer is sequestrated, is a liability of the Secretary of State, not the employer.²⁴⁶ In this case, however, there is no specific provision for the Secretary of State to stand in the shoes of the employee for the purposes of claiming the debt in the sequestration.

- (iii) Levies on coal and steel production.²⁴⁷ This comprises any sums due from the debtor at the date of sequestration or, in the case of a deceased debtor, the date of death, in respect of the levies on the production of coal and steel referred to in arts 49 and 50 of the European Coal and Steel Community Treaty and any surcharge for delay provided for in art.50(3) of that treaty and art.6 of the Decision 3/52 of the High Authority of the European Coal and Steel Community.
- (iv) Debts owed to the Financial Services Compensation Scheme.²⁴⁸ Such debts comprise any debt owed by the debtor to the scheme manager of the Financial Services Compensation Scheme under s.215(2A) of

²⁴¹ See Bankruptcy (Scotland) Regulations 2014 reg.21.

²⁴² See Ch.12.

²⁴³ See Employment Rights Act 1996 Pt XI, Ch.VI (redundancy payments) and Pt XII (other payments). These provisions do not apply to certain classes of employees: see Employment Rights Act 1996 Pt XIII. These provisions also apply where the debtor has granted a trust deed for creditors or entered into a composition contract or where the debtor has died and a judicial factor has been appointed under s.11A of the Judicial Factors (Scotland) Act 1889. Judicial factors are discussed in Ch.23.

²⁴⁴ See Pension Schemes Act 1993 Pt VII, Ch.II. These provisions also apply where the debtor has granted a trust deed for creditors or entered into a composition contract or where the debtor has died and a judicial factor has been appointed under s.11A of the Judicial Factors (Scotland) Act 1889. Judicial factors are discussed in Ch.23.

²⁴⁵ See Employment Rights Act 1996 ss.167 (redundancy payments) and 189 (other payments) and Pension Schemes Act 1993 s.127 (contributions to pension schemes).

²⁴⁶ Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) reg.9B.

²⁴⁷ Bankruptcy (Scotland) Act 2016 Sch.3, para.4.

²⁴⁸ Bankruptcy (Scotland) Act 2016 Sch.3, para.5.

the Financial Services and Markets Act 2000 (rights of the scheme on insolvency). “The scheme manager” has the same meaning as in s.212(1) of the Financial Services and Markets Act 2000.²⁴⁹ This provision was introduced by the Deposit Guarantee Scheme Regulations 2015,²⁵⁰ which implemented in part Directive 2014/49/EU on deposit guarantee schemes (recast).

- (v) Deposits covered by Financial Services Compensation Scheme.²⁵¹ This comprises so much of any amount owed by the debtor at the date of sequestration or, in the case of a deceased debtor, the date of death, in respect of an eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to the person or persons to whom the amount is owed.²⁵² “Eligible deposit” is defined in para.13 in Pt 2 of Sch.3 of the Bankruptcy (Scotland) Act 2016. This provision was introduced by the Financial Services (Banking Reform) Act 2013, which made a number of changes to the Financial Services Compensation Scheme.²⁵³

16–105 Secondary preferred debts are:

- (i) so much of any amount owed by the debtor at the date of sequestration or, in the case of a deceased debtor, the date of death, to one or more eligible persons in respect of an eligible deposit as exceeds any compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to that person or persons²⁵⁴; and
- (ii) an amount owed by the debtor at the date of sequestration or, in the case of a deceased debtor, the date of death, to one or more eligible persons in respect of a deposit which was made through a non-EEA branch of a credit institution authorised by the competent authority of an EEA state and which would have been an eligible deposit if it had been made through an EEA branch of that credit institution.²⁵⁵ For the purposes of these provisions, “eligible deposit”, “deposit”, “eligible person”, “credit institution”, “EEA branch” and “non-EEA branch” are all defined in para.13 in Pt 2 of Sch.3 of the Bankruptcy (Scotland) Act 2016.

Ordinary debts

- 16–106** Ordinary debts are debts which are not secured debts and which are not mentioned in any of the other categories set out in s.129(1).²⁵⁶ Ordinary debts generally form the bulk of the debts in any sequestration and include interest on ordinary and secondary preferred debts which is excluded from constituting an ordinary or secondary preferred debt as set out above. In most cases, creditors will be lucky to receive any payment at all in respect of ordinary debts.

²⁴⁹ Bankruptcy (Scotland) Act 2016 Sch.3, para.12.

²⁵⁰ Deposit Guarantee Scheme Regulations 2015 (SI 2015/486).

²⁵¹ Bankruptcy (Scotland) Act 2016 Sch.3, para.6.

²⁵² Bankruptcy (Scotland) Act 2016 Sch.3, paras 6, 9.

²⁵³ See the Explanatory Notes which accompany the Act.

²⁵⁴ Bankruptcy (Scotland) Act 2016 Sch.3, paras 7, 9.

²⁵⁵ Bankruptcy (Scotland) Act 2016 Sch.3, paras 8, 9.

²⁵⁶ Bankruptcy (Scotland) Act 2016 s.129(1)(g).

Post-sequestration interest

Interest between the date of sequestration and the date of payment of the debt is payable at the rate specified in s.129(10) of the Bankruptcy (Scotland) Act,²⁵⁷ which is the higher of the prescribed rate at the date of sequestration and the rate which would have applied but for the sequestration. The prescribed rate is currently 8 per cent.²⁵⁸ Interest payable on ordinary preferred debts, secondary preferred debts and ordinary debts between the date of sequestration and the date of payment of the debt ranks equally despite the fact that the debts themselves do not.²⁵⁹ **16-107**

The Scottish Government in its *Consultation on Bankruptcy Law Reform* issued in February 2012, against a background of record low interest rates which persists at the time of writing, considered the issue of post-sequestration interest on debts and sought views on whether the prescribed rate of interest (then, as now, 8 per cent) should be retained, whether post-procedure interest and charges should be frozen in all debt relief processes in the same way as in the debt arrangement scheme and, if not, whether the interest rate should be linked to the Bank of England base rate.²⁶⁰ The responses to the consultation showed a majority in favour of the retention of the prescribed rate of interest but also a majority in favour of post-procedure interest and charges being frozen in all debt relief processes.²⁶¹ The Scottish Government's response to the consultation did not, however, mention the issue²⁶² and the position remains unchanged as described. **16-108**

Postponed debts

Postponed debts are:

16-109

- (1) any loan made to the debtor in consideration of a share of the profits in the debtor's business which is postponed to the claims of other creditors under s.3 of the Partnership Act 1890²⁶³;
- (2) any loan made to the debtor by the debtor's spouse or civil partner²⁶⁴; and
- (3) a creditor's right to anything vesting in the trustee by virtue of a successful challenge under s.98 of the Bankruptcy (Scotland) Act 2016 (gratuitous alienations) or the sale proceeds of anything so vesting.²⁶⁵

It is thought that interest on a postponed debt would also be a postponed debt. **16-110**

Abatement of debts

Any debt falling within categories (c)–(i) of s.129(1) has the same priority as any other debt falling within the same category and, where there are **16-111**

²⁵⁷ Bankruptcy (Scotland) Act 2016 s.129(1)(h).

²⁵⁸ Bankruptcy (Scotland) Regulations 2016 reg.26.

²⁵⁹ Bankruptcy (Scotland) Act 2016 s.129(5).

²⁶⁰ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.14.8.

²⁶¹ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), paras 9.22–9.24.

²⁶² Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (November 2012).

²⁶³ Bankruptcy (Scotland) Act 2016 s.129(4)(a).

²⁶⁴ Bankruptcy (Scotland) Act 2016 s.129(4)(b).

²⁶⁵ Bankruptcy (Scotland) Act 2016 s.129(4)(c).

insufficient funds to enable all the debts in any category to be paid in full, the debts abate in equal proportions.²⁶⁶

Surplus

- 16–112** In the unlikely, but not unheard of, event that any surplus remains after all of the debts referred to above have been paid in full, the surplus must be returned to the debtor or the debtor's successors or assignees.²⁶⁷ This is subject, where relevant, to art.49 of the EU insolvency proceedings regulation, which provides for any surplus in secondary proceedings to be transferred to the main proceedings.²⁶⁸ "Surplus" for this purpose is defined as including any kind of estate,²⁶⁹ which allows for any estate which has not been realised to be returned to the debtor *in specie*. It does not, however, include any unclaimed dividend.²⁷⁰

Accounting periods

- 16–113** The distribution of the debtor's estate takes place with reference to accounting periods into which the sequestration is divided.²⁷¹ A distinction is made between the first accounting period and subsequent accounting periods.
- 16–114** The first accounting period is 12 months beginning with the date of the award of sequestration or such shorter period beginning with that date as may be determined or agreed.²⁷² Where the trustee was appointed as interim trustee prior to the award of sequestration, however, the first accounting period begins with the date of their appointment as interim trustee and ends 12 months after the date of the award of sequestration or such shorter period beginning with that date as may be determined or agreed.²⁷³ This means that, unless it is shortened, the first accounting period will be longer than 12 months, perhaps considerably longer if the interim trustee has been office for an extended period as a result of continuation(s) of the sequestration petition. The first accounting period may be shortened to a period of not less than six months where the funds of the debtor's estate are considered to be sufficient to pay a dividend within that shorter period.²⁷⁴ In a case in which AiB is trustee, the decision is made by AiB²⁷⁵; in any other case, the decision is made by agreement between the trustee and the commissioners or, if there are no commissioners, AiB.²⁷⁶
- 16–115** Subsequent accounting periods are 12 months in length beginning with the end of the immediately preceding accounting period unless otherwise determined or agreed.²⁷⁷ In a case in which AiB is trustee, the decision is made by AiB²⁷⁸; in any other case, the decision is made by agreement between the trustee and the commissioners or, if there are no commissioners, AiB.²⁷⁹ In contrast to the

²⁶⁶ Bankruptcy (Scotland) Act 2016 s.129(5).

²⁶⁷ Bankruptcy (Scotland) Act 2016 s.129(6).

²⁶⁸ Bankruptcy (Scotland) Act 2016 s.129(8). The EU insolvency proceedings regulation is discussed in Ch.25.

²⁶⁹ Bankruptcy (Scotland) Act 2016 s.129(7)(a).

²⁷⁰ Bankruptcy (Scotland) Act 2016 s.129(7)(b). Unclaimed dividends are discussed further at para.18–08.

²⁷¹ Bankruptcy (Scotland) Act 2016 ss.130, 131.

²⁷² Bankruptcy (Scotland) Act 2016 s.130(2)(a).

²⁷³ Bankruptcy (Scotland) Act 2016 s.130(3)(a), (4).

²⁷⁴ Bankruptcy (Scotland) Act 2016 s.130(5).

²⁷⁵ Bankruptcy (Scotland) Act 2016 s.130(5)(a).

²⁷⁶ Bankruptcy (Scotland) Act 2016 s.130(5)(b).

²⁷⁷ Bankruptcy (Scotland) Act 2016 s.130(2)(b), (3)(b).

²⁷⁸ Bankruptcy (Scotland) Act 2016 s.130(3)(b)(ii).

²⁷⁹ Bankruptcy (Scotland) Act 2016 s.130(3)(b)(i).

first accounting period, which may only be shortened, a subsequent accounting period can be shortened or lengthened. A decision to change the length of a subsequent accounting period may relate to one or more accounting periods²⁸⁰ and may be made before the beginning of the accounting period in which it is to have effect.²⁸¹ It cannot, however, be retrospective: it must be made before the accounting period in which it is to have effect would otherwise have ended.²⁸² A decision may provide for different accounting periods to be of different duration.²⁸³

Where there are commissioners and a decision to vary the length of an accounting period or periods is made by agreement between the trustee and the commissioners, AiB's *Notes for Guidance for Trustees* require the agreement to be recorded and a copy sent to AiB. Where there are no commissioners and the trustee requires to seek AiB's agreement to vary the length of an accounting period or periods, applications should be made to AiB in the form provided in AiB's *Notes for Guidance for Trustees*. **16–116**

The provisions relating to accounting periods have undergone change over time. The Bankruptcy (Scotland) Act 1985 originally provided for accounting periods of 26 weeks, with the first accounting period beginning with the date of sequestration²⁸⁴ and provision for any accounting period other than the first to be shortened only.²⁸⁵ The Bankruptcy (Scotland) Act 1993 altered the position to provide for a first accounting period of six months, with subsequent accounting periods of six months which might be shortened or lengthened.²⁸⁶ It did not, however, alter the date from which the first accounting period ran, i.e. the date of sequestration, which meant that in practice there might be little happening within the first accounting period, particularly where a petition for sequestration had been continued. The Bankruptcy and Diligence etc. (Scotland) Act 2007 therefore changed the date from which the first accounting period ran to the date of the award of sequestration, unless there was an interim trustee appointed, in which case it would run from the date of their appointment²⁸⁷; it also changed the length of both the first and subsequent accounting periods to 12 months, subject to the existing provisions for shortening or lengthening subsequent accounting periods, in order to ease the burden of administration.²⁸⁸ This meant, however, that there was a longer delay in the payment of any dividends to creditors. As a result, the Bankruptcy and Debt Advice (Scotland) Act 2014 introduced provision for the shortening of the first accounting period where the payment of a dividend was possible before the end of the first accounting period.²⁸⁹ The cumulative effect of these changes, reflected in the current provisions, results in a more practical scheme with an appropriate degree of flexibility. **16–117**

²⁸⁰ Bankruptcy (Scotland) Act 2016 s.130(6)(a).

²⁸¹ Bankruptcy (Scotland) Act 2016 s.130(6)(b).

²⁸² Bankruptcy (Scotland) Act 2016 s.130(6)(b).

²⁸³ Bankruptcy (Scotland) Act 2016 s.130(6)(c).

²⁸⁴ See Bankruptcy (Scotland) Act 1985 s.52(1) as enacted.

²⁸⁵ See Bankruptcy (Scotland) Act 1985 s.52(6) as enacted.

²⁸⁶ See Bankruptcy (Scotland) Act 1985 s.52(1), (2) and (2A) as substituted by the Bankruptcy (Scotland) Act 1993 and the consequential repeal of s.52(6) of the Bankruptcy (Scotland) Act 1985.

²⁸⁷ See Bankruptcy (Scotland) Act 1985 s.52(2) as amended and (2ZA) as added, by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

²⁸⁸ See Bankruptcy (Scotland) Act 1985 s.52(2) as amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

²⁸⁹ See Bankruptcy (Scotland) Act 1985 s.52(2) as amended and (2ZB) as added, by the Bankruptcy and Debt Advice (Scotland) Act 2014.

Distribution in accordance with accounting periods

- 16-118** The trustee must pay a dividend out of the estate in respect of each accounting period if the funds in the estate are sufficient after making allowance for future contingencies.²⁹⁰ They may, however, pay the debts comprised in the first four categories listed in s.129(1) of the Bankruptcy (Scotland) Act 2016, with the exception of their own remuneration, at any time.²⁹¹ They may also pay the preferred debts at any time with the consent of the commissioners or, if there are no commissioners, AiB.²⁹²
- 16-119** If the trustee is not ready to pay a dividend in any given accounting period or considers that to do so would be inappropriate because the expense of doing so would be disproportionate to the amount of the dividend, they may postpone the payment to a date not later than the time for payment of a dividend in the next accounting period with the consent of the commissioners or, if there are no commissioners, AiB.²⁹³
- 16-120** Where the trustee's adjudication of a creditor's claim is subject to review or appeal at the time of payment of a dividend, the trustee must set aside, until the review or appeal is determined, an amount which would be sufficient, if the outcome of the review or appeal resulted in the acceptance of the creditor's claim in full, to pay a dividend in respect of that claim.²⁹⁴ In addition, where a creditor has failed to produce timeously evidence in support of their claim when requested to do so by the trustee but the trustee has accepted that there is a valid reason for that failure, the trustee must set aside, for such period as they consider reasonable to allow that or any other evidence enabling them to be satisfied as to the validity of the claim to be produced, an amount which would be sufficient to pay a dividend in respect of that claim if it were accepted in full.²⁹⁵ Curiously, this does not seem to extend to the case where the trustee has requested another person to produce such evidence.
- 16-121** Where a creditor has submitted a claim later than eight weeks before the end of an accounting period but more than eight weeks before the end of a subsequent accounting period in which funds are available for the payment of a dividend, and the trustee accepts the claim in whole or in part, the trustee must pay the creditor the dividend which is payable to them in respect of that subsequent accounting period plus an equalising dividend of the same amount as any dividends which have been paid to other creditors in the same category as him in respect of earlier accounting periods.²⁹⁶ The payment of an equalising dividend is, however, without prejudice to any dividend which has already been paid.²⁹⁷
- 16-122** Any dividend paid in respect of a claim must be paid to the creditor²⁹⁸ and a payment must not be made more than once by virtue of the same debt.²⁹⁹

²⁹⁰ Bankruptcy (Scotland) Act 2016 s.131(1).

²⁹¹ Bankruptcy (Scotland) Act 2016 s.131(3)(a).

²⁹² Bankruptcy (Scotland) Act 2016 s.131(3)(b).

²⁹³ Bankruptcy (Scotland) Act 2016 s.131(4).

²⁹⁴ Bankruptcy (Scotland) Act 2016 s.131(5). The trustee's adjudication and the provisions for review or appeal are discussed at para.16-22 onwards.

²⁹⁵ Bankruptcy (Scotland) Act 2016 s.131(6), (7). The provisions relating to the trustee's powers to request further evidence in support of a claim are discussed at para.16-18.

²⁹⁶ Bankruptcy (Scotland) Act 2016 s.131(8). The time limits for submitting claims are discussed at para.16-07.

²⁹⁷ Bankruptcy (Scotland) Act 2016 s.131(9).

²⁹⁸ Bankruptcy (Scotland) Act 2016 s.131(11).

²⁹⁹ Bankruptcy (Scotland) Act 2016 s.131(10).

Accounts and scheme of division where trustee not AiB

Within two weeks of the end of an accounting period, a trustee other than AiB must submit to the commissioners or, if there are no commissioners, AiB, their accounts of their intromissions with the debtor's estate for audit, a scheme of division (where funds are available for the payment of a dividend), and a claim for their reasonable outlays and remuneration.³⁰⁰ AiB's *Notes for Guidance for Trustees* provides a form of account and notes on completion which AiB requires the trustee to use unless a different form is authorised and a form of scheme of division. Failure to comply with the time limit for submission will require an application to be made to AiB under the provisions for curing defects in procedure to waive the failure to comply with the time limit.³⁰¹ **16-123**

With regard to outlays, it is specifically provided that before paying any account in respect of legal services, the trustee must submit it for taxation by the auditor of the court before which the sequestration is pending, unless the account has been agreed between the trustee and the person entitled to payment, the trustee is not an associate of that person and it has been determined by the commissioners or, if there are no commissioners, AiB, that the account need not be submitted for taxation.³⁰² It has already been noted that the trustee should not employ agents, including solicitors, to carry out functions which should properly be carried out by the trustee themselves.³⁰³ The trustee's outlays will include any premium (or a proportionate part of any premium) for the trustee's bond of caution³⁰⁴ and any fees due to AiB.³⁰⁵ Appropriate supporting evidence of outlays should be provided: AiB's *Notes for Guidance for Trustees* provides guidance as to the acceptable forms of supporting evidence. **16-124**

Within six weeks of the end of an accounting period, the commissioners or AiB (as the case may be) may audit the trustee's accounts and must issue a determination fixing the amount of the outlays and remuneration payable to the trustee.³⁰⁶ The trustee must then make the audited accounts, scheme of division and determination available for inspection by the debtor and the creditors.³⁰⁷ Difficulties may arise if the commissioners do not issue the required determination. In such a case, the trustee may report the matter to AiB, who may decide to report the matter to the sheriff.³⁰⁸ Alternatively, the trustee may apply to the sheriff for the removal of the commissioners.³⁰⁹ Neither approach may resolve the problem in practice, however, although in each case the sheriff has the power to make an appropriate order which could include an order to issue the required determination.³¹⁰ It may also be possible to seek an appropriate order under the statutory provisions for remedying defects in procedure.³¹¹ **16-125**

³⁰⁰ Bankruptcy (Scotland) Act 2016 s.132(1), (6). Where the documents are submitted to the commissioners, the trustee must send a copy to AiB: Bankruptcy (Scotland) Act 2016 s.132(2).

³⁰¹ The provisions for curing defects in procedure are discussed in Ch.12.

³⁰² Bankruptcy (Scotland) Act 2016 s.132(3), (4) and (5). Associate is defined in s.229 of the Bankruptcy (Scotland) Act 2016: the definition is discussed further in Ch.14.

³⁰³ See Ch.12.

³⁰⁴ Bankruptcy (Scotland) Act 2016 s.221 and Bankruptcy (Scotland) Regulations 2016 reg.28. The requirement for caution is discussed in Ch.4.

³⁰⁵ Fees due to AiB are discussed in Ch.4.

³⁰⁶ Bankruptcy (Scotland) Act 2016 s.133(1)(a).

³⁰⁷ Bankruptcy (Scotland) Act 2016 s.133(1)(b).

³⁰⁸ Bankruptcy (Scotland) Act 2016 s.200(4) and see further para.10-117

³⁰⁹ Bankruptcy (Scotland) Act 2016 s.77(7) and (8) and see further para.10-116.

³¹⁰ Bankruptcy (Scotland) Act 2016 ss.200(4) and 77(1) and see further paras 10-117 and 10-116.

³¹¹ These are discussed further in Ch.12.

- 16-126** The basis of the trustee's remuneration may be a commission calculated by reference to the value of the debtor's estate which has been realised by the trustee,³¹² but there must in any event be taken into account the work which, having regard to the value of the estate realised by the trustee, was reasonably undertaken by the trustee *and* the extent of the trustee's responsibilities in administering the estate.³¹³ The amount of remuneration fixed may take into account any adjustment to be made to the amount of remuneration fixed in an earlier accounting period.³¹⁴ Appropriate evidence to support the trustee's claim for remuneration should be provided: AiB's *Notes for Guidance for Trustees* contains detailed guidance as to the appropriate evidence in different cases.
- 16-127** The trustee, the debtor or any creditor may appeal against the determination of the trustee's outlays and remuneration not later than eight weeks after the end of an accounting period,³¹⁵ subject to the proviso that the debtor may do so only if they can satisfy the person to whom the appeal is made that they have, or are likely to have, a pecuniary interest in the outcome of the appeal.³¹⁶ Where the determination is made by the commissioners, the appeal is to AiB,³¹⁷ with a further appeal to the sheriff, whose decision is final.³¹⁸ Where the determination is made by AiB the appeal is to the sheriff,³¹⁹ whose decision is final.³²⁰ The debtor or a creditor is required to give the trustee notice of their intention to appeal before embarking on any appeal.³²¹
- 16-128** The trustee must pay creditors their dividends in accordance with the scheme of division on the expiry of the period for appeal against the determination of the trustee's outlays and remuneration without such an appeal having been taken or on the final determination of the last such appeal where such an appeal has been taken.³²² The trustee must deposit any dividend which has been allocated to a creditor but not cashed or uplifted or which has been set aside as discussed above in an appropriate bank or institution.³²³
- 16-129** If a creditor's claim is revalued, the trustee may make such adjustment to any dividend to be paid to the creditor as they consider necessary to take account of the revaluation or require the creditor to repay the whole or part of any dividend already paid to the creditor as appropriate.³²⁴

³¹² Bankruptcy (Scotland) Act 2016 s.133(2).

³¹³ Bankruptcy (Scotland) Act 2016 s.133(3).

³¹⁴ Bankruptcy (Scotland) Act 2016 s.133(4).

³¹⁵ Bankruptcy (Scotland) Act 2016 s.134(1).

³¹⁶ Bankruptcy (Scotland) Act 2016 s.134(2), (4).

³¹⁷ Bankruptcy (Scotland) Act 2016 s.134(1)(a). Curiously, no provision is made for such an appeal in the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016.

³¹⁸ Bankruptcy (Scotland) Act 2016 s.134(3). The appeal must be in Form 9.1 in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.9.1. As to the procedure on such an appeal, see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.9.3.

³¹⁹ Bankruptcy (Scotland) Act 2016 s.134(1)(b). The appeal must be in Form 9.1 in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.9.1. As to the procedure on such an appeal, see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.9.3.

³²⁰ Bankruptcy (Scotland) Act 2016 s.134(3).

³²¹ Bankruptcy (Scotland) Act 2016 s.134(5).

³²² Bankruptcy (Scotland) Act 2016 s.135(1).

³²³ Bankruptcy (Scotland) Act 2016 s.135(2). "Appropriate bank or institution" is defined in Bankruptcy (Scotland) Act 2016 s.228(1).

³²⁴ Bankruptcy (Scotland) Act 2016 s.135(3).

Accounts and scheme of division where trustee AiB

At the end of an accounting period, AiB as trustee must prepare accounts of their intrusions with the debtor's estate and make a determination of their fees and outlays calculated in accordance with the Bankruptcy Fees etc. (Scotland) Regulations 2014.³²⁵ In making such a determination, AiB may take into account any adjustment which they wish to make to any remuneration fixed in respect of an earlier accounting period.³²⁶ Curiously, there is no requirement to prepare a scheme of division, although dividends are required to be paid in accordance with a scheme of division as discussed further below. **16-130**

AiB must make the accounts and determination available for inspection by the debtor and the creditors not later than six weeks after the end of the accounting period to which they relate.³²⁷ **16-131**

The debtor or any creditor may appeal to the sheriff against the determination of AiB's fees and outlays not later than eight weeks after the end of the accounting period,³²⁸ subject to the proviso that the debtor may do so only if they can satisfy the sheriff that they have, or are likely to have, a pecuniary interest in the outcome of the appeal.³²⁹ The decision of the sheriff is final.³³⁰ The debtor or a creditor is required to give AiB notice of their intention to appeal before embarking on an appeal.³³¹ **16-132**

AiB must pay creditors their dividends in accordance with the scheme of division on the expiry of the period for appeal against the determination of AiB's fees and outlays.³³² Curiously, in contrast to the position where the trustee is not AiB, there is no provision for the payment to be deferred pending the outcome of any appeal where such an appeal is taken. AiB must deposit any dividend which has been allocated to a creditor but not cashed or uplifted or which has been set aside as discussed above in an appropriate bank or institution.³³³ **16-133**

If a creditor's claim is revalued, the trustee may make such adjustment to any dividend to be paid to the creditor as they consider necessary to take account of the revaluation or require the creditor to repay the whole or part of any dividend already paid to the creditor as appropriate.³³⁴ **16-134**

³²⁵ Bankruptcy (Scotland) Act 2016 s.136(1).

³²⁶ Bankruptcy (Scotland) Act 2016 s.136(3).

³²⁷ Bankruptcy (Scotland) Act 2016 s.136(2).

³²⁸ Bankruptcy (Scotland) Act 2016 s.136(4). The appeal must be in Form 9.1 in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.9.1. As to the procedure on such an appeal, see Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.9.3.

³²⁹ Bankruptcy (Scotland) Act 2016 s.136(5), (7).

³³⁰ Bankruptcy (Scotland) Act 2016 s.136(6).

³³¹ Bankruptcy (Scotland) Act 2016 s.136(8).

³³² Bankruptcy (Scotland) Act 2016 s.136(9). As noted above, there is no specific requirement for a scheme of division to be prepared, but this provision clearly contemplates that this has been done.

³³³ Bankruptcy (Scotland) Act 2016 s.136(10). "Appropriate bank or institution" is defined in Bankruptcy (Scotland) Act 2016 s.228(1).

³³⁴ Bankruptcy (Scotland) Act 2016 s.136(11).

CHAPTER 17

THE DEBTOR

INTRODUCTION

Sequestration does not only affect the debtor's estate. As a result of the duties and disqualifications which flow from it, sequestration affects the debtor and, in the case of a debtor other than a living individual, the debtor's representatives (although some of the duties and disabilities apply only to a debtor who is a living individual). Ultimately, however, the debtor will generally receive a discharge which will relieve them of liability for most, though not all, of their pre-sequestration debts. **17-01**

This chapter considers the effects of sequestration on the debtor generally, the debtor's duties during and after sequestration, the disqualifications which apply to the debtor as a consequence of sequestration, the offences which may be committed by the debtor (and others), the discharge of the debtor, the bankruptcy restrictions regime and financial education for the debtor. **17-02**

EFFECTS OF SEQUESTRATION GENERALLY

While perhaps less so than historically,¹ the consequences of sequestration for the debtor and, in the case of an individual debtor, their family, are still serious. Many of these have already been discussed in the preceding chapters: the debtor's non-exempt assets at the date of sequestration and non-exempt assets which constitute *acquirenda* vest in the trustee to be distributed to creditors (subject to the re-vesting of certain assets in certain circumstances); where a debtor has income which does not vest in the trustee, they may be required to make a debtor contribution; there are restrictions on the debtor's dealings; there are statutory obligations to be complied with; and there is the possibility of a private or public examination. **17-03**

A debtor whose estate has been sequestrated may also be disqualified from continuing to hold or obtaining certain offices and undertaking certain activities and a debtor may be made subject to certain restrictions after discharge through the bankruptcy restrictions regime. The debtor may also be required to undertake a course of financial education. There may also be other practical effects, for example, the debtor may have difficulty in obtaining credit in future. **17-04**

DUTY TO CO-OPERATE WITH TRUSTEE AND OTHER DUTIES

The Bankruptcy (Scotland) Act 2016 imposes a number of specific duties on a debtor which have already been considered in context, such as the duty **17-05**

¹ See Ch.2.

to co-operate with any interim trustee² and the duty to provide a statement of assets and liabilities.³ Failure to comply with these duties is often an offence.

- 17-06** There is also a general duty to co-operate with the trustee. A debtor, including a discharged debtor, must take every practicable step and, in particular, execute any document, which may be necessary to enable the trustee to carry out their functions under the Bankruptcy (Scotland) Act 2016.⁴ This is very wide and could include, for example, completing tax returns, instructing agents or carrying out the transfer of property, which may be particularly useful in the case of property outside Scotland in cases where the trustee might otherwise have difficulty in recovering or realising the property.⁵
- 17-07** If the debtor fails to execute any document, the trustee may make an application to the sheriff, who may authorise the sheriff clerk to execute the document.⁶ The execution of the document by the sheriff clerk has the same force and effect as if the document had been executed by the debtor.⁷
- 17-08** If the debtor fails to take any other step, the trustee may make an application to the sheriff who may order the debtor to take the appropriate step.⁸ For example, in *Ingle's Trustee v Ingle*,⁹ the debtor was ordered to provide the trustee with a list of assets and liabilities. Failure to comply with an order of the sheriff is an offence.¹⁰

DISQUALIFICATIONS

- 17-09** The disqualifications which flow from sequestration are not contained in the bankruptcy legislation itself but are generally found in other legislation providing for a debtor whose estate has been sequestrated to be disqualified from, or restricted in, continuing to hold or obtain certain offices or undertaking certain activities. For that reason, it is beyond the scope of this work to provide a comprehensive list of the disqualifications which flow from sequestration, but some of what might be considered the most important are noted here. In some cases, the disqualifications also apply in other related circumstances, for example, on the granting of a trust deed for creditors (protected or otherwise), where there is a bankruptcy restrictions order or undertaking,¹¹ on apparent insolvency, on the making of a composition with creditors and so on: each provision varies. In many cases, the disqualifications which flow from sequestration itself cease on the discharge of the debtor, but again each provision varies. This means that the relevant provisions must always be checked to discover the full extent of their application.

² See Ch.10.

³ See Ch.13.

⁴ Bankruptcy (Scotland) Act 2016 s.215(1), (6); see also Bankruptcy (Scotland) Act 2016 s.145(3)(g) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(3)(g).

⁵ See further Chs 24 and 25.

⁶ Bankruptcy (Scotland) Act 2016 s.215(2)(a).

⁷ Bankruptcy (Scotland) Act 2016 s.215(3).

⁸ Bankruptcy (Scotland) Act 2016 s.215(2)(b).

⁹ *Ingle's Trustee v Ingle*, 1996 S.L.T. 26.

¹⁰ Bankruptcy (Scotland) Act 2016 s.215(4).

¹¹ The restrictions which flow from a bankruptcy restrictions order or undertaking are discussed at para.17-118 onwards in the context of the bankruptcy restrictions regime.

Parliamentary disqualifications

Where the estate of an individual debtor is sequestrated, they are disqualified from sitting or voting in the House of Lords, being elected to or sitting or voting in the House of Commons or sitting or voting in a committee of either House.¹² The disqualification ceases on the debtor's discharge or on the recall or reduction of the sequestration.¹³ No writ of summons may be issued to a lord of Parliament while they are so disqualified,¹⁴ and where a member of the House of Commons continues to be so disqualified until the end of the period of six months from the date of the award of sequestration, their seat is vacated.¹⁵ **17-10**

An individual who is disqualified from sitting and voting in the House of Commons as a result of these provisions is disqualified from being a member of the Scottish Parliament.¹⁶ Where a person who is so disqualified is returned as a member of the Scottish Parliament, their return is void and their seat vacant.¹⁷ Where a member of the Scottish Parliament becomes so disqualified and continues to be so until the end of the period of six months from the date of the award of sequestration, their seat is vacated¹⁸; in the interim, they are not permitted to participate in any proceedings of the Scottish Parliament and any of their other rights and privileges as a member of the Scottish Parliament may be withdrawn by resolution of the Scottish Parliament.¹⁹ **17-11**

Local authority disqualifications

A person whose estate has been sequestrated is disqualified from being nominated as a candidate for election as, or from being elected, or from being, a member of a local authority.²⁰ The disqualification ceases on the debtor's discharge or on the recall or reduction of the sequestration.²¹ Provision is made for the raising of proceedings for disqualification in appropriate cases.²² **17-12**

A person who is disqualified from being nominated as a candidate for election as, or from being elected, or from being, a member of a local authority is also **17-13**

¹² Insolvency Act 1986 s.427(1). The provision refers to an award of sequestration made by a court, but of course in the case of a debtor application for sequestration, the award of sequestration is made by AiB rather than the court. There is provision for a court which makes an award of sequestration to certify the award to the Speaker of the House of Lords or the Speaker of the House of Commons as appropriate: Insolvency Act 1986 s.427(5). This assumes, however, that the court is aware of the fact that the debtor is a lord of Parliament or member of the House of Commons.

¹³ Insolvency Act 1986 s.427(2).

¹⁴ Insolvency Act 1986 s.427(3).

¹⁵ Insolvency Act 1986 s.427(4). It is provided that where a court has certified an award of sequestration in relation to a member of the House of Commons to the Speaker of the House of Commons, further certification must be made to the Speaker of the House of Commons of the recall or reduction of the award of sequestration within that six month period or of the expiry of the six month period without the recall or reduction of the award of sequestration: Insolvency Act 1986 s.427(6). This may cause difficulties in practice, however, since a different court (or AiB) may be involved.

¹⁶ Scotland Act 1998 s.15(1)(b).

¹⁷ Scotland Act 1998 s.17(1).

¹⁸ Scotland Act 1998 s.17(2) and (4) and Insolvency Act 1986 s.427(6A). The requirements for certification of an award of sequestration and of the recall or reduction of an award of sequestration within the six month period from the date of the award of sequestration or the expiry of that six month period without recall or reduction of the award are also applied in modified form, the relevant certification being made to the Presiding Officer of the Scottish Parliament: Insolvency Act 1986 s.427(6A).

¹⁹ Scotland Act 1998 s.17(4).

²⁰ Local Government (Scotland) Act 1973 s.31(1)(b).

²¹ Local Government (Scotland) Act 1973 s.31(2).

²² Local Government (Scotland) Act 1973 s.32.

disqualified from being a member of a committee (including a subcommittee) of such an authority, or being a representative of that authority on a joint committee of the authority and another local authority, subject to certain exceptions.²³

Justice of the Peace

- 17-14 An undischarged debtor is prohibited from acting as a Justice of the Peace.²⁴

Professional disqualifications

- 17-15 Where a solicitor's estate is sequestrated, their practising certificate ceases to have effect and they are suspended from practice as a solicitor.²⁵ The practising certificate has effect again on the solicitor being discharged.²⁶ A solicitor who is suspended from practice following sequestration of their estate may apply at any time to the Council of the Law Society of Scotland to terminate the suspension²⁷ and the Council may grant the application with or without conditions or refuse it.²⁸ Where the application is refused or granted subject to conditions, the solicitor may appeal to the court, which may affirm the decision, vary any conditions or terminate the suspension with or without conditions.²⁹
- 17-16 The effect of sequestration on an advocate's right to practise appears to be undecided.³⁰ It may be noted, however, that on matriculation, an advocate must produce to the Clerk of Faculty a certificate in the prescribed form disclosing, inter alia, whether they have ever been sequestrated and the circumstances thereof and provide to the Clerk of Faculty the names of two persons of standing in the community (one or both of whom shall, if the clerk so requires, be members or officers of any professional body to which the intrant formerly belonged) with knowledge of the matter from whom references may be obtained regarding the fitness of the intrant to hold the office of advocate,³¹ and on application for admission, they must provide either written confirmation that there has been no change in circumstances affecting the matters thereby certified since the date of the certificate or a further certificate replacing the original certificate covering any such change of circumstances.³²
- 17-17 A person whose estate has been sequestrated and who has not been discharged is disqualified from acting as an insolvency practitioner.³³ It is an offence to act as an insolvency practitioner while so disqualified.³⁴

²³ Local Government (Scotland) Act 1973 s.59(1).

²⁴ Bankruptcy (Scotland) Act 1883.

²⁵ Solicitors (Scotland) Act 1980 s.18(1). The solicitor is required to intimate the sequestration to the Council of the Law Society of Scotland immediately in writing: Solicitors (Scotland) Act 1980 s.18(2).

²⁶ Solicitors (Scotland) Act 1980 s.19(1), (4).

²⁷ Solicitors (Scotland) Act 1980 s.19(6).

²⁸ Solicitors (Scotland) Act 1980 s.19(7).

²⁹ Solicitors (Scotland) Act 1980 s.19(8).

³⁰ See Stair Memorial, *Encyclopaedia of the Laws of Scotland*, Vol.13, para.1379.

³¹ Faculty of Advocates, *Regulations As To Intrants* (2009), "General Regulations for Admission" section 2(1)(a)(iii) and (b).

³² Faculty of Advocates, *Regulations As To Intrants* (2009), "General Regulations for Admission" section 6(2).

³³ Insolvency Act 1986 s.390(4)(a).

³⁴ Insolvency Act 1986 s.389(1).

Director of a company

It is an offence for an undischarged debtor to act as a director of a company or directly or indirectly take part or be concerned in the promotion, formation or management of a company without the leave of the court.³⁵ **17-18**

A person who is involved in the management of a company in contravention of this provision also incurs personal liability for specified debts of the company.³⁶ **17-19**

Charity trustee

Where a person's estate has been sequestrated and they have not been discharged, they are disqualified from being a Scottish charity trustee.³⁷ The Office of the Scottish Charities Regulator may, however, waive such a disqualification either generally or in relation to a particular charity or type of charity on the application of the disqualified person.³⁸ **17-20**

A person who acts as a charity trustee while they are disqualified is guilty of an offence.³⁹ **17-21**

Pension trustee

Where a person's estate has been sequestrated and they have not been discharged, they are disqualified from being a trustee of any occupational pension scheme established under a trust⁴⁰ and a trustee who becomes so disqualified is removed as such.⁴¹ The Occupational Pensions Regulatory Authority may, however, waive such a disqualification either generally or in relation to a particular scheme or a class of schemes on the application of the disqualified person.⁴² **17-22**

A person who purports to act as a trustee of an occupational pension scheme established under a trust while they are disqualified is guilty of an offence.⁴³ **17-23**

Health boards

An undischarged debtor is disqualified from being a member of a health board constituted under s.2(1) of the National Health Service Act 1978.⁴⁴ The Scottish Ministers may, however, direct that such disqualification shall not apply.⁴⁵ **17-24**

³⁵ Company Directors Disqualification Act 1986 s.11(1), (2)(a)(i). The court is defined as the court which awarded sequestration of the debtor's estates or, in a case where the award is not made by the court, i.e. the award is made by AiB, the court which would have jurisdiction in respect of sequestration of the debtor's estate: Company Directors Disqualification Act 1986 s.11(2A)(a)(ii).

³⁶ Company Directors Disqualification Act 1986 s.15.

³⁷ Charities and Trustee Investment (Scotland) Act 2005 ss.69(1), (2)(b) and 70(3).

³⁸ Charities and Trustee Investment (Scotland) Act 2005 s.69(4). Such a waiver must be notified to the person concerned: Charities and Trustee Investment (Scotland) Act 2005 s.69(5).

³⁹ Charities and Trustee Investment (Scotland) Act 2005 s.70(1).

⁴⁰ Pensions Act 1995 s.29(1)(b).

⁴¹ Pensions Act 1995 s.30(1).

⁴² Pensions Act 1995 s.29(5)(a). Such a waiver cannot, however, affect anything done beforehand: Pensions Act 1995 s.29(6).

⁴³ Pensions Act 1995 s.30(3).

⁴⁴ Health Boards (Membership and Procedure) (Scotland) Regulations 2001 (SSI 2001/302) reg.6(1)(g), (3).

⁴⁵ Health Boards (Membership and Procedure) (Scotland) Regulations 2001 reg.6(2).

Registered social landlords

- 17–25** An undischarged debtor who is an officer of a registered social landlord may be removed by the Scottish Housing Regulator.⁴⁶ The regulator must give at least 14 days notice of its intention to the officer and the registered social landlord.⁴⁷ There is an appeal to the Court of Session, which may confirm or quash the decision or remit the matter to the regulator for reconsideration.⁴⁸ The decision of the Court of Session is final.⁴⁹

Membership of creditors' committees

- 17–26** Where a person's estate is sequestrated, any membership of a liquidation committee, a creditors' committee in administration or a creditors' committee in receivership is terminated automatically.⁵⁰
- 17–27** An undischarged debtor may not act as the representative of a member of such a committee.⁵¹

OFFENCES

- 17–28** The Bankruptcy (Scotland) Act 2016 creates a number of criminal offences, some of which may be committed by persons other than the debtor. There are also common law offences relating to bankruptcy.

The Bankruptcy (Scotland) Act 2016*Specific offences*

- 17–29** Many of the offences created by the Bankruptcy (Scotland) Act 2016 are specific offences for failure to comply with specific statutory requirements: for example, it is an offence for the debtor to fail without reasonable excuse to comply with a direction of the interim trustee relating to the management of their estate.⁵²
- 17–30** These offences are discussed in the context of the specific provisions the failure to comply with which gives rise to the offence.

General offences

- 17–31** Section 218 of the Bankruptcy (Scotland) Act 2016 creates a number of general offences which may be committed by the debtor or other persons in relation to the making of false statements in relation to the debtor's assets or business or

⁴⁶ Housing (Scotland) Act 2010 s.60(1)(a).

⁴⁷ Housing (Scotland) Act 2010 s.60(2).

⁴⁸ Housing (Scotland) Act 2010 s.64(1), (2).

⁴⁹ Housing (Scotland) Act 2010 s.64(2).

⁵⁰ In the case of a liquidation committee, see Insolvency (Scotland) Rules 1986 r.4.50(1)(a) (compulsory liquidation) and r.5 (creditors' voluntary liquidation); in the case of a creditors' committee in administration, see Insolvency (Scotland) Rules 1986 r.2.36J(a); and in the case of a creditors' committee in receivership, see Insolvency (Scotland) Rules 1986 r.4.50(1)(a) as applied by r.3.6.

⁵¹ In the case of a liquidation committee, see Insolvency (Scotland) Rules 1986 r.4.48(4) (compulsory liquidation) and r.5 (creditors' voluntary liquidation); in the case of a creditors' committee in administration, see Insolvency (Scotland) Rules 1986 r.2.36H(4)(c); and in the case of a creditors' committee in receivership, see Insolvency (Scotland) Rules 1986 r.4.48(4) as applied by r.3.6.

⁵² Bankruptcy (Scotland) Act 2016 s.40(1)(a).

financial affairs⁵³; the destruction, damage, concealment, disposal or removal from Scotland of estate or documents⁵⁴; failure to come to Scotland when required to do so by the court⁵⁵; the falsification of documents relating to the debtor's assets or business or financial affairs⁵⁶; failure to report falsification of documents relating to the debtor's assets or business or financial affairs⁵⁷; the making of gratuitous alienations and the creation of unfair preferences⁵⁸; the pledge or disposal, other than in the ordinary course of trade or business, of property obtained on credit and not paid for⁵⁹; and the obtaining of credit beyond the prescribed sum without disclosing specified information.⁶⁰ A number of these offences have already been discussed in the particular context in which they are relevant,⁶¹ but the offences relating to failure to come to Scotland when required by the court; the pledge or disposal, other than in the ordinary course of trade or business, of property obtained on credit and not paid for; and the obtaining of credit beyond the prescribed sum without disclosing specified information are discussed further below.

It may be noted that it was formerly an offence for a debtor involved in trade or business to fail to keep or preserve specified records unless it was shown that such failure was neither reckless nor dishonest.⁶² Although it no longer constitutes an offence, however, such conduct, in common with other conduct which may or may not constitute an offence, may be relevant for the purposes of bankruptcy restrictions.⁶³ 17-32

Failure to come to Scotland when required by the court

It is an offence for a debtor who is absent from Scotland after the date of sequestration to fail to come to Scotland for any purpose connected with the administration of their estate when required to do so by the court.⁶⁴ This appears to be a strict liability offence. 17-33

Pledge or disposal of property obtained on credit and not paid for

It is an offence for a debtor who is engaged in trade or business, at any time in the period of one year ending with the sequestration, to pledge or dispose of, other than in the ordinary course of trade or business, any property which they have obtained on credit and not paid for, unless they show that it was not done with the intent to prejudice their creditors.⁶⁵ There may be some debate about the calculation of the relevant period within which the offence may be committed, since the provision does not refer to the date of sequestration, which has a defined meaning, but merely to the sequestration, which could be open to interpretation. The reference to intent to prejudice creditors includes intent to prejudice an individual creditor.⁶⁶ A debtor also commits this offence 17-34

⁵³ Bankruptcy (Scotland) Act 2016 s.218(1), (2) and see further Ch.13.

⁵⁴ Bankruptcy (Scotland) Act 2016 s.218(3), (4) and see further Chs 11 and 13.

⁵⁵ Bankruptcy (Scotland) Act 2016 s.218(5).

⁵⁶ Bankruptcy (Scotland) Act 2016 s.218(6), (7) and see further Ch.13.

⁵⁷ Bankruptcy (Scotland) Act 2016 s.218(8) and see further Ch.13.

⁵⁸ Bankruptcy (Scotland) Act 2016 s.218(9), (10) and see further Ch.14.

⁵⁹ Bankruptcy (Scotland) Act 2016 s.218(11), (12).

⁶⁰ Bankruptcy (Scotland) Act 2016 s.218(13).

⁶¹ See footnote references above.

⁶² Bankruptcy (Scotland) Act 1985 s.67(8) as enacted. This provision was repealed by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

⁶³ See further para.17-83 onwards.

⁶⁴ Bankruptcy (Scotland) Act 2016 s.218(5).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.218(11), (12).

⁶⁶ Bankruptcy (Scotland) Act 2016 s.219(3).

if they do anything in England, Wales or Northern Ireland which would constitute the offence if done in Scotland.⁶⁷

Obtaining credit without disclosing relevant information

- 17–35** It is an offence for a debtor, either alone or jointly with another person, to obtain credit of a specified amount without giving the person from whom the credit is obtained the relevant information about their status.⁶⁸
- 17–36** For the purposes of this provision, a debtor is defined as a person whose estate has been sequestrated and who has not been discharged, a person who has been adjudged bankrupt in England and Wales or Northern Ireland and who has not been discharged, or a person who is subject to a bankruptcy restrictions order or bankruptcy restrictions undertaking made in England or Wales.⁶⁹
- 17–37** Obtaining credit is defined as including entering into a hire-purchase agreement or conditional sale agreement.⁷⁰
- 17–38** The specified amount of credit is currently credit of £2,000 or more or, where the debtor has debts of £1,000 or more, credit of any amount.⁷¹ In calculating the amount of credit obtained or the debtor's debts, no account is to be taken of any credit obtained or, as the case may be, any liability for charges in respect of, any of the supplies by utilities specified in s.222(4) of the Bankruptcy (Scotland) Act 2016 or any council tax within the meaning of s.99(1) of the Local Government Finance Act 1992.⁷²
- 17–39** The relevant information about the status of the debtor which must be disclosed is the information that the debtor's estate has been sequestrated and the debtor has not been discharged, that the debtor is an undischarged bankrupt in England and Wales or Northern Ireland or that the debtor is subject to a bankruptcy restrictions order or bankruptcy restrictions undertaking made in England or Wales, as the case may be.⁷³
- 17–40** In *Drew v HMA*,⁷⁴ the debtor was sentenced to 12 months imprisonment for obtaining credit of more than the then specified amount from a number of businesses over a period of almost three years without disclosing his status as an undischarged debtor. The conviction and sentence were upheld on appeal. In *Batchelor v HMA*,⁷⁵ the debtor was sentenced to a *cumulo* sentence of one year's imprisonment on 10 charges of obtaining credit of more than the then specified amount, one of which involved the obtaining of total credit of £36,000 from one particular creditor, over a period of one year without disclosing his status as an undischarged debtor. On appeal against sentence, it was held that this sentence was not excessive and that it was appropriate for it to run consecutively with the debtor's sentence on other charges under the

⁶⁷ Bankruptcy (Scotland) Act 2016 s.219(4).

⁶⁸ Bankruptcy (Scotland) Act 2016 s.218(13).

⁶⁹ Bankruptcy (Scotland) Act 2016 s.219(2)(a).

⁷⁰ Bankruptcy (Scotland) Act 2016 s.219(2)(b).

⁷¹ Bankruptcy (Scotland) Act 2016 s.218(13). A different amount of credit or debts may be prescribed.

⁷² Bankruptcy (Scotland) Act 2016 s.219(1). The provisions on supplies by utilities are discussed in Ch.12.

⁷³ Bankruptcy (Scotland) Act 2016 s.219(2)(c).

⁷⁴ *Drew v HMA*, 1996 S.L.T. 1062.

⁷⁵ *Batchelor v HMA* 26 September 2000 Appeal Court High Court of Justiciary, available at http://www.scotcourts.gov.uk/opinions/C192_99.html [Accessed 18 September 2017].

Hallmarking Act 1973, since both pieces of legislation embodied “significant institutions which exist for the promotion of sound commerce and the proper administration of financial affairs”: the actings of the appellant undermined these important institutions and the sentencing judge was fully entitled to give weight to that wider public interest. In *Mejury v Renfrewshire Council*,⁷⁶ the Inner House held that the debtor’s conviction, inter alia, for obtaining credit of more than the then specified amount on one occasion without disclosing his status as an undischarged debtor was a relevant matter for a licensing subcommittee of a local authority to take into account in refusing the debtor’s application for renewal of his taxi licence on the basis that he was not a fit and proper person to hold such a licence.

Proceedings for offences under the Bankruptcy (Scotland) Act 2016

The Bankruptcy (Scotland) Act 2016 specifies the form of proceedings and penalties for each offence. **17–41**

In the case of summary proceedings, the general rule is that summary proceedings for statutory offences which are triable only summarily must be commenced within six months after the contravention occurred or, in the case of a continuous contravention, within six months after the last date of such contravention, unless the enactment creating the offence fixes a different time limit.⁷⁷ The Bankruptcy (Scotland) Act 2016 does fix a different time limit because of the nature of many of the offences which it creates. It therefore provides that summary proceedings for an offence under the Bankruptcy (Scotland) Act 2016 may be commenced at any time within the period of 12 months after the date on which evidence sufficient to justify the proceedings comes to the knowledge of the Lord Advocate, subject to the proviso that no such proceedings may be commenced more than three years after the commission of the offence.⁷⁸ A certificate of the Lord Advocate as to the date on which the evidence in question came to their knowledge is conclusive evidence of that date⁷⁹ and the proceedings are deemed to be commenced on the date on which a warrant to apprehend or to cite the accused is granted provided the warrant is executed without undue delay.⁸⁰ **17–42**

Common law

In addition to the statutory offences mentioned, there are also common law offences. Gordon states that bankruptcy frauds are criminal at common law.⁸¹ He goes on to say⁸²: **17–43**

“Generally speaking ‘any act fraudulently conceived and carried out by a debtor for the purpose of deceiving his creditors or depriving them of their just rights’ constitutes a bankruptcy fraud.”

⁷⁶ *Mejury v Renfrewshire Council* 28 November 2000 Inner House Court of Session, available at [http://www.scotcourts.gov.uk/opinions/022_17\(16a\)_99.html](http://www.scotcourts.gov.uk/opinions/022_17(16a)_99.html) [Accessed 18 September 2017].

⁷⁷ Criminal Procedure (Scotland) Act 1995 s.136(1), (2).

⁷⁸ Bankruptcy (Scotland) Act 2016 s.220(1), (2).

⁷⁹ Bankruptcy (Scotland) Act 2016 s.220(4).

⁸⁰ Bankruptcy (Scotland) Act 2016 s.220(3) applying Criminal Procedure (Scotland) Act 1995 s.136(3).

⁸¹ Gordon, GH, *The Criminal Law of Scotland*, 4th edn (Edinburgh: W. Green, 2017), Chalmers and Leverick (eds), para.26.02.

⁸² Gordon, GH, *The Criminal Law of Scotland*, 4th edn (Edinburgh: W. Green, 2017), Chalmers and Leverick (eds), para.26.02 (references omitted).

- 17–44 He identifies the following common crimes in particular: “away-putting”, or concealing, of assets; the destruction or mutilation of accounts or other books with intent to defraud creditors; obtaining sequestration by fraudulent means; presenting a fraudulent petition for sequestration (which would now presumably extend to a fraudulent debtor application); and concealment by a solvent debtor of their effects from their creditors as part of a fraudulent design to make themselves appear insolvent or to obtain sequestration.⁸³

Reporting of offences

- 17–45 A trustee in sequestration other than Accountant in Bankruptcy (AiB) is required to report the matter to AiB where they have reasonable grounds to suspect that an offence has been committed in relation to a sequestration by the debtor, in respect of their assets, their dealings with their assets or their conduct in relation to their business or financial affairs, or by a person other than the debtor in relation to that person’s dealings with the debtor, interim trustee or trustee in respect of the debtor’s assets, business or financial affairs.⁸⁴ Where AiB is the trustee in sequestration, they may become aware of suspected offences in the course of their administration of the debtor’s estate.
- 17–46 AiB must report the matter to the Lord Advocate where they have reasonable grounds to suspect that an offence has been committed in relation to a sequestration by the debtor, in respect of their assets, their dealings with their assets or their conduct in relation to their business or financial affairs, or by a person other than the debtor in relation to that person’s dealings with the debtor, interim trustee or trustee in respect of the debtor’s assets, business or financial affairs.⁸⁵ Where AiB is the trustee, the decision as to whether to report the matter to the Lord Advocate is taken in their supervisory capacity and not in their capacity as trustee.⁸⁶

DISCHARGE OF DEBTOR

Background

- 17–47 The provisions for the discharge of the debtor have been subject to change and development over time. Prior to the Bankruptcy (Scotland) Act 1985, the debtor could obtain a discharge either on composition or without composition, but it was clear that discharge was regarded as a privilege, not a right, and the provisions for obtaining a discharge, whether on composition or without composition, were complex.⁸⁷ The Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* in 1982 considered that the position in relation to discharge was unsatisfactory and recommended that discharge without composition should be automatic after a period of five years,

⁸³ See Gordon, GH, *The Criminal Law of Scotland*, 4th edn (Edinburgh: W. Green, 2017), Chalmers and Leverick (eds), para.26.02 and references there cited.

⁸⁴ Bankruptcy (Scotland) Act 2016 s.50(3)(a) and (5). The trustee’s report is absolutely privileged: Bankruptcy (Scotland) Act 2016 s.50(4). AiB has produced a suspected offences report form for use by the trustee which is included in AiB’s *Notes for Guidance for Trustees*. See also Ch.4.

⁸⁵ Bankruptcy (Scotland) Act 2016 s.200(5)(b) and (c), (6).

⁸⁶ *Mitchell, Appellant* 27 September 2010 Edinburgh Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/SQ538_07.html [Accessed 18 September 2017].

⁸⁷ See Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), Ch.19. For a detailed discussion of the history of the discharge provisions, see McKenzie Skene, DW, “Morally Bankrupt? Apportioning blame in bankruptcy” 2004 J.B.L. 171.

subject to deferral by the court on the application of the trustee or a creditor, with the option of an application to the court for an accelerated discharge after a period of one year, and that discharge on composition, although seemingly little used, should be retained and the procedure simplified.⁸⁸ The Bankruptcy (Scotland) Act 1985 duly introduced provisions for the automatic discharge of the debtor, although after a period of three years rather than five, subject to deferral by the court on the application of the trustee or a creditor.⁸⁹ Provision was made for the debtor to obtain a certificate as evidence of his discharge.⁹⁰ The option of an application to the court for an accelerated discharge was not enacted in view of the shorter period for automatic discharge. Discharge on composition was, however, retained with a simplified procedure.⁹¹

Important changes to the provisions for the debtor's discharge were made by the Bankruptcy and Diligence etc. (Scotland) Act 2007. As already noted,⁹² the Scottish Executive in its consultation paper *Personal Bankruptcy Reform in Scotland: A Modern Approach* issued in November 2003⁹³ had sought views on a wide range of proposals for reform of bankruptcy law in Scotland. These included proposals, which largely mirrored a similar change in the law in England and Wales, for the reduction of the period for the automatic discharge of the debtor from three years to one year in the majority of cases, subject to certain safeguards.⁹⁴ The safeguards included the extension of the period for income contributions beyond discharge in order to protect returns to creditors⁹⁵ and the introduction of a bankruptcy restrictions regime in order to protect the public and businesses by allowing for the continuation of bankruptcy restrictions beyond discharge for what might loosely be termed blameworthy debtors.⁹⁶ The issue of discharge from debts was therefore effectively to be separated from the issue of release from bankruptcy restrictions for blameworthy debtors.⁹⁷ The views of consultees on the proposed reduction of the period for the automatic discharge were evenly divided, but the Scottish Executive, while acknowledging the concerns of consultees, decided to proceed with the proposal subject to the safeguards it had proposed.⁹⁸ The Bankruptcy and Diligence etc. (Scotland) Act 2007 therefore amended the Bankruptcy (Scotland) Act 1985 to reduce the period for the automatic discharge of the debtor from three years to one,⁹⁹ at the same time extending the period for income contributions beyond discharge and introducing a bankruptcy restrictions regime. The possibility of deferral of discharge by the court on the application of the trustee or a creditor remained, although the issue of

⁸⁸ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), Ch.19.

⁸⁹ Bankruptcy (Scotland) Act 1985 s.54 as enacted.

⁹⁰ Bankruptcy (Scotland) Act 1985 s.54(2) as enacted. The discharge was effective whether or not such a certificate was obtained however.

⁹¹ Bankruptcy (Scotland) Act 1985 s.56 and Sch.4 as enacted.

⁹² See Ch.2.

⁹³ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003).

⁹⁴ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), Pt 4. For a detailed discussion of the proposals, including the proposed safeguards, see McKenzie Skene, DW, "Morally Bankrupt? Apportioning blame in bankruptcy" 2004 J.B.L. 171.

⁹⁵ See further Ch.11.

⁹⁶ Discussed further at para.17–83 onwards.

⁹⁷ See McKenzie Skene, DW, "Morally Bankrupt? Apportioning blame in bankruptcy" 2004 J.B.L. 171. As discussed further at para.17–09, the disqualifications which flow from sequestration generally cease on the debtor's discharge.

⁹⁸ See Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft bill and consultation* (July 2004), paras 5.3–5.22.

⁹⁹ Bankruptcy and Diligence etc. (Scotland) Act 2007 s.1.

the relationship between deferral of discharge and the new bankruptcy restrictions regime was not explicitly addressed. This was arguably necessary because of the grounds on which deferral had previously been granted. Although the Bankruptcy (Scotland) Act 1985 did not specify particular grounds for deferral, it was clear from the case law that some good reason would be required,¹⁰⁰ and there was authority to the effect that the debtor's conduct alone could justify deferral.¹⁰¹ This begged the question of the extent to which deferral of discharge on the basis of the debtor's conduct remained appropriate in the light of the introduction of a bankruptcy restrictions regime. The issue was considered in the case of *Accountant in Bankruptcy v TW*,¹⁰² which involved an application for a bankruptcy restrictions order in a case in which a deferral of the debtor's discharge had already been granted. It was accepted in that case that it was not incompetent to grant a bankruptcy restrictions order where the debtor's discharge had already been deferred. There was, however, a degree of overlap in the tests for deferral of discharge and the granting of a bankruptcy restrictions order in so far as a failure by a debtor to comply with their obligations under the bankruptcy legislation might be relevant to both processes. The processes were, however, distinct, and if the period of deferment was the same as that sought for a bankruptcy restrictions order, it was difficult to see what practical purpose might be served in granting such an order. The answer to that may lie in the different effects of deferral and a bankruptcy restrictions order, but the case highlights the issue of whether the debtor's conduct should be regarded as subject to action being taken against them under both regimes. This point is returned to below. The Bankruptcy and Diligence etc. (Scotland) Act 2007 also made further changes to the procedure for discharge on composition,¹⁰³ but these changes were never brought into force.

- 17–49 The Scottish Government's *Consultation on Bankruptcy Law Reform* issued in February 2012¹⁰⁴ sought views on further changes to the provisions for the debtor's discharge. These proposals arose from concerns about debtor co-operation: it was noted that some individuals chose not to co-operate with the trustee in sequestration, and while it was possible in such a case to make an application for deferral of the debtor's discharge, in the short time available such a course of action was not always practical.¹⁰⁵ It was therefore proposed that the debtor's discharge should be more closely linked to co-operation, on the basis that the debt relief conferred by discharge was a right which should be earned,¹⁰⁶ and that AiB should have the power to defer the debtor's discharge for lack of co-operation without recourse to the sheriff, subject to appeal.¹⁰⁷ The relationship with the bankruptcy restrictions regime was not explicitly

¹⁰⁰ See, for example, *Crittall Warmlife Ltd v Flaherty*, 1988 G.W.D. 22-930; *Watson v Henderson*, 1988 S.C.L.R. 439; *Whittaker's Trustee v Whittaker*, 1993 S.C.L.R. 718.

¹⁰¹ *Nicol's Trustee v Nicol*, 1996 G.W.D. 10-531. See also the later case of *Accountant in Bankruptcy v Campbell*, 2012 S.L.T. (Sh Ct) 35 and Jones, "Deferral of Debtor's Discharge" 1995 JLS 388.

¹⁰² *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court, a decision of Sheriff Holligan.

¹⁰³ See Bankruptcy and Diligence etc. (Scotland) Act 2007 s.21.

¹⁰⁴ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012).

¹⁰⁵ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.13. It may be noted that even before the reduction in the period for automatic discharge from three years to one brought about by the Bankruptcy and Diligence etc. (Scotland) Act 2007, with the corresponding reduction in the time available to make an application for deferral of discharge, issues had arisen with the timing of such applications: see *Pattison v Halliday*, 1991 S.L.T. 645; *Whittaker's Trustee v Whittaker*, 1993 S.C.L.R. 718; *Clydesdale Bank Plc v Davidson*, 1994 S.L.T. 225.

¹⁰⁶ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.13.2.

¹⁰⁷ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), para.13.3.

mentioned, but it seems clear that in policy terms, the issue of the debtor's conduct, at least in the form of non-co-operation, is still regarded as relevant to discharge as well as bankruptcy restrictions,¹⁰⁸ although whether this accords with the underlying philosophy of the reforms introduced by Bankruptcy and Diligence etc. (Scotland) Act 2007 may be regarded as debateable. Be that as it may, views were sought on whether discharge should be linked to co-operation, whether there should be a maximum period of deferral of discharge for lack of co-operation, the possibility of indefinite deferral of discharge where a debtor could not be traced and the proposal for AiB to have the power to defer the debtor's discharge subject to appeal. The majority of consultees were in favour of discharge being linked to co-operation, although there was less consensus on the maximum period; the majority of consultees were also in favour of the possibility of indefinite deferral of discharge where a debtor could not be traced and the proposal for AiB to have the power to defer the debtor's discharge subject to appeal.¹⁰⁹ The Scottish Government therefore indicated its intention to introduce provisions for the discharge of an individual debtor to be conditional on an application for discharge being made and on co-operation with the trustee and for discharge to be deferred indefinitely where an individual could not be traced.¹¹⁰

The Bankruptcy and Debt Advice (Scotland) Act 2014 duly repealed the existing provisions for automatic discharge and replaced them with rather more complex provisions for the discharge of the debtor, including provisions for the deferral of discharge where the debtor cannot be traced.¹¹¹ These provisions apply to all debtors, not just individuals. The effect is that discharge is no longer automatic subject to deferral, but must be granted following the appropriate procedure, except in minimal assets cases where discharge does remain automatic. The law therefore seems, in effect, to have come full circle. **17-50**

The Bankruptcy and Debt Advice (Scotland) Act 2014 also repealed the provisions for discharge on composition. As noted above, changes had been made to the procedure by the Bankruptcy and Diligence etc. (Scotland) Act 2007, but never brought into force. Discharge on composition remained little used, perhaps because of the requirement to pay a minimum dividend, and one of the main advantages of the procedure, namely that a discharge could be obtained at a relatively early stage, was perhaps largely negated by the reduction in the period for automatic discharge brought about by the Bankruptcy and Diligence etc. (Scotland) Act 2007. The other advantage of a discharge on composition, however, was that it brought the sequestration to an end and re-vested the debtor in their estate,¹¹² whereas a discharge without composition does not have this effect.¹¹³ This seems not to have been a sufficient reason for debtors to use the process, however, and thus justify its retention. **17-51**

¹⁰⁸ See *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court, discussed above.

¹⁰⁹ See *Accountant in Bankruptcy, Consultation on Bankruptcy Law Reform: The Report of the Summary of the Responses* (August 2012), paras 8.1–8.4.

¹¹⁰ Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (November 2012).

¹¹¹ See Bankruptcy (Scotland) Act 1985 ss.54A–54G as inserted by the Bankruptcy and Debt Advice (Scotland) Act 2014.

¹¹² Bankruptcy (Scotland) Act 1985 Sch.4, paras 13 and 16(a) respectively.

¹¹³ See further at para.17–79 and Ch.18.

- 17–52** The current provisions for discharge of the debtor are now contained in ss.137–144 of the Bankruptcy (Scotland) Act 2016 and are discussed in the following section. The effect of the discharge is discussed further at para.17–75 onwards.

Provisions for discharge of the debtor

- 17–53** The provisions for discharge of the debtor vary depending on whether or not the trustee is AiB and whether or not the sequestration is a minimal assets case. There are separate provisions for the deferral of discharge where the debtor cannot be traced.

Discharge of debtor where trustee not AiB

- 17–54** AiB may discharge the debtor at any time after the date which is 12 months after the date on which sequestration is awarded by granting a certificate of discharge in the prescribed form.¹¹⁴ Discharge is, therefore, discretionary.
- 17–55** In order to inform AiB's decision, the trustee is required to prepare and send a report on specified matters to AiB.¹¹⁵ The report must be sent to AiB without delay after the date which is 10 months after the date of the award of sequestration¹¹⁶ and, if the debtor is not otherwise discharged, before sending to AiB the documentation which the trustee is required to send to them on concluding the administration of the sequestration.¹¹⁷ The specified matters are:
- (a) Information about the debtor's assets, liabilities and financial and business affairs; the debtor's conduct in relation to those assets, liabilities and affairs; the sequestration; and the debtor's conduct in the course of the sequestration.¹¹⁸
 - (b) A statement of whether, in the opinion of the trustee, the debtor has at the date of the report complied with any debtor contribution order, co-operated with the trustee in accordance with s.215 of the Bankruptcy (Scotland) Act 2016, complied with the debtor's statement of undertakings, made a full and fair surrender of the debtor's estate, made a full disclosure of all claims which the debtor is entitled to make against any other person and delivered to the trustee every document under the debtor's control relating to the debtor's estate and financial and business affairs.¹¹⁹
 - (c) A statement of whether the trustee has, at the date the report is sent to AiB, carried out all of the trustee's functions under the Bankruptcy (Scotland) Act 2016.¹²⁰
- 17–56** At the same time as sending the report to AiB, the trustee must give to the debtor and every creditor known to them a copy of the report and a notice informing the recipient that they have a right to make representations to AiB in relation to the report within 28 days beginning with the day on which the notice is given.¹²¹

¹¹⁴ Bankruptcy (Scotland) Act 2016 s.137(1), (2). The prescribed form is Form 25 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

¹¹⁵ Bankruptcy (Scotland) Act 2016 s.137(4).

¹¹⁶ Bankruptcy (Scotland) Act 2016 s.137(4)(a).

¹¹⁷ Bankruptcy (Scotland) Act 2016 s.137(4)(b).

¹¹⁸ Bankruptcy (Scotland) Act 2016 s.137(5)(a).

¹¹⁹ Bankruptcy (Scotland) Act 2016 s.137(5)(b).

¹²⁰ Bankruptcy (Scotland) Act 2016 s.137(5)(c).

¹²¹ Bankruptcy (Scotland) Act 2016 s.137(6).

Before deciding whether to discharge the debtor, AiB must consider the report provided by the trustee and take into account any representations in relation to the report which have been made to them within the 28 day period.¹²² 17-57

Where discharge is granted under these provisions, it does not take effect before the expiry of 14 days beginning with the day of notification of the decision.¹²³ 17-58
There is, however, no formal provision for notification of the decision.

Discharge of debtor where AiB trustee

AiB may discharge the debtor at any time after the date which is 12 months after the date on which sequestration is awarded by granting a certificate of discharge in the prescribed form.¹²⁴ Again, therefore, discharge is discretionary. 17-59

AiB must decide whether to discharge the debtor as soon as practicable after the date which is 12 months after the date on which sequestration.¹²⁵ They must then notify the debtor and every creditor known to them of their decision¹²⁶ and send them a report giving an account of the debtor's assets, liabilities and financial and business affairs, the debtor's conduct in relation to those assets, liabilities and affairs, the sequestration and the debtor's conduct in the course of the sequestration, including compliance with the debtor's statement of undertakings.¹²⁷ 17-60

Where AiB refuses to discharge the debtor and the debtor is not otherwise discharged, AiB must once again make a decision as to whether to discharge the debtor as soon as practicable after the date which is 12 months after the date of refusal of discharge.¹²⁸ They must then notify the debtor and every creditor known to them of their decision¹²⁹ and send them a report giving an account of the same matters as before.¹³⁰ 17-61

Where discharge is granted under these provisions, it does not take effect before the expiry of 14 days beginning with the day of notification of the decision.¹³¹ 17-62

Review and appeal of AiB's decision

The trustee or the debtor may apply to AiB for review of their decision to refuse to discharge the debtor,¹³² while a creditor may to AiB for review of their decision to discharge the debtor.¹³³ Any application for review must be 17-63

¹²² Bankruptcy (Scotland) Act 2016 s.137(3).

¹²³ Bankruptcy (Scotland) Act 2016 s.137(7).

¹²⁴ Bankruptcy (Scotland) Act 2016 s.138(1), (2). The prescribed form is Form 26 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

¹²⁵ Bankruptcy (Scotland) Act 2016 s.138(3)(a).

¹²⁶ Bankruptcy (Scotland) Act 2016 s.138(3)(b).

¹²⁷ Bankruptcy (Scotland) Act 2016 s.138(3)(c) and (4).

¹²⁸ Bankruptcy (Scotland) Act 2016 s.138(5), (6)(a).

¹²⁹ Bankruptcy (Scotland) Act 2016 s.138(6)(b).

¹³⁰ Bankruptcy (Scotland) Act 2016 s.138(6)(c).

¹³¹ Bankruptcy (Scotland) Act 2016 s.138(7).

¹³² Bankruptcy (Scotland) Act 2016 s.139(1). The application must be made in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(q).

¹³³ Bankruptcy (Scotland) Act 2016 s.139(2). The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 do not specify a form for the making of such an application. This is presumably an oversight and it is thought that the application should nonetheless be in Form 3 in the Schedule to those regulations.

made within 14 days beginning with the day of notification of the relevant decision.¹³⁴ Where the application is by a creditor for review of a decision to grant the debtor's discharge, the discharge is suspended until the determination of the review.¹³⁵

- 17–64** Where a review application is made, AiB must without delay send a copy of the application to the trustee, the debtor and the creditors and advise them of the right to make representations within 21 days.¹³⁶ AiB must then: (i) take into account any representations made by an interested party and confirm, amend or revoke the decision within 28 days beginning with the day on which the application is made¹³⁷; and (ii) notify their decision to the trustee, the debtor and the creditors.¹³⁸ The debtor, the trustee or any creditor may appeal to the sheriff against AiB's decision within 14 days beginning with the day of the decision.¹³⁹

Discharge of debtor in minimal asset cases

- 17–65** Discharge of the debtor in minimal asset cases effectively remains automatic. It is provided that the debtor is discharged on the date which is six months after the date on which sequestration is awarded.¹⁴⁰ The debtor may apply to AiB for a certificate of discharge in the prescribed form as evidence of his discharge.¹⁴¹
- 17–66** Apart from the provisions for deferral of discharge where the debtor cannot be traced, there is no provision for deferral of the debtor's automatic discharge in a minimal assets case. However, in certain circumstances, AiB must consider whether a minimal assets case should cease to be such, and one of these circumstances is where, at any time after the date of sequestration, AiB is not satisfied that the debtor has co-operated with the trustee and considers that if the sequestration were to cease to be a minimal assets case, this would be of financial benefit to the estate and in the interests of the creditors.¹⁴² If as a result a minimal assets case ceased to be such, the provisions on discharge discussed above would then apply with the result that discharge would no longer be automatic.

Deferral of discharge where debtor cannot be traced

- 17–67** These provisions apply where the trustee, having made reasonable inquiries, is unable to ascertain the whereabouts of the debtor and is consequently unable to carry out the trustee's functions.¹⁴³
- 17–68** In such a case, the trustee must send a deferral notice in the prescribed form to the debtor's last known address¹⁴⁴ and give a deferral notice to every creditor

¹³⁴ Bankruptcy (Scotland) Act 2016 s.139(3).

¹³⁵ Bankruptcy (Scotland) Act 2016 s.139(4).

¹³⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹³⁷ Bankruptcy (Scotland) Act 2016 s.139(5).

¹³⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹³⁹ Bankruptcy (Scotland) Act 2016 s.139(6). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(p).

¹⁴⁰ Bankruptcy (Scotland) Act 2016 s.140(1).

¹⁴¹ Bankruptcy (Scotland) Act 2016 s.140(2). The prescribed form is Form 27 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

¹⁴² Bankruptcy (Scotland) Act 2016 Sch.1, para.2(6).

¹⁴³ Bankruptcy (Scotland) Act 2016 s.141(1).

¹⁴⁴ Bankruptcy (Scotland) Act 2016 s.141(2)(a). The prescribed form is Form 28 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

known to the trustee.¹⁴⁵ Where the trustee is not AiB, the trustee must then apply to AiB in the prescribed form for deferral of discharge.¹⁴⁶ Such an application must be made no earlier than eight months after the date on which sequestration is awarded and no later than 10 months after that date.¹⁴⁷ On receipt of such an application, AiB must take into account any representations made by an interested person within 14 days beginning with the day on which the application is made and, if they are satisfied that the trustee is unable to ascertain the whereabouts of the debtor and that it would not be reasonably practicable for the trustee to continue to search for the debtor, they must issue a certificate deferring discharge indefinitely.¹⁴⁸

Where the trustee is AiB, there will be no application for deferral, but AiB must take into account any representations made by an interested person within 14 days beginning with the day on which the deferral notice was given and, if they are satisfied that it would not be reasonably practicable to continue to search for the debtor, issue a certificate deferring discharge indefinitely.¹⁴⁹ **17-69**

Where a certificate of deferral is issued, AiB must make an appropriate entry in the register of insolvencies.¹⁵⁰ **17-70**

Following the issue of a certificate of deferral under these provisions, a trustee other than AiB may apply to AiB for authority to resign office.¹⁵¹ Such an application may not be made, however, if the trustee ascertains the debtor's whereabouts or the debtor contacts the trustee after the certificate is issued or after the date which is six months after the date on which the certificate is issued.¹⁵² An application must include details of every creditor known to the trustee.¹⁵³ Where an application is made, AiB must give the trustee a notice in the prescribed form granting the application.¹⁵⁴ AiB is then deemed to be the trustee and must notify every creditor known to them that they are deemed to be trustee.¹⁵⁵ In such a case, the provisions for a handover to the new trustee which apply in the case of the appointment of a new trustee following resignation or removal apply¹⁵⁶ and the former trustee may only recover their outlays and remuneration by way of a claim in the final distribution of the debtor's estate.¹⁵⁷ **17-71**

Where a certificate of deferral has been issued but the trustee ascertains the debtor's whereabouts or the debtor contacts the trustee, the procedure for the debtor's subsequent discharge differs depending on whether or not the trustee **17-72**

¹⁴⁵ Bankruptcy (Scotland) Act 2016 s.141(2)(b).

¹⁴⁶ Bankruptcy (Scotland) Act 2016 s.141(2)(c). The prescribed form is Form 29 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

¹⁴⁷ Bankruptcy (Scotland) Act 2016 s.141(3).

¹⁴⁸ Bankruptcy (Scotland) Act 2016 s.141(4), (5). The certificate must be in Form 30 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.27.

¹⁴⁹ Bankruptcy (Scotland) Act 2016 s.141(6). The certificate must be in Form 30 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.27.

¹⁵⁰ Bankruptcy (Scotland) Act 2016 s.141(7).

¹⁵¹ Bankruptcy (Scotland) Act 2016 s.142(1), (2). The prescribed form is Form 31 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

¹⁵² Bankruptcy (Scotland) Act 2016 s.142(4).

¹⁵³ Bankruptcy (Scotland) Act 2016 s.142(3).

¹⁵⁴ Bankruptcy (Scotland) Act 2016 s.142(5). The prescribed form is Form 32 in Sch.1 to the Bankruptcy (Scotland) Regulations 2016: see Bankruptcy (Scotland) Regulations 2016 reg.3.

¹⁵⁵ Bankruptcy (Scotland) Act 2016 s.142(6)(a), (b).

¹⁵⁶ Bankruptcy (Scotland) Act 2016 s.142(6)(d). These provisions are discussed in Ch.10.

¹⁵⁷ Bankruptcy (Scotland) Act 2016 s.142(6)(c).

is AiB. Where the trustee is AiB, they may discharge the debtor at any time after the date which is 12 months after the date on which the debtor's whereabouts were ascertained or the debtor made contact as the case may be.¹⁵⁸ Where the trustee is not AiB, the same procedure will be followed as in a normal case where the trustee is not AiB, with the trustee's report being sent to AiB without delay after the date which is 10 months after the earlier of the date on which the debtor's whereabouts were ascertained or the debtor made contact with the trustee.¹⁵⁹ In either case, where discharge is granted, it is deemed to have been granted under the provisions for discharge of the debtor where the trustee is not AiB,¹⁶⁰ but it does not take effect before the expiry of 14 days beginning with the day of notification of the decision to discharge.¹⁶¹

17–73 The debtor may apply to AiB for review of their decision to refuse to discharge the debtor¹⁶² and a creditor may to AiB for review of their decision to discharge the debtor.¹⁶³ Any application for review must be made within 14 days beginning with the day of notification of the relevant decision.¹⁶⁴ Where the application is by a creditor for review of a decision to grant the debtor's discharge, the discharge is suspended until the determination of the review.¹⁶⁵

17–74 Where a review application is made, AiB must without delay send a copy of the application to the trustee, the debtor and the creditors and advise them of the right to make representations within 21 days.¹⁶⁶ AiB must then: (i) take into account any representations made by an interested party and confirm, amend or revoke the decision within 28 days beginning with the day on which the application is made¹⁶⁷; and (ii) notify their decision to the trustee, the debtor and the creditors.¹⁶⁸ The debtor, the trustee or any creditor may appeal to the sheriff against AiB's decision within 14 days beginning with the day of the decision.¹⁶⁹

Effect of discharge

17–75 The effect of the discharge is that the debtor is discharged within the UK of all debts and obligations for which the debtor was liable at the date of sequestration with some exceptions.¹⁷⁰ Unless a debt or obligation falls within one of the exceptions, therefore, it will be discharged on the date of the discharge from

¹⁵⁸ Bankruptcy (Scotland) Act 2016 s.143(2).

¹⁵⁹ Bankruptcy (Scotland) Act 2016 s.143(3), (4), (5) and (6).

¹⁶⁰ Bankruptcy (Scotland) Act 2016 s.143(8).

¹⁶¹ Bankruptcy (Scotland) Act 2016 s.143(7).

¹⁶² Bankruptcy (Scotland) Act 2016 s.144(1). The application must be made in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(r).

¹⁶³ Bankruptcy (Scotland) Act 2016 s.144(2). The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 do not specify a form for the making of such an application. This is presumably an oversight and it is thought that the application should nonetheless be in Form 3 in the Schedule to those regulations.

¹⁶⁴ Bankruptcy (Scotland) Act 2016 s.144(3).

¹⁶⁵ Bankruptcy (Scotland) Act 2016 s.144(4).

¹⁶⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

¹⁶⁷ Bankruptcy (Scotland) Act 2016 s.144(5).

¹⁶⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

¹⁶⁹ Bankruptcy (Scotland) Act 2016 s.144(6). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(q).

¹⁷⁰ Bankruptcy (Scotland) Act 2016 s.145(1), (2) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(1), (2) and (7). The effect of the discharge outwith the UK is a matter for the relevant foreign law applying its rules of domestic and private international law: see further Chs 24 and 25.

sequestration, even where it was not known to the trustee and was not the subject of a claim in the sequestration.¹⁷¹ The exceptions are:

- (a) any liability to pay a fine or other penalty due to the Crown.¹⁷² It is specifically provided that this includes a confiscation order made under Pts 2, 3 or 4 of the Proceeds of Crime Act 2002¹⁷³;
- (b) any liability to pay a fine imposed in Scotland by a Justice of the Peace court (or a district court)¹⁷⁴;
- (c) any liability under a compensation order within the meaning of s.249 of the Criminal Procedure (Scotland) Act 1995¹⁷⁵;
- (d) any liability to forfeiture of money deposited in court under s.24(6) of the Criminal Procedure (Scotland) Act 1995¹⁷⁶;
- (e) any liability for fraud or breach of trust¹⁷⁷;
- (f) any obligation to pay aliment or any sum of an alimentary nature under any enactment or rule of law *or* any periodical allowance payable on divorce by virtue of a court order or under an obligation which is not: (i) aliment or a periodical allowance which could have been included in the amount of a creditor's claim under para.2 of Sch.2; or (ii) child support maintenance within the meaning of the Child Support Act 1991 which was unpaid in respect of any period before the date of sequestration of a person by whom it was due to be paid or an employer by whom it was, or was due to be, deducted under s.31(5) of the Child Support Act 1991 (deductions from earnings orders).¹⁷⁸ The provision refers only to periodical allowance payable on divorce and has not been amended to include periodical allowance payable on the dissolution of a civil partnership: this was presumably an oversight. In a case in which divorce proceedings had been raised prior to a husband's sequestration and decree for payment of a capital sum had been granted against him prior to his discharge, it was held that the capital sum in that case was "of an alimentary nature" for the purposes of the predecessor of this provision and that it would be exceptional for such an award not to be alimentary in nature¹⁷⁹;
- (g) the obligation to co-operate with the trustee under s.215 of the Bankruptcy (Scotland) Act 2016.¹⁸⁰ This provision is necessary

¹⁷¹ See *Grimshaw v Bruce* [2011] CSOH 212, in which it was held that a claim for damages for personal injuries was discharged by the debtor's discharge; *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13, not challenged on this point on appeal.

¹⁷² Bankruptcy (Scotland) Act 2016 s.145(3)(a) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(3)(a).

¹⁷³ Bankruptcy (Scotland) Act 2016 s.145(6) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(6).

¹⁷⁴ Bankruptcy (Scotland) Act 2016 s.145(3)(b) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(3)(b).

¹⁷⁵ Bankruptcy (Scotland) Act 2016 s.145(3)(c) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(3)(c).

¹⁷⁶ Bankruptcy (Scotland) Act 2016 s.145(3)(d) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(3)(d).

¹⁷⁷ Bankruptcy (Scotland) Act 2016 s.145(3)(e) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(3)(e).

¹⁷⁸ Bankruptcy (Scotland) Act 2016 s.145(3)(f) and (4) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(3)(f) and (4). The aliment or periodical allowance which can be included in the amount of a creditor's claim is discussed in Ch.16.

¹⁷⁹ *Lessani v Lessani*, 2007 Fam. L. R. 81.

¹⁸⁰ Bankruptcy (Scotland) Act 2016 s.145(3)(g) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(3)(g). Section 215 is discussed at para.17–06 onwards.

- because, as already noted, the debtor may be discharged before the administration of the estate is complete; and
- (h) any liability in respect of a student loan.¹⁸¹

17–76 The Scottish Government's *Consultation on Bankruptcy Law Reform* issued in February 2012 sought views on whether liability for any other debts should be excluded from the debtor's discharge, in particular liability for debts incurred within a certain period prior to the application for sequestration, liability for arrears of child support maintenance and liability for credit union debts.¹⁸² So far as liability for debts incurred within a certain period prior to the application for sequestration is concerned, exclusion from discharge was supported by the majority of respondents¹⁸³ and it was initially announced that provision would be made to exclude from the debtor's discharge certain types of debt incurred within the period of 12 weeks prior to a debtor application for sequestration.¹⁸⁴ The proposal was, however, subsequently dropped.¹⁸⁵ So far as liability for arrears of child support maintenance is concerned, the issue arose because the position in Scotland differed from that in England and Wales,¹⁸⁶ where such arrears are excluded from the debtor's discharge unless the court otherwise directs,¹⁸⁷ but the majority of respondents supported the existing Scottish position.¹⁸⁸ The position therefore remained unchanged. So far as liability for credit union debts is concerned, exclusion from discharge was not supported by the majority of respondents.¹⁸⁹ The position again therefore remained unchanged.¹⁹⁰ Ultimately there has been no change to the list of debts excluded from the debtor's discharge. The issue is one of striking the appropriate balance between the right of the debtor to a fresh start and the rights of certain creditors

¹⁸¹ See Bankruptcy (Scotland) Act 2016 s.145(7) and the Education (Student Loans) Act 1990 Sch.2, para.6 (as saved by art.3 of the Teaching and Higher Education Act 1998 (Commencement No.2 and Transitional Provisions) Order 1998 (SSI 1998/2004) and amended by the Bankruptcy and Diligence etc. (Scotland) Act 1987 s.34(2)), the Education (Student Loans for Tuition Fees) (Scotland) Regulations 2006 (SSI 2006/333) reg.12 (as amended by the Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations (SSI 2010/300) reg.2) and the Education (Student Loans) (Scotland) Regulations 2007 (SSI 2007/154) reg.15 (as amended by the Education (Treatment of Student Loans on Sequestration) (Scotland) Regulations reg.3). Student loans are discussed further in Ch.11.

¹⁸² Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 13.4.1–13.6.4.

¹⁸³ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), paras 8.5–8.9.

¹⁸⁴ See Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (November 2012).

¹⁸⁵ See Accountant in Bankruptcy, *Bankruptcy Law Reform Update* (February 2013).

¹⁸⁶ See Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 13.5.1–13.5.3.

¹⁸⁷ See Insolvency Act 1986 s.281(5).

¹⁸⁸ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), paras 8.10–8.12.

¹⁸⁹ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), paras 8.13–8.16.

¹⁹⁰ There had been previous consultation on the special treatment of credit union debts in the context of protected trust deeds, which was also rejected: see Accountant in Bankruptcy, *Credit Union Debts in Protected Trust Deeds: Supplementary Consultation on Draft Regulations*, available at <http://www.scotland.gov.uk/Resource/Doc/174118/0048563.pdf> [Accessed 18 September 2017] and Accountant in Bankruptcy, *Credit Union Debts in Protected Trust Deeds: Report on Public Consultation*, available at <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000581.pdf> [Accessed 18 September 2017]; see also Accountant in Bankruptcy, *Protected Trust Deed Review* (June 2009), available at <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000821.pdf> [Accessed 18 September 2017]. Trust deeds are discussed in Ch.22.

to be paid notwithstanding. On the whole, it is thought that the approach of not extending the list any further was the correct one.

Where the debtor is discharged under the provisions for discharge in minimal asset cases, the debtor must comply with certain conditions during the relevant period.¹⁹¹ The relevant period is the period of six months beginning with the date of discharge.¹⁹² The first condition is that the debtor is required, before obtaining credit of a specified amount, either alone or jointly with another person, to inform the person providing the credit that the debtor is required to comply with the conditions contained in these provisions.¹⁹³ The specified amount is currently credit of £2,000 or more or, where the debtor has debts of £1,000 or more, credit of any amount.¹⁹⁴ The second condition is that the debtor must not engage, whether directly or indirectly, in business under a name other than that to which the discharge relates unless the debtor informs any person with whom the debtor enters into any business transaction of the name of the business to which the discharge relates.¹⁹⁵ If the debtor fails to comply with either of these conditions, the period for which they apply is extended to a period of 12 months beginning with the date of discharge¹⁹⁶ and if the debtor fails to comply with either of the conditions during that extended period, the debtor is guilty of an offence.¹⁹⁷ 17-77

The fact that a debt or obligation has been discharged does not prevent the trustee from paying the creditor's claim in the sequestration after the date of discharge.¹⁹⁸ In addition, it is specifically provided that the debtor's discharge does not affect any right of a secured creditor for an obligation in respect of which the debtor has been discharged to enforce his security in respect of that obligation.¹⁹⁹ As enacted, the Bankruptcy (Scotland) Act 1985 did not contain any such provision. It was said that as a consequence, it was possible to argue that the discharge of the underlying debt discharged the security, with the result that following the debtor's discharge the secured property could be sold by the trustee unencumbered by the security.²⁰⁰ The Bankruptcy (Scotland) Act 1993 therefore introduced retrospective provisions to the effect that the debtor's discharge did not affect the right of a secured creditor: (i) for a debt in respect of which the debtor was discharged to enforce their security for payment of the debt and any interest due and payable on the debt until the debt was paid in full; or (ii) for an obligation in respect of which the debtor was discharged to enforce their security in respect of that obligation.²⁰¹ The first part of this provision seemed to cause some confusion in practice, however, in so far as some secured creditors, it is suggested wrongly, appeared to believe that the reference to the 17-78

¹⁹¹ Bankruptcy (Scotland) Act 2016 s.146.

¹⁹² Bankruptcy (Scotland) Act 2016 s.146(6).

¹⁹³ Bankruptcy (Scotland) Act 2016 s.146(2), (3).

¹⁹⁴ Bankruptcy (Scotland) Act 2016 s.146(2). A different amount of credit or debts may be prescribed.

¹⁹⁵ Bankruptcy (Scotland) Act 2016 s.146(4), (5).

¹⁹⁶ Bankruptcy (Scotland) Act 2016 s.147(1).

¹⁹⁷ Bankruptcy (Scotland) Act 2016 s.147(2).

¹⁹⁸ See *Young, Noter*, 2010 S.L.T. (Sh Ct) 37; *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13, not challenged on this point on appeal.

¹⁹⁹ Bankruptcy (Scotland) Act 2016 s.145(5) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.4(5) and see *Clydesdale Bank Plc v McCaw* 24 May 2002 OH, available at http://www.scotcourts.gov.uk/opinions/XA110_01.html [Accessed 18 September 2017].

²⁰⁰ See McBryde's annotations to the Bankruptcy (Scotland) Act 1993 at pp.6-42 and references there referred to.

²⁰¹ See Bankruptcy (Scotland) Act 1993 s.11, Sch.1, para.23.

debt being paid in full allowed them to continue to pursue the debtor for any shortfall which remained after the enforcement of the security notwithstanding the debtor's discharge. The Scottish Law Commission in its *Consultation Paper on Consolidation of Bankruptcy Legislation in Scotland*²⁰² recommended that the provisions be simplified and shortened by the omission of the first part of the provision on the basis that debts (and the payment of interest on debts) are obligations and therefore encompassed by the second part of the provision.²⁰³ That recommendation was repeated in its *Report on the Consolidation of Bankruptcy Legislation in Scotland*²⁰⁴ and was duly given effect to by the Bankruptcy and Debt Advice (Scotland) Act 2014. As noted therefore, the current provision provides simply that the debtor's discharge does not affect any right of a secured creditor for an obligation in respect of which the debtor has been discharged to enforce their security in respect of that obligation. This change, although not specifically designed for that purpose, will hopefully remove the previous confusion referred to, making it clear that while the secured creditor remains entitled to enforce their security, they will not be entitled to recover any shortfall remaining after the enforcement of the security from the debtor.

- 17–79** The trustee's administration of the sequestrated estate may continue after the discharge of the debtor and the discharge does not re-vest the sequestrated estate in the debtor: the estate which is vested in the trustee remains vested in the trustee for the purposes of the sequestration, subject to the statutory provisions on re-vesting.²⁰⁵
- 17–80** The debtor's discharge is no longer the cut-off point for *acquirenda*, so property which the debtor acquires after discharge but before the date which is four years after the date of sequestration and which would have vested in the trustee in sequestration if it had been part of the debtor's estate at the date of sequestration will vest in the trustee as *acquirenda*.²⁰⁶ Property which the debtor acquires after discharge which is not *acquirenda*, either because it would not have vested in the trustee if it had been part of the debtor's estate at the date of sequestration or because it is acquired on a date which is more than four years after the date of sequestration, vests in the debtor and cannot be subject to diligence in respect of pre-sequestration debts other than those which are excluded from the debtor's discharge.²⁰⁷ Such property may, however, be subject to diligence in respect of any post-sequestration debts.
- 17–81** A debtor contribution order is not affected by the debtor's discharge and the debtor must continue to make any payments due under the order for the payment period notwithstanding their discharge.²⁰⁸

²⁰² Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland* (August 2011).

²⁰³ Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland* (August 2011), para.2.47 and recommendation 24.

²⁰⁴ Scottish Law Commission, *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, May 2013), para.2.49 and recommendation 25.

²⁰⁵ *Galbraith v Whitehead* (1863) 1 M. 644; *Buchanan v McCulloch* (1865) 4 Macph 135; *Young, Noter*, 2010 S.L.T. (Sh Ct) 37; *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13, not challenged on this point on appeal; *Dooneen Ltd v Mond* [2016] CSIH 59. The statutory provisions on re-vesting are discussed in Ch.11.

²⁰⁶ See Ch.11.

²⁰⁷ See *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13, not challenged on this point on appeal, and Ch.11.

²⁰⁸ See further Ch.11.

As noted above, the disqualifications which flow from sequestration generally but not invariably cease on the debtor's discharge. The relevant provisions must therefore be checked in each case to determine when the disqualification ceases.²⁰⁹ A debtor who is subject to a bankruptcy restrictions order or undertaking will be subject to the disqualifications which flow from such an order or undertaking for the period of the order or undertaking.²¹⁰ 17-82

BANKRUPTCY RESTRICTIONS

Introduction

As noted above, the bankruptcy restrictions regime was introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 as one of the safeguards for the reduction of the period of the debtor's automatic discharge from three years to one year brought about by that Act.²¹¹ It makes provision for the imposition of certain restrictions on a living debtor post-discharge where this is justified by the debtor's conduct before or during sequestration. 17-83

As introduced, the regime made provision for the making of bankruptcy restrictions orders by the sheriff, the acceptance of bankruptcy restrictions undertakings by AiB and the making of interim bankruptcy restrictions orders by the sheriff in appropriate cases.²¹² It largely mirrored the corresponding regime which had been introduced in England and Wales as the corollary of the reduction of the period for automatic discharge of the debtor in England and Wales,²¹³ which was in turn modelled on the regime for disqualification of directors under the Company Directors Disqualification Act 1986. 17-84

The Scottish Government's *Consultation on Bankruptcy Law Reform* issued in February 2012 sought views on the removal of bankruptcy processes from the sheriff court to AiB, with options ranging from the removal of certain administrative processes through the removal of a wider range of processes to the removal of all such processes.²¹⁴ It did not, however, specify which processes might fall within the first two options and there was no specific mention of bankruptcy restrictions. The first two options were generally supported by consultees, while the third option was not.²¹⁵ The Scottish Government response to the consultation therefore indicated an intention to proceed with the removal of certain processes from the court, which included the making of bankruptcy restrictions orders.²¹⁶ In the event, however, this was implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014 only in part: 17-85

²⁰⁹ The disqualifications which flow from sequestration are discussed further at para.17-09 onwards.

²¹⁰ Bankruptcy restrictions are discussed at para.17-83 onwards.

²¹¹ See discussion at para.17-48, Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), Pt 9 and Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and consultation* (July 2004), paras 5.36-5.44.

²¹² See Bankruptcy (Scotland) Act 1985 ss.56A-56K as inserted by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

²¹³ See Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), Pt 9 and Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and consultation* (July 2004), paras 5.36-5.44.

²¹⁴ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 14.11.1-14.11.15.

²¹⁵ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), paras 10.1-10.9.

²¹⁶ *The Scottish Government's Response to: The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 18 September 2017], para.5.

provision is now made for bankruptcy restrictions orders to be made by the sheriff in some cases and by AiB in others, while bankruptcy restrictions undertakings have been abolished. Existing bankruptcy restrictions undertakings, however, remain valid.

- 17-86** At the time of writing, there do not appear to be any reported Scottish cases on the bankruptcy restrictions regime, although there is one unreported decision, referred to below. However, details of bankruptcy restrictions orders granted and bankruptcy restrictions undertakings previously accepted, including the grounds and duration, are published on AiB's website. There have been a number of reported cases relating to the regime in England and Wales which may be referred to given the similarity of the regimes.²¹⁷
- 17-87** The bankruptcy restrictions regime applies only where a debtor application or petition for sequestration was presented on or after 1 April 2008 and no conduct of the debtor before that date may be taken into account for the purposes of bankruptcy restrictions.²¹⁸

Bankruptcy restrictions orders

- 17-88** Where sequestration of the estate of a living debtor is awarded, an order, known as a bankruptcy restrictions order, may be made in respect of the debtor.²¹⁹
- 17-89** A bankruptcy restrictions order may be made by AiB or by the sheriff on the application of AiB.²²⁰ Orders of between two and five years duration fall to be made by AiB, while orders of between five and 15 years duration fall to be made by the sheriff.²²¹

Initial procedure

- 17-90** In order to enable AiB to consider whether it is appropriate to make a bankruptcy restrictions order or to apply to the sheriff for a bankruptcy restrictions order in any particular case, a trustee in sequestration other than AiB is required to report the matter to AiB where they have reasonable grounds to believe that any behaviour of the debtor is of a kind which would result in a sheriff granting an application for a bankruptcy restrictions order.²²² If this provision was interpreted strictly, it might be thought that the trustee is only required to report the matter if the debtor's conduct would justify a bankruptcy restrictions order of between five and 15 years, since it is in such cases that an order falls to be made by the sheriff, but it is thought that this cannot be what is intended. There is no prescribed form for the report, but a form of report for the use of trustees and detailed guidance is given in AiB's *Notes for Guidance for Trustees*. The trustee's report is absolutely privileged.²²³
- 17-91** Where AiB is themselves the trustee in sequestration, they will become aware of any behaviour which might justify the making of a bankruptcy restrictions

²¹⁷ In *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court, the sheriff referred to English authority in the absence of any reported Scottish cases.

²¹⁸ Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No.3, Savings and Transitions) Order 2008 (SSI 2008/115).

²¹⁹ Bankruptcy (Scotland) Act 2016 s.155(1).

²²⁰ Bankruptcy (Scotland) Act 2016 s.155(1).

²²¹ Bankruptcy (Scotland) Act 2016 s.159(2) and see further below with regard to the duration of an order.

²²² Bankruptcy (Scotland) Act 2016 s.50(3)(b).

²²³ Bankruptcy (Scotland) Act 2016 s.50(4).

order through their administration of the debtor's estate. Any subsequent decision as to whether to make a bankruptcy restrictions order or apply to the sheriff for a bankruptcy restrictions order will be taken in their capacity as AiB exercising a statutory function rather than in their capacity as trustee in the sequestration.²²⁴

It is thought that in principle, AiB's decision to make a bankruptcy restrictions order or apply to the sheriff for a bankruptcy restrictions order or not to do either of these things would be subject to judicial review. **17-92**

Procedure where bankruptcy restrictions order to be made by AiB

Where AiB proposes to make a bankruptcy restrictions order themselves, they must notify the debtor accordingly.²²⁵ There is no prescribed form for the notice, but it must inform the debtor of their right to make representations to AiB in relation to the proposed bankruptcy restrictions order.²²⁶ AiB must take into account any such representations before making an order.²²⁷ **17-93**

Except with the permission of the sheriff, AiB must make any bankruptcy restrictions order within the period beginning with the date of sequestration and ending with the date on which the debtor's discharge becomes effective.²²⁸ It is thought that permission to make an order outwith this period will be granted only where there is a good reason why it could not have been made timeously. **17-94**

Procedure where application to sheriff for bankruptcy restrictions order

An application to the sheriff for a bankruptcy restrictions order may be made only by AiB.²²⁹ **17-95**

There is no statutory requirement that AiB must consider the making of a bankruptcy restrictions order to be in the public interest before making such an application. In practice, however, AiB will only make an application if they consider that it is in the public interest. Public interest is considered further below in the context of the grounds for making a bankruptcy restrictions order. **17-96**

Except with the permission of the sheriff, AiB must make an application for a bankruptcy restrictions order within the period beginning with the date of sequestration and ending with the date on which the debtor's discharge becomes effective.²³⁰ It is thought that permission to make an application outwith this period will be granted only where there is a good reason why it could not have been made timeously. It is thought that an application for permission to make an application for a bankruptcy restrictions order outwith the specified period may be dealt with as a preliminary matter in the application for the bankruptcy restrictions order itself.²³¹ **17-97**

²²⁴ See *Mitchell, Appellant* 27 September 2010 Edinburgh Sheriff Court, available at http://www.scotcourts.gov.uk/opinions/SQ538_07.html [Accessed 18 September 2017] and discussion in Ch.4.

²²⁵ Bankruptcy (Scotland) Act 2016 s.155(2).

²²⁶ Bankruptcy (Scotland) Act 2016 s.155(3).

²²⁷ Bankruptcy (Scotland) Act 2016 s.155(4).

²²⁸ Bankruptcy (Scotland) Act 2016 s.158.

²²⁹ Bankruptcy (Scotland) Act 2016 s.155(1)(b).

²³⁰ Bankruptcy (Scotland) Act 2016 s.158.

²³¹ See further at para. 17-99.

- 17–98** There is no statutory requirement for AiB to give a debtor notice of their intention to apply to the sheriff for a bankruptcy restrictions order, but it is understood that as a matter of practice, AiB will write to the debtor at an early stage where bankruptcy restrictions are being considered and, where they proceed with an application to the sheriff, they will advise the debtor and, in cases where they are not the trustee, the trustee.
- 17–99** An application for a bankruptcy restrictions order is made in Form 7.1-A in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.²³² The sheriff must make an order for intimation of the application to any person they consider has an interest in it and an order specifying how it is to be determined.²³³ Without prejudice to that provision, it is provided that where the application is unopposed, it is to be disposed of by the sheriff in chambers without the attendance of parties unless the sheriff otherwise directs.²³⁴ Where the sheriff requires to hear parties on the application, the sheriff clerk will fix a hearing and intimate the date and time of the hearing to the parties.²³⁵

Grounds for making bankruptcy restriction order

- 17–100** A bankruptcy restrictions order must be made if AiB or the sheriff (as the case may be) thinks it appropriate having regard to the conduct of the debtor whether before or after the date of sequestration.²³⁶
- 17–101** In deciding whether to make a bankruptcy restrictions order, AiB or the sheriff (as the case may be) must in particular take into account any of the following kinds of behaviour on the part of the debtor²³⁷:
- (a) Failing to keep records which account for a loss of property by the debtor, or by a business carried on by them, where the loss occurred in the period beginning two years before the date of presentation of the petition for sequestration or the date the debtor application for sequestration was made as the case may be and ending with the date of the application for a bankruptcy restrictions order.²³⁸ Similar although not identical conduct was previously an offence under s.67(8) of the Bankruptcy (Scotland) Act 1985, but that provision was repealed by the Bankruptcy and Diligence etc. (Scotland) Act 2007.
 - (b) Failing to produce records of that kind on demand by AiB, the interim trustee or the trustee.²³⁹
 - (c) Failing to supply accurate information to an authorised person for the purpose of the granting of a certificate for sequestration.²⁴⁰
 - (d) Making a gratuitous alienation or any other alienation for no consideration or for no adequate consideration which a creditor has, under any rule of law, a right to challenge.²⁴¹ “Gratuitous alienation” is

²³² Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.1(1).

²³³ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(1).

²³⁴ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(3)(a).

²³⁵ Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.7.4(3)(b).

²³⁶ Bankruptcy (Scotland) Act 2016 s.156(1).

²³⁷ Bankruptcy (Scotland) Act 2016 s.156(2).

²³⁸ Bankruptcy (Scotland) Act 2016 s.156(2)(a).

²³⁹ Bankruptcy (Scotland) Act 2016 s.156(2)(b).

²⁴⁰ Bankruptcy (Scotland) Act 2016 s.156(2)(c). Certificates for sequestration are discussed in Ch.7.

²⁴¹ Bankruptcy (Scotland) Act 2016 s.156(2)(d).

defined for this purpose as an alienation challengeable under s.98 of the Bankruptcy (Scotland) Act 2016²⁴² and making an alienation which is challengeable at common law is also caught by this provision. Such conduct may also constitute an offence under the Bankruptcy (Scotland) Act 2016.²⁴³

- (e) Creating an unfair preference or any other preference which a creditor has, under any rule of law, a right to challenge.²⁴⁴ In contrast to gratuitous alienation, “unfair preference” is not defined, but it may be presumed that it would include a preference challengeable under s.99 of the Bankruptcy (Scotland) Act 2016, and creating a preference which is challengeable at common law is also caught by this provision. Such conduct may also constitute an offence under the Bankruptcy (Scotland) Act 2016.²⁴⁵
- (f) Making an excessive pension contribution.²⁴⁶ “Excessive pension contribution” is, for this purpose, to be construed in accordance with s.101 of the Bankruptcy (Scotland) Act 2016.²⁴⁷
- (g) Failing to supply goods or services which were wholly or partly paid for where the failure has given rise to a claim in the sequestration.²⁴⁸
- (h) Trading at a time before the date of sequestration when the debtor knew or ought to have known that they were unable to meet their debts.²⁴⁹
- (i) Incurring, before the date of sequestration, a debt which the debtor had no reasonable expectation of being able to pay.²⁵⁰
- (j) Failing to account satisfactorily to the sheriff, AiB, the interim trustee or the trustee for a loss of property or for an insufficiency of property to meet their debts.²⁵¹
- (k) Carrying on any gambling, speculation or extravagance which may have materially contributed to or increased the extent of their debts or which took place between the date of presentation of the petition for sequestration or the date the debtor application for sequestration was made (as the case may be) and the date on which sequestration is awarded.²⁵²
- (l) Neglect of business affairs of a kind which may have materially contributed to or increased the extent of their debts.²⁵³
- (m) Fraud or breach of trust.²⁵⁴
- (n) Failing to co-operate with AiB, the interim trustee or the trustee.²⁵⁵

AiB or the sheriff (as the case may be) must also consider in particular whether the debtor has previously been sequestered and, if so, remained undischarged from that sequestration at any time during the period of five years ending with the date of the sequestration to which the application relates.²⁵⁶ **17–102**

²⁴² Bankruptcy (Scotland) Act 2016 s.156(4).

²⁴³ Bankruptcy (Scotland) Act 2016 s.218(9), (10) and see further at para.17–31 and Ch.14.

²⁴⁴ Bankruptcy (Scotland) Act 2016 s.156(2)(c).

²⁴⁵ Bankruptcy (Scotland) Act 2016 s.218(9), (10) and see further at para.17–31 and Ch.14.

²⁴⁶ Bankruptcy (Scotland) Act 2016 s.156(2)(f).

²⁴⁷ Bankruptcy (Scotland) Act 2016 s.156(4).

²⁴⁸ Bankruptcy (Scotland) Act 2016 s.156(2)(g).

²⁴⁹ Bankruptcy (Scotland) Act 2016 s.156(2)(h).

²⁵⁰ Bankruptcy (Scotland) Act 2016 s.156(2)(i).

²⁵¹ Bankruptcy (Scotland) Act 2016 s.156(2)(j).

²⁵² Bankruptcy (Scotland) Act 2016 s.156(2)(k).

²⁵³ Bankruptcy (Scotland) Act 2016 s.156(2)(l).

²⁵⁴ Bankruptcy (Scotland) Act 2016 s.156(2)(m).

²⁵⁵ Bankruptcy (Scotland) Act 2016 s.156(2)(n).

²⁵⁶ Bankruptcy (Scotland) Act 2016 s.156(3).

17–103 The use of the phrase “in particular” means that the matters set out above are not exhaustive.²⁵⁷ AiB or the sheriff may therefore take any other relevant matter into account.

17–104 There is no statutory requirement that the making of a bankruptcy restrictions order must be in the public interest. However, AiB’s *Notes for Guidance for Trustees* make clear that a trustee other than AiB who is submitting a report to AiB and AiB themselves must be satisfied that the imposition of bankruptcy restrictions is in the public interest. The *Notes for Guidance for Trustees* go on to say that the public interest will vary from case to case and set out a number of criteria which may be relevant to determining whether a bankruptcy restrictions order would be in the public interest. The nature of the test to be applied for making a bankruptcy restrictions order was considered by Sheriff Holligan in *Accountant in Bankruptcy v TW*.²⁵⁸ In the absence of any reported Scottish cases, Sheriff Holligan considered the analysis of Launcelot Henderson QC in the English case of *Official Receiver v Randhawa*,²⁵⁹ from which he quoted at length, to be compelling. The essential points in that case as approved by Sheriff Holligan may be summarised as follows: the decision-maker is required to form a judgement as to the appropriateness of making an order, but the exercise is not properly characterised as one of discretion, the question of appropriateness having to be answered with regard to the conduct of the debtor; the types of conduct specified in the statute are not exhaustive, but any conduct of a specified type and any prior sequestration within the specified parameters must be taken into account; the decision-maker will not carry out a roving enquiry into the debtor’s conduct but will focus on specific allegations of misconduct; there is no express guidance on the criteria or standards which must be applied, but in general terms, what is envisaged is a failure in some significant respect to live up to proper standards of competence or probity in the conduct of financial affairs; an element of culpability or irresponsibility will usually, if not always, need to be present; mitigating circumstances may be taken into account and need not be confined to matters directly related to the allegations of misconduct; the main object of a bankruptcy restrictions order is the protection of the public but the jurisdiction is also intended to have a deterrent effect; and the minimum period suggested that it was intended to impose a substantial sanction in any case in which the debtor’s conduct was shown to have fallen below the appropriate standard whether or not they still represented a danger to the public.

Duration of order

17–105 A bankruptcy restrictions order comes into force when it is made and ceases to have effect at the end of the day specified in the order.²⁶⁰

17–106 A bankruptcy restrictions order may be made for a period of not less than two and not more than 15 years from the date on which it is made: as noted above, orders of between two and five years duration fall to be made by AiB, while orders of between five and 15 years duration fall to be made by the sheriff.²⁶¹

²⁵⁷ *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court.

²⁵⁸ *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court.

²⁵⁹ *Official Receiver v Randhawa* [2007] 1 W.L.R. 1700.

²⁶⁰ Bankruptcy (Scotland) Act 2016 s.159(1).

²⁶¹ Bankruptcy (Scotland) Act 2016 s.159(2) and see para.17–89.

The length of the period will depend on the seriousness of the conduct giving rise to the order. In *Accountant in Bankruptcy v TW*,²⁶² Sheriff Holligan appeared to accept the approach taken in *Official Receiver v Randhawa*²⁶³ of adopting the same three brackets reflecting different degrees of seriousness of conduct as are routinely applied in cases under the Company Directors Disqualification Act 1986 following the case of *Re Sevenoaks Stationers (Retail) Ltd*,²⁶⁴ and AiB's *Notes for Guidance for Trustees* adopts this approach. 17-107

Interim bankruptcy restrictions orders

An interim bankruptcy restrictions order may be made by AiB or by the sheriff on the application of AiB. 17-108

AiB may make an interim bankruptcy restrictions order at any time after they have notified the debtor that they propose to make a bankruptcy restrictions order and before they have decided whether to make such an order if they think that there are prima facie grounds to suggest that a bankruptcy restrictions order will be made and it is in the public interest to make an interim order.²⁶⁵ 17-109

The sheriff may make an interim bankruptcy restrictions order on the application of AiB at any time between the making of an application for a bankruptcy restrictions order and the determination of that application if they think that there are prima facie grounds to suggest that the application will be successful and it is in the public interest to make an interim order.²⁶⁶ It is suggested that such an application may be made in the application for the bankruptcy restrictions order rather than requiring a separate application. 17-110

An interim order has the same effect as a bankruptcy restrictions order and comes into force when it is made.²⁶⁷ It ceases to have effect on AiB making a decision on whether to make a bankruptcy restrictions order, on the sheriff determining the bankruptcy restrictions application or on the sheriff discharging the interim order on the application of AiB or the debtor.²⁶⁸ It is suggested that such an application to discharge an interim order may be made in the application for the bankruptcy restrictions order where there is one rather than requiring a separate application. Where a bankruptcy restrictions order is made, the period for which it is to have effect runs from the date of the interim order.²⁶⁹ 17-111

Revocation or variation of order

On the application of the debtor, AiB or the sheriff (as the case may be) may revoke or vary a bankruptcy restrictions order made by them.²⁷⁰ Variation may include providing for the order to cease to have effect at the end of a date earlier than the date specified in the order.²⁷¹

²⁶² *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court.

²⁶³ *Official Receiver v Randhawa* [2007] 1 W.L.R. 1700.

²⁶⁴ *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch. 164.

²⁶⁵ Bankruptcy (Scotland) Act 2016 s.160(1), (2).

²⁶⁶ Bankruptcy (Scotland) Act 2016 s.160(3), (4).

²⁶⁷ Bankruptcy (Scotland) Act 2016 s.160(5).

²⁶⁸ Bankruptcy (Scotland) Act 2016 s.160(6).

²⁶⁹ Bankruptcy (Scotland) Act 2016 s.160(7).

²⁷⁰ Bankruptcy (Scotland) Act 2016 s.159(3), (4).

²⁷¹ Bankruptcy (Scotland) Act 2016 s.159(8).

- 17–112** Where an application for revocation or variation is made to AiB, it must be in the prescribed form²⁷² and the procedure for dealing with the application is set out in the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016. Where such an application is made, AiB must take into account any representations made to them by any interested person within 21 days beginning with the day on which the application is made and confirm, revoke or vary the order within 28 days beginning with that day.²⁷³ The debtor may appeal to the sheriff against AiB's decision within 14 days beginning with the date of the decision.²⁷⁴ In determining such an appeal, or otherwise on an application by AiB, the sheriff may make an order providing that the debtor may not make another application for revocation or variation for such period as may be specified in the order.²⁷⁵
- 17–113** Where an application for revocation or variation is made to the sheriff, the form of the application and the procedure will be the same as that for an application for a bankruptcy restrictions order.²⁷⁶
- 17–114** No grounds for revocation or variation are specified, but it is suggested that a bankruptcy restrictions order will fall to be revoked or varied only in exceptional circumstances. In particular, it is suggested that a bankruptcy restrictions order would fall to be revoked only where it is established that it should not have been made in the first place and that the effect of such a revocation, which is not specified, would be that it would be as if the bankruptcy restrictions order had never been made.

Bankruptcy restrictions undertakings

- 17–115** As noted above, the bankruptcy restrictions regime as introduced made provision for the acceptance of bankruptcy restrictions undertakings by AiB, but bankruptcy restrictions undertakings were abolished by the Bankruptcy and Debt Advice (Scotland) Act 2014. Existing bankruptcy restrictions undertakings, however, remain valid.

Registration and publication of bankruptcy restrictions orders and undertakings

- 17–116** Details of bankruptcy restrictions orders and interim bankruptcy restrictions orders are recorded in the register of insolvencies.²⁷⁷ Details of bankruptcy restrictions undertakings accepted before the abolition of bankruptcy restrictions undertakings will also appear in the register.
- 17–117** Details of bankruptcy restrictions orders may also be issued in a press release and details of all current bankruptcy restrictions orders and undertakings appear on AiB's website.

Effects of bankruptcy restrictions orders and undertakings

- 17–118** A bankruptcy restrictions order or an existing bankruptcy restrictions undertaking results in certain restrictions being imposed on a debtor. For the most

²⁷² See Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.5(1)(g).

²⁷³ Bankruptcy (Scotland) Act 2016 s.159(5).

²⁷⁴ Bankruptcy (Scotland) Act 2016 s.159(6).

²⁷⁵ Bankruptcy (Scotland) Act 2016 s.159(7).

²⁷⁶ See para.17–99.

²⁷⁷ Bankruptcy (Scotland) Act 2016 s.200(2)(d). As to the information recorded, see further Ch.4.

part, however, like the restrictions which flow from sequestration itself,²⁷⁸ these are not listed in the bankruptcy legislation but are found in other legislation providing for a debtor who is subject to a bankruptcy restrictions order or undertaking to be disqualified from or restricted in holding or obtaining certain offices or undertaking certain activities. It has been noted that it is for this reason that it is not possible for a bankruptcy restrictions order itself to specify all the restrictions which flow from it,²⁷⁹ and for the same reason it is beyond the scope of this work to provide a comprehensive list of the restrictions which flow from a bankruptcy restrictions order or undertaking. It may be noted, however, that as a result of amendments made by the Bankruptcy and Diligence etc. (Scotland) Act 2007 itself on the introduction of the bankruptcy restrictions regime, a person subject to a bankruptcy restrictions order or undertaking is disqualified from acting as a receiver in Scotland²⁸⁰ and from being nominated for, elected for or holding office as a member of a local authority.²⁸¹

The effect of a bankruptcy restrictions order or undertaking in certain other cases has, however, caused difficulty. Following the introduction of the bankruptcy restrictions regime, AiB's *Notes for Guidance for Trustees* and other publications relating to bankruptcy restrictions included statements to the effect that a person who was subject to a bankruptcy restrictions order or undertaking was disqualified from acting as the director, or taking part in the promotion, formation or management, of a company without the leave of the court, from acting as an insolvency practitioner, and from acting as a Member of Parliament, and in *Accountant in Bankruptcy v TW*,²⁸² reference was made to some of the more significant effects of a bankruptcy restriction order relating to acting as a director of a company under the Company Directors Disqualification Act 1986 and holding public office. The writer's view, however, was that these statements were incorrect. No amendments to the relevant effect had been made to the relevant provisions of the Company Directors Disqualification Act 1986²⁸³ or the Insolvency Act 1986²⁸⁴ by the Bankruptcy and Diligence etc. (Scotland) Act 2007 on the basis that these provisions were reserved matters. It is understood that the original intention was that appropriate amending legislation would be passed by the UK Parliament,²⁸⁵ but it was subsequently concluded that this was unnecessary on the basis that the references to bankruptcy restrictions orders which were added to the relevant legislation when the bankruptcy restrictions regime in England and Wales was introduced are *habile* to include references to the subsequently-introduced Scottish bankruptcy restrictions orders and undertakings.²⁸⁶ The writer's view, however, was that this must be incorrect, the references in question having been added by legislation applying exclusively in England and Wales, consequent to the introduction of a regime applying exclusively in England and Wales, and prior to the existence of the corresponding

²⁷⁸ See para.17–09.

²⁷⁹ *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court.

²⁸⁰ Insolvency Act 1986 s.51.

²⁸¹ Local Government Act 1973 s.31.

²⁸² *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court.

²⁸³ Company Directors Disqualification Act 1986 s.11, discussed above in the context of the disqualifications flowing from sequestration.

²⁸⁴ Insolvency Act 1986 ss.390 (insolvency practitioners) and 427 (Members of Parliament), discussed at paras 17–17 and 17–10 respectively in the context of the disqualifications flowing from sequestration.

²⁸⁵ Information given to the writer by AiB's office in response to a query shortly before the Scottish bankruptcy restrictions regime came into force asking when the necessary changes to the relevant legislation in relation to the reserved areas would be made.

²⁸⁶ Insolvency Service, *Technical Manual*, para.42.97.

Scottish regime. Eventually, this position was accepted and appropriate amendments were finally made to the Company Directors Disqualification Act 1986 and the provisions of the Insolvency Act 1986 relating to insolvency practitioners by the Small Business Enterprise and Employment Act 2015.²⁸⁷ Unfortunately, no corresponding amendments were made to the provisions of the Insolvency Act 1986 relating to parliamentary disqualifications, apparently because it was not thought appropriate to include provisions relating to parliamentary disqualifications in the Small Business Enterprise and Employment Act 2015. Presumably, therefore, this will have to await a suitable legislative opportunity.

17–120 AiB's website also states that persons subject to bankruptcy restrictions must disclose to those with whom they wish to do business the name (or trading style) under which they were made bankrupt. It is thought, however, that this is also incorrect. There is no requirement in the Bankruptcy (Scotland) Act 2016 for a debtor to disclose to those with whom the debtor wishes to do business the name or trading style under which the debtor was sequestrated where the debtor is subject to bankruptcy restrictions, although as noted above, a debtor who has received a discharge in a minimal assets case must not, within the relevant period, engage directly or indirectly in business under a name other than that to which the discharge relates unless the debtor informs any person with whom the debtor enters into any business transaction of the name of the business to which the discharge relates.²⁸⁸ Section 360 of the Insolvency Act 1986 makes it an offence for a debtor who has been adjudged bankrupt in England and Wales to engage, whether directly or indirectly, in any business under a name other than that in which they were adjudged bankrupt without disclosing to all persons with whom they enter any business transactions the name in which they were so adjudged²⁸⁹; it also makes it an offence for a person whose estate has been sequestrated in Scotland to do anything in England and Wales prior to their discharge which would constitute an offence under this provision if they were an undischarged bankrupt in England and Wales²⁹⁰; and it was amended by the Enterprise Act 2002 to provide that it applies to a bankrupt after discharge where a bankruptcy restrictions order is in force in respect of them.²⁹¹ However, s.360 of the Insolvency Act 1986 does not extend to Scotland,²⁹² and any argument that the references to bankruptcy restrictions orders which were added by the Enterprise Act 2002 are *habile* to include references to the subsequently-introduced Scottish bankruptcy restrictions is considered to be incorrect for the reasons stated above.

17–121 A bankruptcy restrictions order may, if AiB or the sheriff (as the case may be) thinks it appropriate, specify that s.218(13) of the Bankruptcy (Scotland) Act 2016 is to apply to the debtor for the period of the order.²⁹³ As noted above, that provision makes it an offence for a debtor, either alone or jointly with another person, to obtain credit of £2,000 or more or, if the debtor has debts of £1,000 or more, credit of any amount, without giving the person from whom the credit is obtained relevant information about their status.²⁹⁴ Where the provision is

²⁸⁷ See now Company Directors Disqualification Act 1986 s.11 as amended by the Small Business Enterprise and Employment Act 2015 and Insolvency Act 1986 s.390 as so amended.

²⁸⁸ See para.17–77.

²⁸⁹ Insolvency Act 1986 s.360(1)(b).

²⁹⁰ Insolvency Act 1986 s.360(2).

²⁹¹ Insolvency Act 1986 s.360(5). The reference to a bankruptcy restrictions order includes a bankruptcy restrictions undertaking: Insolvency Act 1986 s.281A, Sch.4A, para.8.

²⁹² Insolvency Act 1986 s.440(2)(b).

²⁹³ Bankruptcy (Scotland) Act 2016 s.157(1).

²⁹⁴ Bankruptcy (Scotland) Act 2016 s.218(13).

applied in a bankruptcy restrictions order, the relevant information which the debtor must give is modified to include the information that they are subject to a bankruptcy restrictions order.²⁹⁵ The inclusion of such a provision in a bankruptcy restrictions order is a matter of discretion, in contrast to the position in England and Wales where this effect is automatic. There is, however, no guidance as to when it is in fact appropriate to include such a provision.²⁹⁶ It is suggested, however, that it would be appropriate at least in cases where the conduct giving rise to the order consisted of or included conduct relating to the use or misuse of credit. It has been noted that where such provision is made, this will be one effect of the order which is evident from its face.²⁹⁷ It may be noted that AiB's publications relating to bankruptcy restrictions appear to assume that this effect always applies, but in fact it applies only if appropriate provision is made as described.

Finally, it may be noted that the Bankruptcy and Diligence etc. (Scotland) Act 2007 added a new s.71B to the Bankruptcy (Scotland) Act 1985, now s.223 of the Bankruptcy (Scotland) Act 2016, which gives the Scottish Ministers power to make regulations repealing, revoking, amending or modifying the effect of an existing disqualification provision. For this purpose, a disqualification provision is defined as a provision made by or under any enactment which disqualifies, whether permanently or temporarily and whether absolutely or conditionally, a relevant debtor or class of debtors from being elected or appointed to an office or position, holding an office or position or becoming or remaining a member of a body or group.²⁹⁸ Such regulations may repeal or revoke a disqualification provision,²⁹⁹ or amend or modify the effect of a disqualification provision so as to reduce the class of debtors to whom it applies, extend it to some or all individuals who are subject to a bankruptcy restrictions order, provide that it applies only to some or all individuals who are subject to a bankruptcy restrictions order or make its application wholly or partly subject to the discretion of a specified person, body or group.³⁰⁰ In the last case, the regulations may provide for the discretion to be subject to the approval of a specified body or group or to appeal to a specified person, body, court or tribunal.³⁰¹ For this purpose, "bankruptcy restrictions order" is given an extended meaning which includes a bankruptcy restrictions order or undertaking made under the statutory provisions in England and Wales.³⁰² The Scottish Ministers may therefore amend any disqualification provision to provide for it to operate where a debtor is subject to bankruptcy restrictions either instead of or as well as in any other circumstances (as noted above, most commonly where the debtor's estate has been sequestrated and the debtor is undischarged). No orders have ever been made under these provisions however.

²⁹⁵ Bankruptcy (Scotland) Act 2016 s.157(2).

²⁹⁶ Such a provision was included in the order made in the case of *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court, but there was no real discussion of the basis for its inclusion on the facts of that particular case.

²⁹⁷ *Accountant in Bankruptcy v TW* unreported 23 September 2013 Edinburgh Sheriff Court.

²⁹⁸ Bankruptcy (Scotland) Act 2016 s.223(2). The reference to a provision which disqualifies a person conditionally includes a reference to a provision which enables them to be dismissed: Bankruptcy (Scotland) Act 2016 s.223(3). A relevant debtor is defined in Bankruptcy (Scotland) Act 2016 s.223(9).

²⁹⁹ Bankruptcy (Scotland) Act 2016 s.223(4).

³⁰⁰ Bankruptcy (Scotland) Act 2016 s.223(5). The Scottish Ministers may be specified for this purpose: Bankruptcy (Scotland) Act 2016 s.223(7).

³⁰¹ Bankruptcy (Scotland) Act 2016 s.223(6). The Scottish Ministers may be specified for this purpose: Bankruptcy (Scotland) Act 2016 s.223(7).

³⁰² Bankruptcy (Scotland) Act 2016 s.223(8).

Effect of recall of sequestration

Recall of sequestration by the sheriff

- 17–123** Where an award of sequestration is recalled by the sheriff, the sheriff may revoke any bankruptcy restrictions order or interim bankruptcy restrictions order which is in force in respect of the debtor and no new bankruptcy restrictions order or interim bankruptcy restrictions order may be made.³⁰³
- 17–124** Where the sheriff refuses to revoke an existing bankruptcy restrictions order or interim bankruptcy restrictions order, the debtor may appeal to the Sheriff Appeal Court against that refusal within 28 days after the date on which the award of sequestration is recalled.³⁰⁴ The decision of the Sheriff Appeal Court is final.³⁰⁵
- 17–125** It is specifically provided that the recall of an award of sequestration does not affect a bankruptcy restrictions order which has not been revoked by the sheriff under these provisions.³⁰⁶

Recall of sequestration by AiB

- 17–126** Where an award of sequestration is recalled by AiB, AiB may revoke any bankruptcy restrictions order or interim bankruptcy restrictions order which is in force in respect of the debtor and no new bankruptcy restrictions order or interim bankruptcy restrictions order may be made.³⁰⁷
- 17–127** Where AiB refuses to revoke an existing bankruptcy restrictions order or interim bankruptcy restrictions order, the debtor may apply to AiB for a review of the decision.³⁰⁸ An application for review must be made within 14 days beginning with the day on which the award of sequestration is recalled.³⁰⁹ Where a review application is made, AiB must without delay send a copy of the application to any interested person and such persons of the right to make representations within 21 days.³¹⁰ AiB must then: (i) take into account any representations made by an interested party and confirm the refusal or revoke the order within 28 days beginning with the day on which the application is made³¹¹; and (ii) notify their decision to the debtor.³¹² The debtor may appeal to the sheriff against AiB's decision within 14 days beginning with the day of the decision.³¹³ The decision of the sheriff is final.³¹⁴
- 17–128** Curiously, there is no specific provision corresponding to that discussed above which applies where sequestration is recalled by the sheriff to the effect that

³⁰³ Bankruptcy (Scotland) Act 2016 s.161(1).

³⁰⁴ Bankruptcy (Scotland) Act 2016 s.161(2). The procedure to be followed in relation to such an appeal is set out in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 r.10.

³⁰⁵ Bankruptcy (Scotland) Act 2016 s.161(3).

³⁰⁶ Bankruptcy (Scotland) Act 2016 s.38(3)(c).

³⁰⁷ Bankruptcy (Scotland) Act 2016 s.161(4).

³⁰⁸ Bankruptcy (Scotland) Act 2016 s.161(5). The application must be made in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(u).

³⁰⁹ Bankruptcy (Scotland) Act 2016 s.161(6).

³¹⁰ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

³¹¹ Bankruptcy (Scotland) Act 2016 s.161(7).

³¹² Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

³¹³ Bankruptcy (Scotland) Act 2016 s.161(8). Such an appeal may be on a matter of fact, a point of law or the merits: see Bankruptcy (Scotland) Act 2016 s.214(1), (2)(t).

³¹⁴ Bankruptcy (Scotland) Act 2016 s.161(9).

the recall of an award of sequestration does not affect a bankruptcy restrictions order which has not been revoked by AiB under these provisions.

Effect of breach

The effect of breaching a bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking will be specified in the provision which contains the relevant restriction. For example, s.51 of the Insolvency Act 1986, which disqualifies a person who is subject to a bankruptcy restrictions order or undertaking from being appointed as a receiver, provides that a person subject to a bankruptcy restrictions order or undertaking who acts as a receiver is liable to imprisonment or a fine or both.³¹⁵ **17-129**

Expenses

AiB's *Notes for Guidance for Trustees* indicate that following a recent change in policy, the costs incurred in investigating potential bankruptcy restrictions are not to be recovered from the debtor's estate. AiB will therefore no longer charge costs associated with bankruptcy restrictions to the debtor's estate and these costs will be met from the public purse. This would appear to be appropriate considering that the imposition of bankruptcy restrictions is done in the public interest. **17-130**

The *Notes for Guidance for Trustees* go on to state, however, that where there are insufficient funds in the debtor's estate to meet the cost of investigation into potential bankruptcy restrictions or the costs of an application to the sheriff, AiB may agree to meet these costs if it is in the public interest to pursue bankruptcy restrictions. This appears to be inconsistent with the previous statement, however, because it implies that costs can be met from the debtor's estate where there are sufficient funds. It may also be noted that provision is made for the payment of a fee to AiB for making an application for a bankruptcy restrictions order.³¹⁶ **17-131**

Where a bankruptcy restrictions order or interim bankruptcy restrictions order is made by the sheriff, it is thought than an award of expenses may be obtained against the debtor in the normal way. **17-132**

FINANCIAL EDUCATION

The Scottish Government's *Consultation on Bankruptcy Law Reform* issued in February 2012³¹⁷ sought views on whether financial education should be an integral part of any statutory debt relief process and, if so, who should deliver it, whether it should be mandatory or optional based on specified criteria (and what these criteria should be), what form it should take, and whether it should be linked to the debtor's discharge.³¹⁸ The majority of consultees were in favour of financial education being an integral part of any statutory debt relief process, but took the view that it should not be mandatory but linked to specified criteria and that it should not be linked to the debtor's discharge.³¹⁹ **17-133**

The Scottish Government subsequently indicated its intention to introduce

³¹⁵ See Insolvency Act 1986 s.51(3), (5).

³¹⁶ See the Bankruptcy Fees etc. (Scotland) Regulations 2014.

³¹⁷ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012).

³¹⁸ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Pt 7.

³¹⁹ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of the Responses* (August 2012), Pt 2.

appropriate provision for financial education.³²⁰ The Bankruptcy and Debt Advice (Scotland) Act 2014 duly introduced such provision in the form of s.43B of the Bankruptcy (Scotland) Act 1985. The current provisions are found in s.117 of the Bankruptcy (Scotland) Act 2016 and reg.25 of the Bankruptcy (Scotland) Regulations 2016.

17–134 The requirements apply only to a living debtor.³²¹ The trustee must notify the debtor that they are required to undertake a prescribed course of financial education if the trustee is of the opinion that any of the specified circumstances apply and that the course would be appropriate for the debtor.³²² The specified circumstances are that:

- (a) In the five years ending on the date that sequestration of the debtor's estate was awarded, the debtor's estate was sequestrated, the debtor granted a protected trust deed, an analogous remedy was in force in relation to the debtor or the debtor participated in a debt management programme under which the debtor made regular payments.³²³ This provision is intended to target serial debtors. Oddly, however, it refers only to the granting of a protected trust deed, not a trust deed which did not become protected. Analogous remedy has the same meaning as in the provisions relating to concurrent proceedings, that is: (i) in relation to England and Wales, an individual voluntary arrangement or bankruptcy order under the Insolvency Act 1986, an administration order under s.112 of the County Courts Act 1984 or a remedy having the like effect to either of those or to sequestration³²⁴; and (ii) in relation to Northern Ireland or any other country, a remedy having the like effect to any of the aforesaid.³²⁵ A debt management programme under which the debtor made regular payments includes a debt payment programme under the debt arrangement scheme³²⁶ but would also include any other arrangement with creditors entered into by the debtor.
- (b) The debtor is subject to a bankruptcy restrictions order or under investigation with a view to an application for such an order being made.³²⁷
- (c) The debtor's pattern of behaviour before or after the award of sequestration is such that the trustee considers that the debtor would benefit from a financial education course.³²⁸
- (d) The debtor agrees to undertake a financial education course.³²⁹

17–135 The trustee must decide whether to require the debtor to undertake a financial education course within six months beginning with the date of the award of sequestration.³³⁰ In a case where a certificate of deferral of discharge has been issued because the debtor could not be traced, but the trustee subsequently ascertains the whereabouts of the debtor or the debtor makes contact, the

³²⁰ The Scottish Government's *Response to the Consultation on Bankruptcy Law Reform* (November 2012).

³²¹ Bankruptcy (Scotland) Act 2016 s.117(1).

³²² Bankruptcy (Scotland) Act 2016 s.117(1).

³²³ Bankruptcy (Scotland) Act 2016 s.117(2)(a).

³²⁴ Bankruptcy (Scotland) Act 2016 s.17(8)(a).

³²⁵ Bankruptcy (Scotland) Act 2016 s.17(8)(b).

³²⁶ Bankruptcy (Scotland) Act 2016 s.117(6).

³²⁷ Bankruptcy (Scotland) Act 2016 s.117(2)(b).

³²⁸ Bankruptcy (Scotland) Act 2016 s.117(2)(c).

³²⁹ Bankruptcy (Scotland) Act 2016 s.117(2)(d).

³³⁰ Bankruptcy (Scotland) Act 2016 s.117(3)(a).

trustee must decide whether to require the debtor to undertake a financial education course as soon as reasonably practicable after that.³³¹

The trustee must not require a debtor to undertake, or complete, a course of financial education if the trustee is of the opinion that the debtor is unable to do so as a result of the debtor's health, which includes any disability or physical or mental illness,³³² or the debtor has completed a course of financial education in the five years ending with the date on which sequestration was awarded.³³³ **17-136**

The prescribed course of financial education is the *Scottish Financial Education Module* published by Money Advice Scotland.³³⁴ Where the debtor's circumstances indicate that the debtor does not require financial education on particular topics within that module, the debtor may be required to undertake the course with the exception of any of the following topics: budgeting and financial planning; saving; borrowing; insurance; tax; financial life stages; and welfare benefits.³³⁵ **17-137**

³³¹ Bankruptcy (Scotland) Act 2016 s.117(3)(b).

³³² Bankruptcy (Scotland) Act 2016 s.117(4)(a).

³³³ Bankruptcy (Scotland) Act 2016 s.117(4)(b).

³³⁴ Bankruptcy (Scotland) Regulations 2016 reg.25(a).

³³⁵ Bankruptcy (Scotland) Regulations 2016 reg.25(b).

CHAPTER 18

END OF SEQUESTRATION

INTRODUCTION

In one sense, it may be said that a sequestration never ends. For practical purposes, however, it will come to an end when the trustee's administration is complete, although it may subsequently be revived. This chapter deals with the end of the sequestration process. **18-01**

END OF SEQUESTRATION

End of sequestration on judicial composition

Historically, a sequestration could be brought to an end where there was a judicial composition, which re-invested the debtor in their estate.¹ As previously noted, however, judicial composition has now been abolished by the Bankruptcy and Debt Advice (Scotland) Act 2014 and it is no longer possible for a sequestration to be brought to an end by judicial composition.² **18-02**

Where a sequestration has already been brought to an end by judicial composition, it may be revived in certain circumstances: this is discussed further at para.18-19 onwards. **18-03**

End of sequestration where no judicial composition

Absent judicial composition, a sequestration continues and is not brought to an end by the discharge of the debtor, who is not re-invested in their estate on discharge without composition³ even if there are no funds left in the estate,⁴ nor by the discharge of the debtor and the trustee,⁵ the discharge of the trustee without the discharge of the debtor,⁶ the death of the trustee⁷ or the death of the debtor and the trustee.⁸ It has been held that since the scheme of the current legislation applies the same reasoning as earlier legislation, the authorities on this point decided under earlier legislation remain good law,⁹ although it was questioned in that case whether it could be said in any meaningful way that a sequestration continues notwithstanding the discharge of the debtor and the **18-04**

¹ See, for example, *Buchanan v McCulloch* (1865) 4 M. 135. Judicial composition is discussed in Ch.17.

² See Ch.17.

³ See most recently *Dooneen Ltd v Mond* [2016] CSIH 59; *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13, not challenged on this point on appeal.

⁴ *Henderson v Bulley* (1849) 11 D. 1470; *Galbraith v Whitehead* (1863) 1 M. 644.

⁵ *Buchanan v McCulloch* (1865) 4 M. 135; *Whyte v Northern Heritable Security Investment Co* (1891) 18 R. (HL) 37; *Accountant in Bankruptcy v Grant*, 2010 W.L. 4422874.

⁶ *Drybrough & Co v MacDonald* (1893) 20 R. 396.

⁷ *Moncreiff's Trustees v Halley* (1899) 1 F. 696; *Cheyne's Trustees, Petitioners*, 1933 S.L.T. 184.

⁸ *Young's Executor, Petitioner* (1888) 16 R. 92.

⁹ *Accountant in Bankruptcy v Grant*, 2010 W.L. 4422874.

trustee. The discharge of the trustee following the completion of their administration will, however, effectively bring the sequestration to an end for all practical purposes.¹⁰

- 18–05** A sequestration which has been brought to an end in this way may, however, be revived and a new trustee appointed: this is discussed further at para.18–23 onwards.

PROCEDURE ON TRUSTEE'S COMPLETION OF ADMINISTRATION OF ESTATE

Trustee not Accountant in Bankruptcy

- 18–06** A trustee other than Accountant in Bankruptcy (AiB),¹¹ after they have made a final division of the debtor's estate and inserted their final audited accounts in the sederunt book, must pay any unclaimed dividends and unapplied balances to AiB,¹² who must deposit them in an appropriate bank or institution.¹³ The trustee must then send the sederunt book, in specified format, and a copy of the audited accounts to AiB¹⁴ and may at the same time apply to AiB for a certificate of discharge.¹⁵ The process for obtaining the trustee's discharge is discussed further at para.18–09 onwards.

Trustee AiB

- 18–07** Where the trustee is AiB, they must deposit any unclaimed dividends and unapplied balances in an appropriate bank or institution.¹⁶ They must then commence the process which will lead to their discharge.¹⁷ This is discussed further at para.18–14 onwards.

Unclaimed dividends

- 18–08** Any person producing evidence of their right may apply to AiB to receive a dividend deposited in accordance with the provisions discussed above.¹⁸ The application must be made within seven years of the date of deposit.¹⁹ If AiB is satisfied of the applicant's right to the dividend, they must authorise the bank or institution in which the dividend was deposited to pay the applicant the amount of the dividend due to them plus interest.²⁰ Where any unclaimed dividends and unapplied balances remain unclaimed at the end of the period of seven years from the date of deposit, AiB must hand over the deposit receipt or other voucher relating to them to the Scottish Ministers, who are thereupon entitled to payment of the unclaimed dividends and unapplied balances, plus interest, from the bank or institution in which they were deposited.²¹

¹⁰ See further at para.18–09 onwards.

¹¹ Bankruptcy (Scotland) Act 2016 s.148(8).

¹² Bankruptcy (Scotland) Act 2016 s.148(1)(a).

¹³ Bankruptcy (Scotland) Act 2016 s.148(3). "Appropriate bank or institution" is defined in the Bankruptcy (Scotland) Act 2016 s.228(1).

¹⁴ Bankruptcy (Scotland) Act 2016 s.148(1)(b)(i). The specified format is an electronic version in such format as AiB may specify from time to time: Bankruptcy (Scotland) Act 2016 s.148(2).

¹⁵ Bankruptcy (Scotland) Act 2016 s.148(1)(b)(ii).

¹⁶ Bankruptcy (Scotland) Act 2016 s.151(1), (2). "Appropriate bank or institution" is defined in the Bankruptcy (Scotland) Act 2016 s.228(1).

¹⁷ Bankruptcy (Scotland) Act 2016 s.151(3).

¹⁸ Bankruptcy (Scotland) Act 2016 s.150(1).

¹⁹ Bankruptcy (Scotland) Act 2016 s.150(1).

²⁰ Bankruptcy (Scotland) Act 2016 s.150(2).

²¹ Bankruptcy (Scotland) Act 2016 s.150(3).

DISCHARGE OF TRUSTEE

Trustee not AiB

As noted above, a trustee other than AiB must apply to AiB if they wish to obtain a discharge. The trustee must send notice of their application to the debtor and all creditors known to them and inform them of their right to make written representations to AiB within 14 days of the notification, the fact that the sederunt book is available for inspection on request to AiB and contains the audited accounts and scheme of division, and the effect of the discharge if granted.²² Following the expiry of the period for representations, having examined the documents submitted by the trustee and taken account of any representations made to them, AiB must decide whether to grant or refuse the trustee's discharge.²³ They must then notify the trustee, the debtor and all creditors who made representations of their decision.²⁴ **18-09**

The trustee, the debtor or any creditor who made representations may apply to AiB for a review of their decision within the period of 14 days beginning with the day of the decision.²⁵ Where such an application is made, AiB must without delay send a copy of the application to the trustee, the debtor and any creditor who made representations and advise them of the right to make written representations within the period of 21 days beginning with the day on which the application is made.²⁶ AiB must then: (i) take into account any relevant representations and confirm, amend or revoke their decision within 28 days beginning with the day on which the application is made²⁷; and (ii) notify the trustee, the debtor and any creditor who made representations of their decision.²⁸ The trustee, the debtor or any creditor who made representations in relation to the original application for discharge may appeal to the sheriff against AiB's decision within 14 days of the decision.²⁹ Where the sheriff decides that a certificate of discharge which has been refused should be granted, they must order AiB to grant it,³⁰ and the sheriff clerk must send a copy of the decree to AiB.³¹ The decision of the sheriff is final.³² **18-10**

Where the trustee's discharge is granted, AiB is required to make an appropriate entry in the register of insolvencies and in the sederunt book.³³ **18-11**

The certificate of discharge takes effect after the expiry of the period for seeking a review of the decision to grant the discharge, but does not take effect pending any such review.³⁴ **18-12**

²² Bankruptcy (Scotland) Act 2016 s.148(4). The effect of the discharge is discussed at para.18-17.

²³ Bankruptcy (Scotland) Act 2016 s.148(5)(a).

²⁴ Bankruptcy (Scotland) Act 2016 s.148(5)(b).

²⁵ Bankruptcy (Scotland) Act 2016 s.149(1), (2). The application must be made in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.2(1)(s).

²⁶ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

²⁷ Bankruptcy (Scotland) Act 2016 s.149(3).

²⁸ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

²⁹ Bankruptcy (Scotland) Act 2016 s.149(4).

³⁰ Bankruptcy (Scotland) Act 2016 s.149(5).

³¹ Bankruptcy (Scotland) Act 2016 s.149(6).

³² Bankruptcy (Scotland) Act 2016 s.149(7).

³³ Bankruptcy (Scotland) Act 2016 s.149(8).

³⁴ Bankruptcy (Scotland) Act 2016 s.148(6).

- 18–13** These provisions also apply with any necessary modifications where the trustee has died, resigned or been removed from office.³⁵

Trustee AiB

- 18–14** Where AiB is the trustee,³⁶ they must send to the debtor and all creditors known to them their determination of their fees and outlays and a notice in writing informing them that they have commenced the procedure leading to their discharge, that the sederunt book is available for inspection on request, that there is right of review and appeal, and the effect of the discharge.³⁷
- 18–15** The debtor or any creditor may apply to AiB for a review of their discharge within the period of 14 days beginning with the day on which the notice was sent.³⁸ Where such an application is made, AiB must without delay send a copy of the application to the debtor and the creditors and advise them of the right to make written representations within the period of 21 days beginning with the day on which the application is made.³⁹ AiB must then: (i) take into account any representations made by an interested person and confirm or revoke their discharge before the expiry of the period of 28 days beginning with the day on which the application is made⁴⁰; and (ii) notify the debtor and the creditors of their decision.⁴¹ The debtor or any creditor may appeal to the sheriff against that decision within 14 days of the decision.⁴² The decision of the sheriff is final.⁴³
- 18–16** Where the statutory requirements have been complied with and either there is no appeal to the sheriff or there is an appeal which is refused in respect of the discharge, AiB is duly discharged.⁴⁴

Effect of discharge

- 18–17** The effect of the trustee's discharge is to discharge them of all liability to the debtor or the creditors in respect of any act or omission in carrying out their functions as trustee and, where relevant, interim trustee, except liability for fraud.⁴⁵

THE SEQUESTERED ESTATE

- 18–18** As noted above, the debtor is not re-invested in their estate on discharge without composition: any assets forming part of the sequestered estate, including *acquirenda*, which have not been realised during the sequestration

³⁵ Bankruptcy (Scotland) Act 2016 s.149(9).

³⁶ Bankruptcy (Scotland) Act 2016 s.151(1).

³⁷ Bankruptcy (Scotland) Act 2016 s.151(3). The effect of the discharge is discussed at para.18–17.

³⁸ Bankruptcy (Scotland) Act 2016 s.151(4), (5). The application must be made in Form 3 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(1)(t).

³⁹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(3).

⁴⁰ Bankruptcy (Scotland) Act 2016 s.151(6).

⁴¹ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.21(5).

⁴² Bankruptcy (Scotland) Act 2016 s.151(7). For a case in which such an appeal was dismissed as misconceived, see *Young, Noter*, 2010 W.L. 19975. The case was decided before the introduction of the provisions for review prior to appeal by the Bankruptcy and Debt Advice (Scotland) Act 2014.

⁴³ Bankruptcy (Scotland) Act 2016 s.151(8).

⁴⁴ Bankruptcy (Scotland) Act 2016 s.151(9), (10).

⁴⁵ Bankruptcy (Scotland) Act 2016 s.148(7) (trustee other than AiB) and s.151(10) (trustee AiB).

therefore remain part of the sequestrated estate notwithstanding the discharge of the debtor and/or the trustee. The debtor may, however, have title to sue in relation to such assets in some circumstances. It has been held that where the debtor has been discharged without composition and trustee has also been discharged, the debtor has title to sue by virtue of their radical right to the estate, although anything recovered by the debtor as a result remains subject to the claims of their creditors, who may revive the sequestration and have a new trustee appointed who would have title to seek payment of anything recovered by the debtor for the benefit of the creditors.⁴⁶

REVIVAL OF SEQUESTRATION

Sequestration where judicial composition

Where a sequestration has been brought to an end by judicial composition, it may be revived in certain circumstances.⁴⁷ 18–19

On the application of any creditor, the Court of Session may recall the order of the sheriff approving the composition and discharging the debtor and the trustee where it is satisfied that there has been, or is likely to be, default in payment of the composition or of any instalment thereof or that for any reason the composition cannot be proceeded with, either at all or without undue delay or injustice to the creditors.⁴⁸ The effect of any such recall where the debtor has been discharged is to revive the sequestration.⁴⁹ The revival of the sequestration will not, however, affect the validity of any transactions entered into by the debtor since their discharge with a person acting in good faith who has given value.⁵⁰ 18–20

Where the trustee has been discharged, the court may appoint a judicial factor to administer the debtor's estate and give the judicial factor such order as it thinks fit as to that administration.⁵¹ 18–21

The clerk of court must send a copy of the decree of recall to the trustee and or judicial factor for insertion into the sederunt book.⁵² 18–22

Sequestration where no judicial composition

Where a sequestration has not been brought to an end by judicial composition but the sequestration has come to an end for all practical purposes, the sequestration may nonetheless be revived and a new trustee appointed at a later date, 18–23

⁴⁶ See *Whyte v Murray* (1888) 16 R. 95; *Geddes v Quistorp* (1889) 17 R. 278. Revival of the sequestration and appointment of a new trustee is discussed in the following section. The debtor's title to sue where the sequestration remains ongoing is discussed further in Ch.12.

⁴⁷ Bankruptcy (Scotland) Act 1985 Sch.4, para.17. The Bankruptcy (Scotland) Act 1985 as in force immediately before 1 April 2015 continues to have effect and apply to a sequestration in respect of which a petition for sequestration was presented or a debtor application for sequestration was made before that date; see Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No.2, Savings and Transitionals) Order 2014 art.4.

⁴⁸ Bankruptcy (Scotland) Act 1985 Sch.4, para.17(1).

⁴⁹ Bankruptcy (Scotland) Act 1985 Sch.4, para.17(2).

⁵⁰ Bankruptcy (Scotland) Act 1985 Sch.4, para.17(2).

⁵¹ Bankruptcy (Scotland) Act 1985 Sch.4, para.17(3).

⁵² Bankruptcy (Scotland) Act 1985 Sch.4, para.17(4).

most commonly where further funds become available for distribution to the creditors.⁵³ If appropriate, a sequestration may be revived more than once.⁵⁴

18–24 Under earlier legislation, there was no specific mechanism for doing this, although the courts were prepared to make such orders as necessary to enable a new trustee to be appointed⁵⁵ or, if appropriate, to appoint a judicial factor on the sequestrated estate.⁵⁶ Prior to the enactment of the Bankruptcy (Scotland) Act 1985, this required an application to the *nobile officium*.⁵⁷ Under the Bankruptcy (Scotland) Act 1985, however, it was held that although it was not possible to seek the appointment of a new trustee under s.29(6) of that Act (which allowed the sheriff in certain circumstances to declare the office of trustee vacant and make any necessary order to allow the sequestration to proceed or to safeguard the estate pending the election of a new trustee), it was possible to seek the appointment of a new trustee under s.63(1)(b) of that Act (which allowed the sheriff to make such order as might be necessary to enable to be done anything which was required or authorised to be done in or in connection with the sequestration process but which could not otherwise be done).⁵⁸ The making of an appointment under this provision was, however, a matter for the discretion of the court.⁵⁹

18–25 The Bankruptcy and Debt Advice (Scotland) Act 2014 introduced specific statutory provisions for the appointment of a new trustee in specified circumstances.⁶⁰ The introduction of these provisions, which had not been included in the Scottish Government's *Consultation on Bankruptcy Law Reform* in 2012 but had been discussed with stakeholders at subsequent stakeholder events, was prompted in particular by the proliferation of cases where the debtor had a claim or claims for the mis-selling of payment protection insurance which were not known to the trustee during the sequestration and

⁵³ See, for example, *Young's Executor, Petitioner* (1888) 16 R. 92 (debtor and trustee, neither of whom had been discharged, both dead but funds remaining for distribution); *Whyte v Northern Heritable Security Investment Co* (1891) 18 R. (HL) 37 (debtor and trustee both discharged but funds belonging to the estate not recovered); *Drybrough & Co v MacDonald* (1893) 20 R. 396 (trustee but not debtor discharged and *acquirdenda* subsequently available for distribution to creditors); *Coull's Trustee, Petitioner*, 1934 S.L.T. 422 (trustee but not debtor discharged and *acquirdenda* subsequently available for distribution to creditors); *Cockburn's Trustees, Petitioners*, 1941 S.L.T. 162 (debtor and trustee discharged but funds belonging to the estate subsequently realised).

⁵⁴ See *Coull's Trustee, Petitioner*, 1934 S.L.T. 422, where the sequestration was revived on two separate occasions after the discharge of the original trustee.

⁵⁵ See *Young's Executor, Petitioner* (1888) 16 R. 92; *Whyte v Northern Heritable Security Investment Co* (1891) 18 R. (HL) 37; *Drybrough & Co v MacDonald* (1893) 20 R. 396; *Cockburn's Trustees, Petitioners*, 1941 S.L.T. 162.

⁵⁶ See *Moncreiff's Trustees v Halley* (1899) 1 F. 696 (judicial factor appointed where the procedure for appointing a new trustee had proved abortive); *Cheyne's Trustees, Petitioners* 1933 S.L.T. 184 (judicial factor appointed where the procedure for appointing a new trustee was likely to prove abortive).

⁵⁷ See *Young's Executor, Petitioner* (1888) 16 R. 92; *Whyte v Northern Heritable Security Investment Co* (1891) 18 R. (HL) 37; *Drybrough & Co v MacDonald* (1893) 20 R. 396; *Moncreiff's Trustees v Halley* (1899) 1 F. 696; *Cheyne's Trustees, Petitioners*, 1933 S.L.T. 184; *Cockburn's Trustees, Petitioners*, 1941 S.L.T. 162.

⁵⁸ *Accountant in Bankruptcy v Grant*, 2010 W.L. 4422874. See also *Accountant in Bankruptcy, Appellant* [2017] SAC (Civ) 5 in which this approach was followed. Cf *Hill v Frame* unreported 12 May 2016 Hamilton Sheriff Court, where the contrary view was expressed obiter.

⁵⁹ *Accountant in Bankruptcy, Appellant* [2017] SAC (Civ) 5 (where an appointment was made); *Patullo, Applicant*, 2017 S.C. GLA 44 (where an appointment was refused on the basis that on the information available, no one was likely to derive any significant benefit from the re-appointment apart from the professionals involved).

⁶⁰ See Bankruptcy (Scotland) Act 1985 ss.58B–58D as inserted by the Bankruptcy and Debt Advice (Scotland) Act 2014.

was intended to reduce both the cost of re-opening sequestrations and the requirement to put cases for the re-opening of sequestration before the sheriff.⁶¹ The current provisions are found in ss.152–154 of the Bankruptcy (Scotland) Act 2016.

The provisions apply where the trustee has been discharged but, within five years beginning with the date of sequestration, either the trustee or, if not the trustee, AiB, becomes aware of any “newly identified estate” with a value of not less than £1,000.⁶² For this purpose, “newly identified estate” is defined as any part of the debtor’s estate vested in the trustee as either estate at the date of sequestration or *acquirenda* but which was not known to the trustee before their discharge.⁶³ 18–26

In a case where the discharged trustee was not AiB, AiB may either re-appoint the discharged trustee as trustee on the discharged trustee’s application or appoint themselves as trustee.⁶⁴ Where the discharged trustee has discovered the newly identified estate and is applying to be re-appointed, they must provide AiB with information about the estimated value of the newly identified estate, why it forms part of the debtor’s estate and the reason it was not recovered previously.⁶⁵ Where the discharged trustee has discovered newly identified estate but is not applying to be re-appointed, they must provide AiB with details of the newly identified estate and, if requested to do so, information about why it forms part of the debtor’s estate and the reason it was not recovered previously.⁶⁶ 18–27

In a case where the discharged trustee was AiB, they may re-appoint themselves as trustee.⁶⁷ In so doing, they must record and consider the same information as that which has to be provided by a trustee other than AiB who is applying for re-appointment as well as the estimated outlays and remuneration of the trustee following appointment or reappointment and the likely dividend to creditors.⁶⁸ 18–28

In any case, AiB may make an appointment under these provisions only if the value of the newly identified estate is, in their opinion, likely to exceed the costs of the appointment and the costs of the recovery, management, realisation and distribution of the estate.⁶⁹ 18–29

Where an application for re-appointment is made by a discharged trustee or AiB intends to appoint or re-appoint themselves as trustee, they must notify the debtor and any other person they consider to have an interest.⁷⁰ The notice must inform the recipient that they have a right to make representations to AiB within the period of 14 days beginning with the day on which the notice is given.⁷¹ AiB must take into account any representations in deciding whether to 18–30

⁶¹ See Bankruptcy and Debt Advice (Scotland) Bill Policy Memorandum, SP Bill 34-PM, para.187 onwards.

⁶² Bankruptcy (Scotland) Act 2016 s.152(1). The sum may be varied by secondary legislation.

⁶³ Bankruptcy (Scotland) Act 2016 s.152(2).

⁶⁴ Bankruptcy (Scotland) Act 2016 s.152(3)(a).

⁶⁵ Bankruptcy (Scotland) Act 2016 s.152(5) and (8)(a)–(c).

⁶⁶ Bankruptcy (Scotland) Act 2016 s.152(6) and (8)(b) and (c).

⁶⁷ Bankruptcy (Scotland) Act 2016 s.152(3)(b).

⁶⁸ Bankruptcy (Scotland) Act 2016 s.152(7) and (8)(a)–(c).

⁶⁹ Bankruptcy (Scotland) Act 2016 s.152(4).

⁷⁰ Bankruptcy (Scotland) Act 2016 s.153(1).

⁷¹ Bankruptcy (Scotland) Act 2016 s.153(2).

make an appointment or reappointment (as the case may be).⁷² Where AiB makes an appointment or reappointment, they must notify the debtor as soon as practicable⁷³ and the notice must include information about the debtor's duty to co-operate with the trustee under s.215 of the Bankruptcy (Scotland) Act 2016.⁷⁴ Any interested person may appeal to the sheriff against AiB's decision to make or refuse to make an appointment or reappointment no later than 14 days after the date of the decision.⁷⁵

- 18–31** The provisions relating to newly identified estate are without prejudice to any other right to take action following the discharge of the trustee.⁷⁶ It therefore remains possible to seek the appointment of a new trustee under what is now s.211(1)(b) of the Bankruptcy (Scotland) Act 2016 where these provisions do not apply but such an appointment is otherwise appropriate.⁷⁷

⁷² Bankruptcy (Scotland) Act 2016 s.153(3).

⁷³ Bankruptcy (Scotland) Act 2016 s.153(4).

⁷⁴ Bankruptcy (Scotland) Act 2016 s.153(5).

⁷⁵ Bankruptcy (Scotland) Act 2016 s.154.

⁷⁶ Bankruptcy (Scotland) Act 2016 s.152(9).

⁷⁷ See *Accountant in Bankruptcy, Appellant* [2017] SAC (Civ) 5.

CHAPTER 19

MINIMAL ASSET CASES

INTRODUCTION

As noted previously, where a debtor satisfies the minimal asset criteria, a number of aspects of the sequestration process are modified.¹ 19-01

In certain circumstances, Accountant in Bankruptcy (AiB) has a duty to consider whether a minimal asset case should cease to be such, and provision is made for the procedure to be followed where AiB decides that it should so cease and for the effects of that decision. 19-02

This chapter considers the modifications which apply in minimal asset cases, the circumstances in which AiB must consider whether a minimal assets case should cease to be such, the procedure to be followed where AiB decides that it should so cease and the effect of that decision. 19-03

MODIFICATIONS TO SEQUESTRATION PROCESS IN MINIMAL ASSET CASES

The majority, though not all, of the relevant modifications are set out in Sch.1 of the Bankruptcy (Scotland) Act 2016. 19-04

Appointment of trustee in sequestration

As noted previously,² where sequestration is awarded in a minimal asset case, AiB is deemed to be the trustee in the sequestration and may not appoint another person to be the trustee.³ 19-05

Trustee's duty on receipt of statement of assets and liabilities

The duty of the trustee on receipt of the debtor's statement of assets and liabilities is modified in a minimal asset case. In such a case, when AiB receives the debtor's statement of assets and liabilities as submitted in the debtor application, they must as soon as practicable prepare and send to every known creditor of the debtor a statement of the debtor's affairs (so far as within their knowledge) stating that because the debtor satisfies the minimal asset criteria, no claims may be submitted by creditors.⁴ 19-06

Statutory meeting

The provisions for the calling of the statutory meeting and certain related provisions concerning the submission of claims for the purposes of voting at that meeting, the proceedings before the trustee vote at that meeting, the trustee vote 19-07

¹ See Ch.7.

² See Ch.8.

³ Bankruptcy (Scotland) Act 2016 s.51(11), (12).

⁴ Bankruptcy (Scotland) Act 2016 Sch.1, para.1(2).

at that meeting, the procedures to be followed where a replacement trustee is elected at that meeting and the discharge of the original trustee where replaced following a trustee vote at that meeting do not apply in minimal asset cases.⁵

Trustee's functions

- 19–08** The trustee's functions are modified in a minimal asset case. In such a case, the trustee does not have the function of maintaining a sederunt book or keeping regular accounts of the trustee's intromissions with the debtor's estate⁶ and the provisions requiring the trustee to insert specified information in the sederunt book do not therefore apply.⁷

Trustee's obligation to obtain account of the debtor's state of affairs

- 19–09** The trustee's obligation to obtain an account of the debtor's current state of affairs at six-monthly intervals is modified in a minimal asset case. In such a case, it is provided instead that AiB may require the debtor to give a written account of the debtor's current state of affairs in such form as may be prescribed at any time prior to the debtor's discharge.⁸

Submission of creditors' claims and distribution of the estate

- 19–10** The provisions for submission of creditors' claims to the trustee and for distribution of the debtor's estate by the trustee do not apply in a minimal asset case.⁹

Discharge of the debtor

- 19–11** As noted previously,¹⁰ where a debtor satisfies the minimal asset criteria, the debtor is discharged on the day six months after the date on which sequestration is awarded.¹¹

Discharge of AiB as trustee

- 19–12** The provisions for the discharge of AiB as trustee are modified in a minimal asset case. In such a case, AiB is not required to go through the normal steps leading to their discharge as trustee and modified provision is made for an appeal against the discharge.¹²

MINIMAL ASSETS CASES CEASING TO BE SUCH

Circumstances in which AiB to consider whether minimal assets case should cease to be such

- 19–13** In certain circumstances, AiB must consider whether a minimal assets case should cease to be such.¹³ The circumstances are:

⁵ Bankruptcy (Scotland) Act 2016 Sch.1, para.1(6) disapplying Bankruptcy (Scotland) Act 2016 ss.44, 46, 48, 49, 60 and 63–65.

⁶ Bankruptcy (Scotland) Act 2016 Sch.1, para.1(3).

⁷ Bankruptcy (Scotland) Act 2016 Sch.1, para.1(6) disapplying Bankruptcy (Scotland) Act 2016 s.210(3).

⁸ Bankruptcy (Scotland) Act 2016 Sch.1, para.1(4). At the time of writing, no form appears to have been prescribed.

⁹ Bankruptcy (Scotland) Act 2016 Sch.1, para.1(6) disapplying Bankruptcy (Scotland) Act 2016 ss.122 and 131.

¹⁰ See Ch.17.

¹¹ Bankruptcy (Scotland) Act 2016 s.140(1). For a full discussion, see further Ch.17.

¹² Bankruptcy (Scotland) Act 2016 Sch.1, para.1(5).

¹³ Bankruptcy (Scotland) Act 2016 Sch.1, para.2(1), (2).

- (a) AiB becomes aware that the debtor application contains an error such that the debtor did not in fact satisfy the minimal asset criteria at the time of the application.¹⁴
- (b) AiB becomes aware that the debtor application deliberately misrepresents or omits a fact existing at the time of the application with the result that the debtor did not in fact satisfy the minimal asset criteria at the time of the application.¹⁵
- (c) At any time after the application is made, either the total value of the debtor's assets, leaving out of account any liabilities and any assets which would not vest in the trustee in sequestration under s.88(1) of the Bankruptcy (Scotland) Act 2016, exceeds £5,000 or such other sum as may be prescribed *or* AiB assesses the debtor as being able to make a contribution in accordance with the common financial tool.¹⁶
- (d) At any time after the date of sequestration, AiB is not satisfied that the debtor has co-operated with the trustee and considers that if the sequestration were to cease to be a minimal assets case, this would be of financial benefit to the estate and in the interests of the creditors.¹⁷

The circumstances may be modified by regulations made by the Scottish Ministers,¹⁸ which may also make any consequential provision.¹⁹ **19-14**

Procedure where AiB decides that minimal asset case should cease to be such

If AiB considers that the sequestration should cease to be a minimal assets case, they must notify the debtor of that fact, the circumstances that they consider apply and the debtor's right to make representations to AiB within 14 days beginning with the giving of the notice.²⁰ There is no time limit for the giving of such notification, but in practice such notification is likely to be given only before the discharge of the the debtor and the AiB as trustee. **19-15**

On the expiry of the period for making representations, and after taking into account any representations which have been made, AiB must decide whether the sequestration should cease to be a minimal assets case.²¹ If they decide that it should, they must as soon as practicable give the debtor notice of that decision and its effect.²² Curiously, there does not appear to be any requirement to give the debtor notice of the decision if it is to the effect that the sequestration should not cease to be a minimal assets case. **19-16**

The debtor may appeal to the sheriff against a decision by AiB that the sequestration should cease to be a minimal asset case.²³ Any appeal must be lodged within 14 days of the date on which AiB gave notice of their decision.²⁴ If the appeal is granted, the sequestration continues as a minimal assets case²⁵; if it **19-17**

¹⁴ Bankruptcy (Scotland) Act 2016 Sch.1, para.2(3).

¹⁵ Bankruptcy (Scotland) Act 2016 Sch.1, para.2(4).

¹⁶ Bankruptcy (Scotland) Act 2016 Sch.1, para.2(5).

¹⁷ Bankruptcy (Scotland) Act 2016 Sch.1, para.2(6).

¹⁸ Bankruptcy (Scotland) Act 2016 Sch.1, para.2(7)(a). At the time of writing, no such regulations have been made.

¹⁹ Bankruptcy (Scotland) Act 2016 Sch.1, para.2(7)(b).

²⁰ Bankruptcy (Scotland) Act 2016 Sch.1, para.3(1), (2).

²¹ Bankruptcy (Scotland) Act 2016 Sch.1, para.3(3).

²² Bankruptcy (Scotland) Act 2016 Sch.1, para.3(4).

²³ Bankruptcy (Scotland) Act 2016 Sch.1, para.4(1), (2).

²⁴ Bankruptcy (Scotland) Act 2016 Sch.1, para.4(3).

²⁵ Bankruptcy (Scotland) Act 2016 Sch.1, para.4(4).

refused, or withdrawn or abandoned, the sequestration ceases to be a minimal asset case.²⁶

Effect of decision that minimal asset case should cease to be such

19–18 Where a minimal asset case ceases to be such, the Bankruptcy (Scotland) Act 2016 applies to the sequestration subject to certain modifications.²⁷ These are:

- (a) The debtor is required to send to the trustee a statement of assets and liabilities within the period of seven days beginning with *either* the expiry of the period for appeal (if no appeal against the decision of AiB is taken) *or* the day on which notice of the refusal of the appeal is given or the day on which the appeal is withdrawn or abandoned as the case may be (if an appeal against the decision of AiB is taken).²⁸
- (b) The provisions for the calling of the statutory meeting apply subject to the modification that the time limit for the calling of the statutory meeting runs from the day the sequestration ceases to be a minimal asset case rather than the date of sequestration.²⁹
- (c) The trustee's obligation to obtain an account of the debtor's current state of affairs at six-monthly intervals is modified to an obligation to obtain a written account of the debtor's current state of affairs in such form as may be prescribed within 60 days beginning with the day on which the sequestration ceases to be a minimal asset case and at six-monthly intervals thereafter.³⁰

²⁶ Bankruptcy (Scotland) Act 2016 Sch.1, para.4(5).

²⁷ Bankruptcy (Scotland) Act 2016 Sch.1, para.5(1).

²⁸ Bankruptcy (Scotland) Act 2016 Sch.1, para.5(2).

²⁹ Bankruptcy (Scotland) Act 2016 Sch.1, para.5(3).

³⁰ Bankruptcy (Scotland) Act 2016 Sch.1, para.5(4).

CHAPTER 20

ALTERNATIVES TO SEQUESTRATION: INTRODUCTION AND OVERVIEW

INTRODUCTION

Debtor access to sequestration is now more readily available than at any previous time.¹ There may be a number of reasons, however, why a debtor would prefer not to go down this particular route. These include the stigma attaching to sequestration (despite attempts to reduce this)²; the serious effects of sequestration, including the restrictions which flow from it and, if relevant, any subsequent bankruptcy restrictions order³; a desire to pay debts in full; and the requirement to pay an upfront fee when applying for sequestration.⁴ The debtor may therefore wish to explore other options for dealing with financial difficulties. **20-01**

Depending on the seriousness of the debtor's financial difficulties and ability to repay, there may be a number of alternatives to sequestration open to the debtor. These include voluntary arrangements with creditors; a composition at common law; the debt arrangement scheme; and a trust deed for creditors. In contrast to sequestration, these are options which may only be initiated by, rather than imposed on, the debtor. In some circumstances, a judicial factor may be appointed to a debtor. Such an appointment will normally be imposed on the debtor rather than sought by the debtor, and a judicial factor is therefore different from the other options mentioned to that extent. Since the appointment of a judicial factor may, however, be an alternative to sequestration, it is considered here as such. **20-02**

Debtors encountering financial difficulties are encouraged to seek appropriate advice as to the options open to them, and indeed such advice is a requirement prior to the debtor applying for sequestration or a debt payment programme or signing a trust deed for creditors. Advice is available from a wide range of sources including free and fee-charging money advisers, solicitors and insolvency practitioners. Debtors should receive advice on the most appropriate option for their circumstances. Ultimately, however, the choice of option is the debtor's choice. The Scottish Executive in its consultation paper *Personal Bankruptcy Reform in Scotland: A Modern Approach* issued in November 2003 sought views on the possibility of diverting suitable debtors away from sequestration into a debt payment programme.⁵ The responses to the consultation were mixed, however, and the matter was not pursued.⁶ The Scottish **20-03**

¹ See Ch.2.

² See Ch.2.

³ See Ch.17.

⁴ See Ch.7.

⁵ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), paras 6.10–6.20 and associated questions.

⁶ Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (June 2004), paras 5.68–5.70.

Government's *Consultation on Bankruptcy Law Reform* in February 2012 returned to the question of whether the debt arrangement scheme should be the default option for debtors who were able to pay their debts in full within a defined period,⁷ but the majority of consultees were not in favour of this proposal⁸ and again the matter was not pursued. The position therefore remains that the choice is the debtor's. Whether this is appropriate is a matter of debate.

VOLUNTARY ARRANGEMENTS WITH CREDITORS

- 20-04** A debtor who is facing financial difficulties may seek to enter into arrangements with individual creditors either before or after enforcement action has been taken. Such arrangements might include an arrangement to pay by instalments, an extension of time to pay, an agreement to write off part of the debt,⁹ a moratorium on creditor action for an agreed period of time, or any combination of these. The debtor might enter into different arrangements with different creditors. There are also statutory provisions whereby a debtor may obtain an extension of time to pay, in certain circumstances, by means of a time to pay direction or order under the Debtors (Scotland) Act 1987 or a time order under the Consumer Credit Act 1974. These provisions are, however, beyond the scope of this work.
- 20-05** Often, particularly where there are multiple creditors, the debtor will seek assistance in negotiating arrangements with creditors. Whether such arrangements are likely to be acceptable to creditors will depend on a number of factors, including the amount of the debt; the debtor's previous payment record; the existence and number of other creditors and the amount of their debts; the stage at which the debtor makes the approach; the way in which the approach is made; the nature of the offer which the debtor is in a position to make; the nature and extent of the debtor's difficulties and the reason for them; the likelihood of the arrangements being adhered to and so on. The success of any such arrangements will in turn depend on factors such as the debtor's ability to maintain them and the attitude of other creditors who have not entered into such arrangements.
- 20-06** Consideration should be given to whether any arrangement entered into may be subject to possible challenge at a later stage.¹⁰

COMPOSITION

- 20-07** A debtor may enter into a composition at common law as an alternative to sequestration or other options.
- 20-08** A composition of this nature is a formal agreement between a debtor and some or all of the debtor's creditors whereby the participating creditors agree to discharge the debtor in return for part payment of their debts in accordance with the terms of the agreement. It will usually provide for the debtor to retain the debtor's assets and pay the creditors an agreed sum, usually in instalments,

⁷ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Pt 10, para.10-10.4.3.

⁸ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of the Responses* (August 2012), paras 5.1-5.6 and 5.12.

⁹ See also composition at para.20-07 onwards.

¹⁰ The challenge of prior transactions is discussed in Ch.14.

out of future income. All creditors must be treated rateably. If a composition is with some creditors only, any non-participating creditor will remain free to take steps to enforce payment their debt. This may cause the debtor to default. If the debtor defaults, the creditors may pursue the debtor for payment of the full amount of the original debt less any sums paid under the composition.

It is thought that compositions at common law are now rare, particularly in view of the availability of the debt arrangement scheme and protected trust deeds for creditors, both of which allow dissenting creditors to be bound to an arrangement which is acceptable to other creditors within certain limits. The debt arrangement scheme and trust deeds for creditors are discussed further below. **20-09**

THE DEBT ARRANGEMENT SCHEME

The debt arrangement scheme is a statutory scheme which was introduced in 2004 and is designed to allow certain debtors to enter into a debt payment programme to repay their debts over an extended period of time while protected from most enforcement action by creditors. **20-10**

The debt arrangement scheme is discussed in Ch.21. **20-11**

TRUST DEEDS FOR CREDITORS

A trust deed for creditors is a voluntary deed whereby a debtor conveys specified assets to a named trustee to be administered for the benefit of creditors and the settlement of debts. **20-12**

Trust deeds are discussed in Ch.22. **20-13**

JUDICIAL FACTORS

Judicial factors may be appointed in a wide range of circumstances, of which insolvency is only one. **20-14**

A judicial factor may be appointed under specific statutory provisions or at common law. They are an officer of the court and supervised in carrying out their functions by the Accountant of Court. **20-15**

Judicial factors appointed in circumstances of insolvency are discussed in Ch.23. **20-16**

CHAPTER 21

DEBT ARRANGEMENT SCHEME

INTRODUCTION

The debt arrangement scheme is a statutory scheme designed to allow certain types of debtor to enter into a debt payment programme to repay their debts over an extended period of time while protected from most enforcement action by creditors. Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 sets out the framework of the scheme, while the majority of the detailed provisions are set out in secondary legislation, currently the Debt Arrangement Scheme (Scotland) Regulations 2011¹ as amended and the Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011² as amended. **21-01**

The scheme came into force on 30 November 2004.³ The Debt Arrangement Scheme (Scotland) Regulations 2011 came into force on 1 July 2011 and apply to debt payment programmes approved under earlier regulations with certain exceptions.⁴ The Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 also came into force on 1 July 2011 but, with one exception, do not affect debt payment programmes in respect of which a request for the consent of creditors was made before that date.⁵ The effect of subsequent amendments is discussed further below. **21-02**

It has been suggested that the scheme should be extended to the whole of the UK.⁶ **21-03**

BACKGROUND TO THE SCHEME⁷

The Scottish Law Commission in its *Fourth Memorandum on Diligence: Debt Arrangement Schemes* in 1980⁸ identified a gap in the provision made by Scots law for helping wage earners in multiple debt to arrange for payment of those **21-04**

¹ Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141).

² Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 (SSI 2011/238).

³ See the Debt Arrangement and Attachment (Scotland) Act 2002 (Commencement No.2 and Revocation) Order 2004 (SSI 2004/416) which revoked the earlier Debt Arrangement and Attachment (Scotland) Act 2002 (Commencement) Order 2004 (SSI 2004/401) which contained an error.

⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.50.

⁵ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.7. As to a request for the consent of creditors, see further at para.21-63 onwards.

⁶ See Financial Inclusion Commission, *Improving the Financial Health of the Nation* (March 2015), Recommendation 14.

⁷ For a detailed account, see McKenzie Skene, DW, "Dealing with multiple debt – an examination of the proposal for a debt arrangement scheme in Scotland" [2002] *Insolvency Lawyer* 212.

⁸ Scottish Law Commission, *Fourth Memorandum on Diligence: Debt Arrangement Schemes* (Scot. Law Com. Consultative Memorandum No.50).

debts to the benefit of both debtor and creditors.⁹ Having provisionally concluded that the introduction of a “relatively simple and inexpensive process” to allow such debtors to make orderly and regular payments of their debts to their creditors would be desirable,¹⁰ it sought views on proposals for the introduction of debt arrangement schemes “designed to assist a wage earner with multiple debts to make orderly and regular payment of the debts to his several creditors”.¹¹ Following consultation, it recommended the introduction of such schemes to assist consumer and small traders with multiple debts.¹² This recommendation was not implemented at the time, but the idea of introducing some form of debt arrangement scheme was revived as a result of the debate around the Bill which ultimately became the Abolition of POUNDINGS and WARRANT SALES ACT 2000 and the general review of the law of diligence to which it gave rise.

- 21-05** Following a reference to the Scottish Law Commission by the then Scottish Executive Minister for Justice, made as a result of the original proposal for the Abolition of POUNDINGS and WARRANT SALES Bill,¹³ the Scottish Law Commission issued its *Discussion Paper on POUNDING and SALE: Effective Enforcement and Debtor Protection*¹⁴ which, inter alia, re-opened the question of the introduction of debt arrangement schemes. The subsequent *Report on POUNDING and WARRANT SALE*¹⁵ went on to recommend that appropriate consideration be given to the introduction of such schemes,¹⁶ although it made no detailed recommendations as to how they should operate, recommending only that this be the product of consultation with both debtor and creditor interests.¹⁷
- 21-06** A working group established by the Scottish Executive Minister for Justice for the purpose of devising an acceptable replacement for pouncing and warrant sale also went on to recommend the introduction of a statutory debt arrangement scheme in its report, *Striking the balance—a new approach to debt management*.¹⁸ Following a positive response to the consultation on that report, the Scottish Executive announced that it would implement the working group’s approach and would issue detailed proposals for a statutory debt arrangement scheme for consultation in due course.
- 21-07** These proposals appeared, inter alia, in the Scottish Executive’s consultation paper *Enforcement of Civil Obligations in Scotland*,¹⁹ which resulted from a

⁹ Scottish Law Commission, *Fourth Memorandum on Diligence: Debt Arrangement Schemes* (Scot. Law Com. Consultative Memorandum No.50), para.1.2.

¹⁰ Scottish Law Commission, *Fourth Memorandum on Diligence: Debt Arrangement Schemes* (Scot. Law Com. Consultative Memorandum No.50), para.1.4.

¹¹ Scottish Law Commission, *Fourth Memorandum on Diligence: Debt Arrangement Schemes* (Scot. Law Com. Consultative Memorandum No.50), para.1.1.

¹² Scottish Law Commission, *Report on Diligence and Debtor Protection* (Scot. Law Com. No.95, 1985), Ch.4.

¹³ See Scottish Law Commission, *Report on POUNDING and WARRANT SALE* (Scot. Law Com. No.177, 2000) para.1.2.

¹⁴ Scottish Law Commission, *Discussion Paper on POUNDING and SALE: Effective Enforcement and Debtor Protection* (Scot. Law Com. Discussion Paper No.110).

¹⁵ Scottish Law Commission, *Report on POUNDING and WARRANT SALE* (Scot. Law Com. No.177, 2000).

¹⁶ Scottish Law Commission, *Report on POUNDING and WARRANT SALE* (Scot. Law Com. No.177, 2000), para.5.61.

¹⁷ Scottish Law Commission, *Report on POUNDING and WARRANT SALE* (Scot. Law Com. No.177, 2000).

¹⁸ See Minister for Justice, *Striking the balance—a new approach to debt management* (July 2001).

¹⁹ Scottish Executive, *Enforcement of Civil Obligations in Scotland* (April 2002).

wider review of the law of diligence undertaken following the introduction of the Abolition of Poidings and Warrant Sales Bill. Prior to the deadline for responses to that consultation paper, however, the Debt Arrangement and Attachment (Scotland) Bill was introduced into the Scottish Parliament containing provisions setting out the framework for the new debt arrangement scheme and giving the Scottish Ministers power to make provision for the details of the scheme by way of regulations. The rationale for this was the importance attached to establishing a debt arrangement scheme as soon as possible, and it was promised that the relevant regulations would be prepared in the light of the responses to the consultation.²⁰ The effect, however, was that the consultation exercise was effectively rendered nugatory in relation to the basic framework of the scheme. There were also concerns as to whether some of the matters left to the regulations should more properly have been dealt with in the primary legislation, particularly since the Bill initially provided for the regulations to be subject to the negative resolution procedure only.²¹ These concerns were partially alleviated following an amendment to provide for the first regulations to be subject to the affirmative resolution procedure.²²

Following the passing of the Debt Arrangement and Attachment (Scotland) Act 2002, draft Debt Arrangement Scheme (Scotland) Regulations were issued for limited consultation. Following that consultation, a revised draft of the regulations was laid before and approved by the Scottish Parliament to become the Debt Arrangement Scheme (Scotland) Regulations 2004.²³ Following amendment by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2004,²⁴ those regulations came into force on 30 November 2004. 21-08

CHANGES TO THE SCHEME

The scheme has been subject to a number of changes since its introduction. As introduced, it was open to individual debtors only.²⁵ Take up of the scheme was low initially, and as a result, the Scottish Executive carried out an internal review of the operation of the scheme which was completed in early 2006 and formed the basis of its advice to the Scottish Ministers on reform of the scheme as part of its wider reforms on bankruptcy and diligence generally.²⁶ The review was not, however, published or formally consulted on. Following the review, inter alia, an amendment was made to the Bankruptcy and Diligence etc. (Scotland) Bill which was then going through the Scottish Parliament. This resulted in the enactment of an enabling provision permitting the Scottish Ministers to make provision in regulations for an element of debt relief within the scheme,²⁷ which was duly provided for by the Debt Arrangement Scheme 21-09

²⁰ Debt Arrangement and Attachment (Scotland) Bill, SP Bill 52-PM, para. 17.

²¹ See McKenzie Skene, DW, "Dealing with multiple debt—an examination of the proposal for a debt arrangement scheme in Scotland" [2002] *Insolvency Lawyer* 212.

²² Debt Arrangement and Attachment (Scotland) Act 2002 s.62(4).

²³ Debt Arrangement Scheme (Scotland) Regulations 2004.

²⁴ Debt Arrangement Scheme (Scotland) Amendment Regulations 2004.

²⁵ It was initially proposed that while the scheme should include small traders, it should not include business debtors: see Scottish Executive, *Enforcement of Civil Obligations in Scotland*, para. 4.153 and Q. 4 D. 4. This distinction would, however, have been difficult to draw as well as arbitrary and difficult to justify and was, thankfully, abandoned: for a more detailed discussion, see McKenzie Skene, DW, "Dealing with multiple debt—an examination of the proposal for a debt arrangement scheme in Scotland" [2002] *Insolvency Lawyer* 212.

²⁶ See further Ch.2.

²⁷ Debt Arrangement and Attachment (Scotland) Act 2002 s.7A as added by the Bankruptcy and Diligence etc. (Scotland) Act 2007 s.211(3).

(Scotland) Amendment Regulations 2007.²⁸ At the same time, a number of other amendments were made simplifying and rationalising elements of the scheme.²⁹ A review of the scheme in 2008 examined the effects of these changes and concluded that despite improved take up of the scheme, it was still not as high as anticipated and usage of the scheme varied greatly across Scotland.³⁰ The review suggested a number of options for the future development of the scheme and indicated that the requirement for further consultation on those options would be re-assessed the following year.³¹ No further formal consultation took place, however, prior to further changes being provided for by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009.³² Following concerns expressed by some stakeholders, however, these regulations were revoked,³³ and a formal consultation on further change took place in the autumn/winter of 2009.³⁴ A report on that consultation was published in 2010.³⁵ As a result, a number of different changes were made to the scheme and the Debt Arrangement Scheme (Scotland) Regulations 2004 were revoked and replaced by the Debt Arrangement Scheme (Scotland) Regulations 2011³⁶ and the Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011.³⁷ A further review of the scheme was also carried out in 2011.³⁸ It examined the ongoing effects of the 2007 changes and found that uptake of the scheme had continued to improve and geographical differences in uptake were less but there were still issues with the scheme which it was hoped would be addressed by the 2011 changes.

- 21–10** Further proposed changes to the scheme were consulted on as part of the Scottish Government's wide-ranging *Consultation on Bankruptcy Law Reform* published in February 2012. One such proposal was to make the scheme the default option where a debtor would be able to pay their debts through the scheme within eight years.³⁹ The majority of respondents were not in favour of this proposal, although there was some support for a shorter period,⁴⁰ and the Scottish Government response to the consultation accordingly indicated that the scheme would be the "expected option" where the debtor was assessed as being able to pay debts in full within 48 months.⁴¹ Another proposal was to introduce a business debt arrangement scheme for sole traders and partnerships.⁴² This proposal was supported by respondents⁴³ and has been taken

²⁸ Debt Arrangement Scheme (Scotland) Amendment Regulations 2007 (SSI 2007/262).

²⁹ Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007 (SSI 2007/187) as corrected by correction slip.

³⁰ Accountant in Bankruptcy, *Debt Arrangement Scheme Review* (2008).

³¹ Accountant in Bankruptcy, *Debt Arrangement Scheme Review* (2008) p.2.

³² Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 (SSI 2009/234).

³³ See the Debt Arrangement Scheme (Scotland) Revocation Regulations 2009 (SSI 2009/258) and accompanying Executive Note.

³⁴ See Accountant in Bankruptcy, *The Debt Arrangement Scheme—Improving Access: A Consultation Document* (2009).

³⁵ Accountant in Bankruptcy, *The Debt Arrangement Scheme—Improving Access: Report on Public Consultation* (2010).

³⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141).

³⁷ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 (SSI 2011/238).

³⁸ Accountant in Bankruptcy, *The Debt Arrangement Scheme Review* (2011).

³⁹ Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), para.10.4.2.

⁴⁰ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012).

⁴¹ Scottish Government, *Response to the Consultation on Bankruptcy Law Reform*, para.5.

⁴² Scottish Government, *Consultation on Bankruptcy Law Reform* (2012), Pt 11.

⁴³ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012).

forward for certain entities but not sole traders, to whom the original scheme still applies.⁴⁴ A further review of the scheme, which took account of the results of the consultation, was also carried out in 2012⁴⁵ and identified a number of further areas for development. As a consequence, further changes were made to the scheme by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013⁴⁶ and by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014,⁴⁷ which also made provision for a modified form of the debt arrangement scheme to apply to specified entities. The Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 came into force on 2 July 2013 and the resulting changes apply, so far as relevant, to existing debt payment programmes with certain exceptions.⁴⁸ The majority of the provisions of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 came into force on 11 December 2014 and the remaining provisions came into force on 1 April 2015. The resulting changes apply, so far as relevant, to existing debt payment programmes with certain exceptions.⁴⁹ Some further corrective changes were made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2015.⁵⁰ The resulting changes do not apply to any debt payment programme in respect of which an application for approval was made before 27 June 2015.⁵¹

A further review of the scheme took place in 2016 resulting in a consultation on a number of aspects of the scheme including the new business debt arrangement scheme.⁵² A summary of the responses was published in July 2016⁵³ and an interim response setting out a number of proposed changes and seeking further views on particular issues was published in June 2017.⁵⁴ The interim response indicates that recommendations for legislation to implement these proposals will be taken forward at the earliest opportunity. The proposed changes are discussed below in the context of the current provisions where relevant.

OUTLINE OF THE SCHEME

The scheme allows individual debtors and certain entities to enter into a debt payment programme for the payment of debts. The debtor must receive money advice before applying for a debt payment programme and the application must be made on the debtor's behalf by an approved money adviser. In certain circumstances, two individual debtors may apply together for a joint debt payment programme. The application is made to the debt arrangement scheme administrator. In principle, each creditor of the debtor (or, in the case of a joint debt payment programme, both debtors) must consent to the application, and in certain circumstances, a creditor will be deemed to have so consented.

⁴⁴ The scope of the scheme is discussed in more detail at para.21–40 onwards.

⁴⁵ See Accountant in Bankruptcy, *Debt Arrangement Scheme Review* (2012).

⁴⁶ Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 (SSI 2013/225).

⁴⁷ Debt Arrangement Scheme (Scotland) Amendment Regulations 2013.

⁴⁸ Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.20.

⁴⁹ Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 reg.23.

⁵⁰ Debt Arrangement Scheme (Scotland) Amendment Regulations 2015 (SSI 2015/216).

⁵¹ Debt Arrangement Scheme (Scotland) Amendment Regulations 2015 reg.5.

⁵² Accountant in Bankruptcy, *Debt Arrangement Scheme Consultation 2016* (March 2016).

⁵³ Accountant in Bankruptcy, *Debt Arrangement Scheme Consultation 2016: The Report of the Summary of Responses* (July 2016).

⁵⁴ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017).

Where all creditors have (or are deemed to have) consented, the debt arrangement scheme administrator must approve the application. In any other case, the debt arrangement scheme administrator must approve the application if it is “fair and reasonable”. All debt payment programmes are subject to specified standard conditions and may be made subject to one or more specified discretionary conditions. A debt payment programme will generally provide for the debtor to make a periodic payment from surplus income and will not generally involve the realisation of assets. Payments are made to an approved payments distributor who distributes them to the creditors included in the debt payment programme. There are restrictions on the debtor taking on new credit during the debt payment programme, but the debtor is not prevented from granting a trust deed for creditors or applying for sequestration subject to the eligibility requirements. With some exceptions, creditors are prevented from taking enforcement action against the debtor. A debt payment programme may be varied on the application of the debtor or a creditor and in certain other circumstances and may be revoked in defined circumstances including default by the debtor. A limited element of debt relief is provided for automatically on the successful completion of a debt payment programme and provision is also made for composition in defined circumstances. There is a debt arrangement scheme register. Some additional requirements and modifications apply in the case of debtors other than individuals.

THE DEBT ARRANGEMENT SCHEME ADMINISTRATOR

- 21–13** The Debt Arrangement and Attachment (Scotland) Act 2002 provides for many of the administrative functions relating to the scheme to be carried out by the Scottish Ministers, but makes provision for those functions (other than those relating to the making of secondary legislation) to be delegated by order.⁵⁵ The functions of the Scottish Ministers have been delegated to AiB since the inception of the scheme.⁵⁶ The person exercising these functions is referred to as the debt arrangement scheme administrator.⁵⁷

MONEY ADVISERS

- 21–14** Compulsory money advice was seen as a key element of the scheme on its introduction, and although there have been a number of changes in the role of money advisers, they retain a central role in the operation of the scheme. Section 3(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 provides that a debtor may not make an application for the approval or variation of a debt payment programme unless the debtor has obtained the advice of a money adviser in relation to: (i) the debtor’s financial circumstances; (ii) the effect of the proposed debt payment programme or variation as the case may be; and (iii) the preparation of the application.⁵⁸ This is subject to the proviso added by the Bankruptcy and Diligence etc. (Scotland) Act 2007 that contrary provision may be made in regulations.⁵⁹ The Debt Arrangement Scheme

⁵⁵ Debt Arrangement and Attachment (Scotland) Act 2002 s.8.

⁵⁶ Debt Arrangement and Attachment (Scotland) Act 2002 (Transfer of Functions to the Accountant in Bankruptcy) Order 2004 (SSI 2004/448).

⁵⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2.

⁵⁸ Debt Arrangement and Attachment (Scotland) Act 2002 s.3(1).

⁵⁹ Debt Arrangement and Attachment (Scotland) Act 2002 s.3(3) as added by the Bankruptcy and Diligence etc. (Scotland) Act 2007 s.212(3). See also Debt Arrangement and Attachment

(Scotland) Amendment Regulations 2009 sought to remove the requirement for compulsory money advice on the basis of widening access to the scheme. This was, however, one of the controversial elements of those regulations which led to their revocation before they came into force.⁶⁰ The Debt Arrangement Scheme (Scotland) Regulations 2011 therefore retain the requirement for a debtor to obtain the advice of a money adviser in applying for a debt payment programme,⁶¹ although they allow an application for variation to be made by an individual debtor (or debtors in the case of a joint debt payment programme) without the involvement of a money adviser.⁶² Money advisers also have a variety of other functions and duties under the Debt Arrangement Scheme (Scotland) Regulations 2011.⁶³

Approval of money advisers

A money adviser is defined as any person who has been approved as a person who may give advice to a debtor for the purposes of s.3(1) of the Debt Arrangement and Attachment (Scotland) Act 2002.⁶⁴ Originally, any person wishing to be a money adviser for the purposes of the scheme had to submit an application for approval as a money adviser to the debt arrangement scheme administrator, who was required to approve the application if satisfied that the applicant was a fit and proper person to be a money adviser.⁶⁵ Certain persons were disqualified from being money advisers.⁶⁶ An approval, unless revoked or suspended,⁶⁷ was valid for a specified period, originally two years,⁶⁸ latterly three years.⁶⁹ In order to widen the range and increase the number of money advisers,⁷⁰ the Debt Arrangement Scheme (Scotland) Regulations 2011 provided that, with the exception of any person disqualified from being a money adviser, those persons falling within certain defined categories qualified automatically as approved money advisers. This approach also reduced to some extent the burden of administration on the debt arrangement scheme administrator. The change was not, however, entirely uncontroversial, in so far as it moved away from a system where the requisite knowledge and skills of those applying for approval was individually assessed to a system where the requisite knowledge and skills were presumed to exist by virtue of the fact that a person had a particular qualification or worked for a particular person or organisation. In some cases, this may be justified—in particular where it is linked to a qualification which can be seen to ensure the requisite knowledge and skills—but in others,

21–15

(Scotland) Act 2002 s.7(2)(bb) as added by the Bankruptcy and Diligence etc. (Scotland) Act 2007 s.212(5)(a), which provides that the regulations may, in particular, make provision about the circumstances in which a debtor is entitled to make an application for the approval or variation of a debt payment programme where the debtor has not obtained such advice.

⁶⁰ See para.21–09.

⁶¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.7(1).

⁶² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(1), (5) (as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014).

⁶³ See para.21–22 onwards.

⁶⁴ Debt Arrangement and Attachment (Scotland) Act 2002 s.9(1).

⁶⁵ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.8(1), (2). Regulation 8(3) went on to provide that, subject to specified exceptions, a person was to be regarded as fit and proper if, but not only if, they satisfied the training and certification requirements set out in that provision.

⁶⁶ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.10.

⁶⁷ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.9.

⁶⁸ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.8(4).

⁶⁹ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.8(4) as amended by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007 (SSI 2007/187) reg.3(3).

⁷⁰ See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011.

it may not be. Any money adviser approved under the previous system continued to be approved as a money adviser for the purposes of the scheme.⁷¹

21–16 The categories of person who are currently automatically approved money advisers under the Debt Arrangement Scheme (Scotland) Regulations 2011 are:

- (a) A person qualified to act as an insolvency practitioner under s.390 of the Insolvency Act 1986.⁷² A money adviser to a debtor who is a legal person, trust or unincorporated body must be a person in this category.⁷³
- (b) A person who works for such an insolvency practitioner and has been authorised by them to act on their behalf as a money adviser for the purposes of the scheme.⁷⁴
- (c) A person who works as a money adviser for an organisation which has been awarded accreditation at Type 2 level or above against the Scottish National Standards for Information and Advice Provision.⁷⁵
- (d) A person who works as a money adviser for a citizens advice bureau which is a full member of the Scottish Association of Citizens Advice Bureau—Citizens Advice Scotland.⁷⁶
- (e) A person who works as a money adviser for a local authority.⁷⁷
- (f) A person who is approved by the debt arrangement scheme administrator under reg.9 of the Debt Arrangement Scheme (Scotland) Regulations 2011.⁷⁸ Regulation 9 largely replicates the original procedure for approval as a money adviser for persons who do not fall into one of the other categories specified. Such a person may submit an application in the required form to the debt arrangement scheme administrator, who may approve the application if satisfied that the applicant has undergone training on the matters specified in Sch.3 to the regulations, is not a person disqualified from being a money adviser and is a fit and proper person to be a money adviser.⁷⁹

21–17 The persons who are disqualified from being a money adviser are:

- (a) A sheriff officer or messenger-at-arms or any employee of such a person.⁸⁰
- (b) A person or body providing financial services, or financial advice other than money advice, in the course of a business or otherwise for profit, or any employee of such a person, with the exception of solicitors, chartered or certified accountants or credit unions.⁸¹
- (c) A person providing debt collection services or any employee of such a person.⁸²

⁷¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.49(1).

⁷² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.8(a). For a detailed discussion of qualified insolvency practitioners, see Ch.4.

⁷³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.8A (as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014).

⁷⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.8(b).

⁷⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.8(c).

⁷⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.8(d).

⁷⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.8(e).

⁷⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.8(f).

⁷⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.9(1), (2) (as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014).

⁸⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.10(a).

⁸¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.10(b).

⁸² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.10(c).

- (d) A person convicted of an offence involving theft, fraud or other dishonesty.⁸³
- (e) A person subject to a bankruptcy restrictions order (including an interim order) made or a bankruptcy restrictions undertaking given in Scotland, England or Wales.⁸⁴
- (f) A person subject to a disqualification order made or disqualification undertaking given under the Company Directors Disqualification Act 1986.⁸⁵
- (g) A person whose approval is revoked or suspended under reg.11.⁸⁶

It is notable that a person is not disqualified from being a money adviser solely by reason of being an undischarged bankrupt or having granted a trust deed for creditors under which they remain undischarged. It may be questioned whether this is appropriate. 21-18

A money adviser must not be an associate of the debtor within the meaning of s.229 of the Bankruptcy (Scotland) Act 2016.⁸⁷ 21-19

The interim response to the 2016 review of the debt arrangement scheme proposes to introduce a requirement for all money advisers to meet Financial Conduct Authority requirements in relation to the provision of debt advice.⁸⁸ 21-20

Fees

A money adviser may charge the debtor a fee for their services, but only if they have informed the debtor of the existence of free money advice and provided the debtor with specified information about the availability of such advice and the debtor has agreed in writing to pay a fee.⁸⁹ Such a fee may not, however, be included as a debt in the debt payment programme.⁹⁰ The interim response to the 2016 review of the debt arrangement scheme proposes to introduce a requirement for disclosure of such fees in the interests of transparency.⁹¹ 21-21

Functions and duties of money advisers

The general functions and duties of a money adviser are set out in reg.12 of the Debt Arrangement Scheme (Scotland) Regulations 2011. Originally, there was no distinction between the functions and duties of money advisers providing free money advice and money advisers charging a fee. However, the Debt Arrangement Scheme (Scotland) Regulations 2011 introduced such a distinction by providing for certain of the functions and duties of a money adviser relating to the ongoing administration of debt payment programmes to be assumed by the debt arrangement scheme administrator where the money adviser did not 21-22

⁸³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.10(d).

⁸⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.10(c).

⁸⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.10(f).

⁸⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.10(g). Revocation or suspension under reg.11 is discussed further at para.21-28 onwards.

⁸⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.7(2). For the meaning of associate within the meaning of s.229 of the Bankruptcy (Scotland) Act 2016, see Ch.14.

⁸⁸ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.6.

⁸⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(2).

⁹⁰ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1) and 3(2)(c) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.6(1) and (2) respectively.

⁹¹ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.5.

charge a fee. This change was intended to encourage more private sector money advisers to become involved in providing the debt arrangement scheme on the basis that a fee could be charged for carrying out those functions and duties and to relieve money advisers in the free advice sector of the burden of carrying out those functions and duties unpaid in order to enable them to assist more debtors at the initial stages.⁹²

21–23 All money advisers have the following general functions and duties, which must be carried out using the common financial tool in the case of a debt payment programme for an individual debtor⁹³:

- (a) provide money advice to the debtor⁹⁴;
- (b) liaise with creditors on behalf of the debtor⁹⁵;
- (c) advise on, and assist with, an application for approval, variation or revocation of a debt payment programme or an application for review of a determination of the debt arrangement scheme administrator under reg.47⁹⁶;
- (d) prepare and submit an application on behalf of the debtor, such application being in accordance with the common financial tool in the case of a debt payment programme for an individual debtor⁹⁷;
- (e) provide evidence or information about a debtor's participation in a debt payment programme to the debt arrangement scheme administrator as required⁹⁸; and
- (f) act as a lay representative in court, but only where they have accepted instructions to do so⁹⁹; this function is, therefore, voluntary.

21–24 Money advisers charging a fee or advising a debtor which is a legal person, trust or unincorporated body, referred to as continuing money advisers, have the following additional general functions and duties¹⁰⁰:

- (a) Review the debt payment programme in every twelfth month, in accordance with the common financial tool in the case of a debt payment programme for an individual debtor.¹⁰¹ In the case of a legal person, trust or unincorporated body, the money adviser is required to include in the review a declaration of viability and, if they are unable to do so because they consider that the debtor does not meet the

⁹² See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011. The change was initially provided for in the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 which, as noted at para.21–09, were revoked before coming into force.

⁹³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 with effect from 1 April 2015. The common financial tool discussed in Ch.11.

⁹⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(1)(a).

⁹⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(1)(b).

⁹⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(1)(c) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.16(2). Reviews under reg.47 are discussed further at paras 21–24 and 21–26.

⁹⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(1)(d) as amended by the Debt Arrangement Scheme (Scotland) Regulations 2014 with effect from 1 April 2015.

⁹⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(1)(e).

⁹⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(1)(f).

¹⁰⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(3) (as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014).

¹⁰¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(3)(a) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 with effect from 1 April 2015.

- requirements for such a declaration, to apply for revocation of the debt payment programme as soon as practicable.¹⁰²
- (b) Give written notice to the debt arrangement scheme administrator as soon as reasonably practicable of:
- (i) the appointment or resignation of the money adviser or, in the case of a debtor which is a legal person, trust or unincorporated body, the nominated person¹⁰³;
 - (ii) in the case of resignation, the reasons for resignation and the full name and business address of the replacement money adviser or nominated person¹⁰⁴; and
 - (iii) any change of address by the debtor.¹⁰⁵
- (c) Provide information required by the debt arrangement scheme administrator about the amount of the money adviser's fee.¹⁰⁶

A money adviser advising a legal person, trust or unincorporated body also has a duty, on becoming aware of information which causes them to believe that a ground for revocation of the debt payment programme exists, to apply for such revocation as soon as reasonably practicable.¹⁰⁷ **21-25**

Where there is no continuing money adviser, the debt arrangement scheme administrator effectively becomes responsible for the 12 month review. The debt arrangement scheme administrator is required to invite the debtor to provide a statement of their current financial circumstances and, on receipt, may advise the debtor that they may wish to take the advice of a money adviser as to a review of the programme.¹⁰⁸ **21-26**

All money advisers are required to have regard to guidance issued by the debt arrangement scheme administrator when carrying out their functions.¹⁰⁹ **21-27**

Revocation or suspension of approval

The debt arrangement scheme administrator may revoke or suspend the approval of a money adviser where: **21-28**

- (a) the money adviser fails without good cause to provide the debt arrangement scheme administrator with evidence or information

¹⁰² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12A(a), (b) (as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014). Declarations of viability are discussed at para.21-62 and revocation is discussed at para.21-118 onwards.

¹⁰³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(3)(b)(i) (as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014). Nominated persons are discussed at para.21-62.

¹⁰⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(3)(b)(ii), (iia) (as amended and inserted respectively by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014).

¹⁰⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(3)(b)(iii).

¹⁰⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(3)(c) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.6(3).

¹⁰⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12A(c) (as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014). Revocation is discussed at para.21-118 onwards.

¹⁰⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(4).

¹⁰⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.12(5). The current guidance is available on the Debt Arrangement Scheme website, <http://www.dasscotland.gov.uk> [Accessed 19 September 2017].

which the debt arrangement scheme administrator has requested regarding the operation of a debt payment programme¹¹⁰; or

- (b) in the opinion of the debt arrangement scheme administrator, the money adviser has failed without good cause to perform any of their functions and continues to fail to do so after a period of two weeks from the date of written notice of the failure.¹¹¹

21–29 The debt arrangement scheme administrator is required to give written notice to a debtor of the revocation or suspension of the approval of the money adviser to that debtor.¹¹² There is no provision for review of or appeal against the debt arrangement scheme administrator's decision to revoke or suspend the approval of a money adviser. The decision would, however, be subject to judicial review.

21–30 It was originally provided that where a money adviser resigned or their approval was suspended or revoked, they should assist the debtor to find a replacement money adviser.¹¹³ This provision was subsequently amended to require the money adviser to assist the debtor in finding a replacement money adviser in the case of resignation or suspension of approval only.¹¹⁴ The Debt Arrangement Scheme (Scotland) Regulations 2011 altered the position by requiring the debt arrangement scheme administrator to assist the debtor in finding a new money adviser where a money adviser resigned or their approval was suspended or revoked.¹¹⁵ The position has been altered again by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014, however, which replaced that requirement with a requirement for a money adviser who intends to resign to assist the debtor in finding a replacement money adviser before resigning.¹¹⁶ Oddly, therefore, there no longer appears to be any requirement for either the debt arrangement scheme administrator or a money adviser whose approval has been suspended or revoked to assist a debtor in finding a replacement money adviser where the money adviser's approval has been suspended or revoked.

PAYMENTS DISTRIBUTORS

21–31 Payments made by a debtor under a debt payment programme are made to, and thereafter distributed to creditors by, a payments distributor.¹¹⁷

Approval of payments distributors

21–32 Payments distributors require to be approved as such.¹¹⁸ Originally, any person or body wishing to be a payments distributor for the purposes of the scheme had to submit an application in writing for approval as a payments distributor to the debt arrangement scheme administrator, who was required to approve the application if satisfied that the applicant was a fit and proper person or body to be a payments

¹¹⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.11(1)(a).

¹¹¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.11(1)(b).

¹¹² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.11(1)(c).

¹¹³ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.7(4) as enacted.

¹¹⁴ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.7(4) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2004.

¹¹⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.7(3).

¹¹⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.7(3) as substituted by the Debt Arrangement Scheme (Scotland) Regulations 2014.

¹¹⁷ Debt Arrangement and Attachment (Scotland) Act 2002 s.2(3)(c).

¹¹⁸ Debt Arrangement and Attachment (Scotland) Act 2002 s.2(5).

distributor.¹¹⁹ An approval could be made subject to any reasonable condition¹²⁰ and, unless revoked or suspended,¹²¹ was valid for a (renewable) period of three years.¹²² However, the Debt Arrangement Scheme (Scotland) Regulations 2011 now provide for the approval of payments distributors to take place following a tendering process, and the debt arrangement scheme administrator is required to invite tenders for persons or bodies to be approved as payments distributors by a fair, open and transparent tendering process.¹²³ A written application is still required¹²⁴ and, following the tendering process, the debt arrangement scheme administrator is required to approve an application if satisfied that the applicant is a fit and proper person or body to be a payments distributor.¹²⁵ An approval may be made subject to any reasonable condition¹²⁶ and, unless revoked or suspended,¹²⁷ is valid for the period specified in the approval or as part of the tendering process.¹²⁸ Any payments distributor approved under the previous system continued to be approved as a payments distributor for the purposes of the scheme.¹²⁹

The debt arrangement scheme administrator must consent to the appointment of a particular payments distributor in a particular debt payment programme¹³⁰ and, if they do not so consent, arrange for another approved payments distributor to act in that particular case.¹³¹ **21–33**

Fees

A payments distributor may not charge any fee to the debtor for acting as payments distributor,¹³² but may charge an administration fee to creditors participating in the debt payment programme which, including any value added tax, must be not more than 8 per cent of the sum to be paid to them.¹³³ **21–34**

Functions of payments distributors

Payments distributors have the following functions on behalf of the debtor¹³⁴: **21–35**

- (a) assist the money adviser with, and advise on, payments distributions¹³⁵;

¹¹⁹ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.13(1), (2). Regulation 13(3) went on to provide that, without prejudice to the generality of the requirement to be a fit and proper person or body, an applicant was not fit and proper if the applicant did not satisfy the criteria set out in Sch.5 to the regulations.

¹²⁰ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.13(4).

¹²¹ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.14.

¹²² Debt Arrangement Scheme (Scotland) Regulations 2004 reg.13(5).

¹²³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.14(2), (3)(b).

¹²⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.14(1).

¹²⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.14(3). Regulation 14(4) goes on to provide that, without prejudice to the generality of the requirement to be a fit and proper person or body, an applicant is not fit and proper if the applicant did not satisfy the criteria set out in Sch.4 to the regulations.

¹²⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.14(5).

¹²⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.15. Revocation or suspension under reg.15 is discussed further at para.21–37 onwards.

¹²⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.14(6).

¹²⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.49(2).

¹³⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.13(1).

¹³¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.13(2).

¹³² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.17(1)(a).

¹³³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.17(1)(b), (2) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.8(2).

¹³⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.16(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.8(1)(a).

¹³⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.16(1)(a) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.8(1)(b). Money advisers are discussed at para.21–14 onwards.

- (b) distribute the sums received under the debt payment programme¹³⁶;
- (c) provide payment and distribution reports to the debt arrangement scheme administrator and any continuing money adviser¹³⁷;
- (d) provide information to the debt arrangement scheme administrator about the exercise of their functions¹³⁸; and
- (e) remit the fee payable to the debt arrangement scheme administrator to the debt arrangement scheme administrator.¹³⁹

21–36 Payments distributors are required to have regard to guidance issued by the debt arrangement scheme administrator when carrying out their functions.¹⁴⁰

Revocation or suspension of approval

21–37 The debt arrangement scheme administrator may revoke or suspend the approval of a payments distributor where:

- (a) the payments distributor fails without good cause to comply with a condition attached to the approval¹⁴¹;
- (b) the debt arrangement scheme administrator is satisfied that the payments distributor is no longer a fit and proper person to be a payments distributor¹⁴²; or
- (c) in the opinion of the debt arrangement scheme administrator, the payments distributor has failed without good cause to perform any of their functions and continues to fail to do so after a period of two weeks from the date of written notice of the failure.¹⁴³

21–38 Where the approval of a payments distributor is revoked, or where the payments distributor otherwise ceases to act, the payments distributor must transfer the debt payment programmes for which they are responsible to a substitute payments distributor specified by the debt arrangement scheme administrator within a reasonable period specified by the debt arrangement scheme administrator.¹⁴⁴

21–39 There is no provision for review of or appeal against the debt arrangement scheme administrator's decision to revoke or suspend the approval of a payments distributor. The decision would, however, be subject to judicial review.

¹³⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.16(1)(b).

¹³⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.16(1)(c) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.8(1)(c), which removed the requirement to provide such reports to creditors as well.

¹³⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.16(1)(d).

¹³⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.16(1)(e).

¹⁴⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.16(3). The current guidance is available on the Debt Arrangement Scheme website, <http://www.dasscotland.gov.uk> [Accessed 19 September 2017].

¹⁴¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.15(a). This provision appears to be repeated in slightly different terms in reg.15(d), which it is assumed is a drafting infelicity. It may, however, give rise to difficulty, since reg.15(d) contains a reference to the debt arrangement scheme administrator's opinion which does not appear in reg.15(a).

¹⁴² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.15(b).

¹⁴³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.15(c).

¹⁴⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.16(2).

SCOPE OF THE SCHEME

The scheme is open to individual debtors habitually resident in Scotland and to legal persons, trusts and unincorporated bodies having an established place of business in Scotland *or* constituted or formed under Scots law and at any time carrying on business in Scotland.¹⁴⁵ **21–40**

Requirement to have debts

In the case of individual debtors, the scheme is open to those who have one or more debts.¹⁴⁶ Originally, the scheme was conceived for, and open only to, individual debtors who had multiple debts, that is two or more debts.¹⁴⁷ In order to widen access to the scheme,¹⁴⁸ however, the Debt Arrangement Scheme (Scotland) Regulations 2011 altered this position and allowed a debtor to apply for a debt payment programme relating to a single debt,¹⁴⁹ subject to the proviso that an application for a such a debt payment programme could not be made where a time to pay direction or time to pay order under the Debtors (Scotland) Act 1987 or a time order under the Consumer Credit Act 1974 in relation to that debt was already in force,¹⁵⁰ an application in those circumstances being seen as inappropriate.¹⁵¹ Notwithstanding that the extension of the scheme to cases involving single debts may be regarded as somewhat doubtful given the availability of the orders referred to and the nature of the scheme, this remains the position for individual debtors.¹⁵² In the case of other debtors, the scheme is currently open only to those who have two or more debts.¹⁵³ However, the interim response to the 2016 review of the debt arrangement scheme proposes to remove the requirement for such debtors to **21–41**

¹⁴⁵ See Debt Arrangement and Attachment (Scotland) Act 2002 s.1 as amended by the Bankruptcy and Debt Advice (Scotland) Act 2014 and Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 reg.20(1) and reg.20(4A) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. A legal person means a partnership, a limited partnership within the meaning of the Limited Partnerships Act 1907 or a corporate body other than a company registered under the Companies Act 2006. Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. It is specifically provided that any reference in the Debt Arrangement Scheme (Scotland) Regulations 2011 to a debtor, however described, does not include an entity referred to in s.6(2) of the Bankruptcy (Scotland) Act 1985 (companies registered under the Companies Act 2006 or entities in respect of which an enactment provides, expressly or by implication, that sequestration is incompetent): Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1A) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The reference to s.6(2) of the Bankruptcy (Scotland) Act 1985 should now be read as a reference to s.6(2) of the Bankruptcy (Scotland) Act 2016.

¹⁴⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(1)(a) as substituted by the Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. For the definition of debt for this purpose, see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.3, discussed at para.21–50 onwards.

¹⁴⁷ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.21(1) and see discussion of the background of the scheme at para.21–04 onwards.

¹⁴⁸ See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011.

¹⁴⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(1) as enacted. This change was initially provided for in the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 which, as noted at para.21–09, were revoked before coming into force.

¹⁵⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(3) as enacted.

¹⁵¹ See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011.

¹⁵² See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(1)(a) as substituted by the Debt Arrangement Scheme (Scotland) Regulations 2014 and reg.21(3).

¹⁵³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(1)(b) as substituted by the Debt Arrangement Scheme (Scotland) Regulations 2014.

have two or more debts in the interests of flexibility.¹⁵⁴ It also proposes to introduce provisions to ensure that business debts can only be included in a business debt payment programme,¹⁵⁵ although the task of defining what is and is not a business debt for this purpose would appear to be fraught with difficulty.

Exclusions

21–42 An application for a debt payment programme may not be made in the following cases:

- (a) where payment of a debt is being made under a conjoined arrestment order, except where a creditor, including a creditor of a debt being paid under a conjoined arrestment order in respect of another debt not being so paid, has attempted to enforce a debt due by the debtor by any lawful means¹⁵⁶;
- (b) where the debtor is party to a protected trust deed¹⁵⁷;
- (c) where the debtor's estate has been sequestrated and the debtor has not been discharged¹⁵⁸;
- (d) where the debtor has been made bankrupt in England and Wales and has not been discharged¹⁵⁹; and
- (e) where the debtor is subject to a bankruptcy restrictions order (including an interim order) made or a bankruptcy restrictions undertaking given in Scotland, England or Wales.¹⁶⁰

21–43 In the majority of these cases, the prohibition against applying for a debt payment programme flows from the fact that there is already a procedure for the payment of debts in operation which in some, although not all, cases will have been initiated by the debtor and which should be allowed to run its course. The prohibition against applying for a debt payment programme where a debtor is subject to bankruptcy restrictions, however, is less readily explicable. It is true that in some cases a debtor who is subject to bankruptcy restrictions may not be discharged, for example, where an interim bankruptcy restrictions order has been made prior to the debtor's discharge, and in those cases the same rationale applies. In the majority of cases, however, bankruptcy restrictions apply after the debtor has been discharged, and it is not clear why a debtor who is subject to such restrictions, perhaps years after the sequestration or bankruptcy which gave rise to them, should be prevented from applying for a debt payment programme, at least in so far as the debts to which it relates have not been incurred in contravention of the bankruptcy restriction order or undertaking.

21–44 It is notable that, originally, a debtor was unable to make an application for a debt payment programme where the debtor was a party to a trust deed for creditors whether or not it had become protected.¹⁶¹ In order to widen access to

¹⁵⁴ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.7.

¹⁵⁵ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017).

¹⁵⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(2)(a), (4).

¹⁵⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(2)(b).

¹⁵⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(2)(c).

¹⁵⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(2)(d).

¹⁶⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(2)(e).

¹⁶¹ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.21(2)(b).

the scheme,¹⁶² however, as noted, the Debt Arrangement Scheme (Scotland) Regulations 2011 now provide that a debtor is prevented from applying for a debt payment programme only where the debtor is a party to a protected trust deed. This allows a debtor to make an application for a debt payment programme where the debtor has granted a trust deed which has either failed to, or has not yet, become protected.¹⁶³ It is understandable that a debtor might prefer to enter into a debt payment programme as opposed to continuing with a trust deed which has not become protected, and it does not seem unreasonable that a debtor should be permitted to apply to do so where it was originally intended that the trust deed should become protected but has not done so. It is more questionable whether a debtor should be permitted to do so where it was never intended that the trust deed should become protected (albeit that such cases are rare in practice) or where the process for obtaining protection has been embarked upon but its outcome is not yet known. Policy matters aside, however, there is a more fundamental difficulty with this provision: a trust deed is valid when it is granted, it remains a valid trust deed at common law whether or not it becomes protected and it cannot be revoked.¹⁶⁴ The debtor is therefore effectively prevented from entering into another arrangement in relation to the assets comprised in the trust deed, which will almost always include future income from which payments under a debt payment programme would be made. The Debt Arrangement Scheme (Scotland) Regulations 2011 seek to address this difficulty by making provision for the effect of the approval of a debt payment programme on a trust deed which is not protected, but the provisions are not free from difficulty.¹⁶⁵

Joint debt payment programmes

The scheme permits two debtors to apply for a joint debt payment programme where each of the debtors is liable for a debt which would be included in the programme and they are: (i) husband and wife; (ii) civil partners; (iii) living together as husband and wife; or (iv) of the same sex and living together in a relationship which has the characteristics of the relationship between husband and wife.¹⁶⁶ Joint debt payment programmes are, therefore, effectively confined to individual debtors. They were introduced by the Debt Arrangement Scheme (Scotland) Regulations 2011 in order to widen access to the scheme,¹⁶⁷ but it is thought that there may be difficulties in determining the outstanding liability of the individual debtors for specific debts if the debt payment programme is not successfully completed. It is specifically provided that for the purposes of the Debt Arrangement Scheme (Scotland) Regulations 2011, a reference to a debtor, including a reference to an individual or individuals, is to be taken to refer to both debtors in the case of a joint debt payment programme unless the context otherwise requires.¹⁶⁸

21-45

¹⁶² See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011.

¹⁶³ See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011.

¹⁶⁴ See further Ch.22.

¹⁶⁵ See further at para.21-92 onwards in relation to the effect of a debt payment programme.

¹⁶⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.10. This originally required that the debtors be jointly and severally liable for a debt which would be included in the programme.

¹⁶⁷ See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011.

¹⁶⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22(3) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

Limits as to time, etc.

- 21–46** In the case of individual debtors, there are no time or monetary limits on the scheme. Both were proposed when the scheme was originally consulted on,¹⁶⁹ and the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 contained provisions which would effectively have limited the period of a debt payment programme,¹⁷⁰ but such provisions have not been introduced, although the total amount of debt and the length of the debt payment programme are matters which the debt arrangement scheme administrator will take into account in deciding whether to approve a debt payment programme where approval is not automatic.¹⁷¹
- 21–47** In the case of legal persons, trusts and unincorporated bodies, there is a five year time limit on the debt payment programme which runs from the date of application.¹⁷² As in the case of individual debtors, however, there are no monetary limits, although in practice the amount of debt will affect whether it is possible to complete a debt payment programme within the time limit.

THE APPLICATION

Form of application

- 21–48** An application for a debt payment programme must be made by a money adviser on behalf of the debtor in the prescribed form.¹⁷³
- 21–49** Originally, both the debtor¹⁷⁴ and the money adviser were required to sign the application,¹⁷⁵ and where the application was submitted electronically, the money adviser was required to retain the signed application form for a period of five years or the period of the programme (if longer).¹⁷⁶ The requirement for the debtor to sign the application was removed by the Bankruptcy and Diligence etc. (Scotland) Act 2007¹⁷⁷ and the Debt Arrangement Scheme (Scotland) Regulations 2011 now provide that an application is competent if, instead of being signed by the debtor, it contains a declaration by the money

¹⁶⁹ For a more detailed discussion of the original proposals, see McKenzie Skene, DW, "Dealing with multiple debt—an examination of the proposal for a debt arrangement scheme in Scotland" [2002] *Insolvency Lawyer* 212.

¹⁷⁰ The provisions would have required the debtor to pay a minimum of £100 per month or 1 per cent of the debt, whichever was greater, which would have effectively precluded very long debt payment programmes for smaller debts: see Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 reg.13 and Executive Note accompanying them. This was one of the controversial elements of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 which, as noted at para.21–09, were consequently revoked before they came into force.

¹⁷¹ See further para.21–80 onwards.

¹⁷² See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(l)(iii) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁷³ Debt Arrangement and Attachment (Scotland) Act 2002 s.2(3)(d) and Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(2)(a) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The prescribed form is, in the case of individual debtors, Form 1 in Sch.1 to the Debt Arrangement Scheme (Scotland) Regulations 2011 as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 and, in the case of legal persons, trusts and unincorporated bodies, Form 1B in Sch.1 to the Debt Arrangement Scheme (Scotland) Regulations 2011 as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁷⁴ Debt Arrangement and Attachment (Scotland) Act 2002 s.2(3) as enacted.

¹⁷⁵ Debt Arrangement and Attachment (Scotland) Act 2002 s.3(2) as enacted.

¹⁷⁶ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.20(2)(b).

¹⁷⁷ See Bankruptcy and Diligence etc. (Scotland) Act 2007 s.212(2).

adviser that the debtor has been given appropriate advice by the money adviser and consented to proceed without signing the application.¹⁷⁸ Where the application is for a joint debt payment programme, both debtors must consent to the application and the declaration by the money adviser must state that both debtors have consented.¹⁷⁹ Where the debtor is a partnership, every partner must consent to the application¹⁸⁰ and the declaration by the money adviser must contain a statement to that effect.¹⁸¹ Such an application may, subject to the proviso discussed further below, be combined with an application by any of the partners as an individual.¹⁸² Where the debtor is a limited partnership, every general partner and any limited partner who has at any time taken part in the management of the firm must consent to the application¹⁸³ and the declaration by the money adviser must contain a statement to that effect.¹⁸⁴ Where the debtor is a trust, the majority of the trustees must consent to the application¹⁸⁵ and the declaration by the money adviser must contain a statement to that effect.¹⁸⁶ Where the debtor is a corporate body other than a company registered under the Companies Act 2006, or an unincorporated body, a person authorised to act on behalf of the body must consent to the application¹⁸⁷ and the declaration by the money adviser must contain a statement to that effect.¹⁸⁸ The requirement for the money adviser to sign the application was removed by the Debt Arrangement Scheme (Scotland) Regulations 2011.¹⁸⁹

Debts to be included

The application must, subject to the proviso discussed further below, include all debts due by the debtor at the time of making the application.¹⁹⁰ This requirement was added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 with the intention of providing maximum protection to debtors¹⁹¹; prior to that, there was no requirement to include all debts in a debt payment programme. However, it seems to have given rise to problems in practice, with the result that the interim response to the 2016 review of the debt arrangement scheme proposes to allow the exclusion of rent

21–50

¹⁷⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(2)(b).

¹⁷⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22(2).

¹⁸⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(2)(a) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(6) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(2)(b) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(3) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(6) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(4) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(6) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(5) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(6) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁸⁹ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(5).

¹⁹⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(2A) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

¹⁹¹ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.1.

and mortgage arrears from a debt payment programme, although the existence of these debts will still be disclosed in the application.¹⁹²

21–51 The application must specify for each debt, to the best of the debtor's knowledge and belief, details of the amount outstanding, the creditor to whom the debt is due and the period for which the debt has been due.¹⁹³ "Debt" is defined as including any sum due by a debtor which is:

- (a) constituted by: (i) a decree or document of debt; (ii) judicial or contractual interest; (iii) contractual charges or penalties for default or breach of contract; (iv) a lease or tenancy agreement; or (v) an enactment¹⁹⁴;
- (b) arrears of periodic payments due under a loan agreement secured by a standard security¹⁹⁵; and
- (c) recoverable as enforcement expenses.¹⁹⁶

21–52 It excludes any sum which is secured by a standard security other than the arrears specified above,¹⁹⁷ any sum which is a liability for the purpose of s.17(2B) of the Legal Aid (Scotland) Act 1986 (payments out of property recovered),¹⁹⁸ any fee charged by a money adviser for their services in relation to the debt payment programme in respect of which the services are provided¹⁹⁹ and any sum in respect of a student loan made under or by virtue of certain specified provisions.²⁰⁰

21–53 Where a legal person, trust or unincorporated body is liable for a debt and an individual who is a partner (in the case of a partnership), a general partner or a limited partner who has at any time taken part in management (in the case of a limited partnership), a trustee (in the case of a trust) or a person authorised to act on behalf of the body (in the case of an unincorporated body) is also liable for that debt, the debt must be disclosed in any application by the legal person, trust or unincorporated body and by the individual concerned,²⁰¹ but may only be included for the purposes of payment in one of them.²⁰²

21–54 Originally, provision was made for a debtor and a creditor to agree in advance of the submission of an application a composition or waiver of interest in relation to any debt to be included in the programme.²⁰³ Following the introduction of the provisions for automatic debt relief in relation to any interest, fees,

¹⁹² Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para. 1.

¹⁹³ Debt Arrangement and Attachment (Scotland) Act 2002 s.2(3)(a).

¹⁹⁴ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.3(1)(a). "Decree" and "document of debt" are to be construed in accordance with s.10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002: Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1).

¹⁹⁵ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.3(1)(b).

¹⁹⁶ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.3(1)(c).

¹⁹⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.3(2)(a).

¹⁹⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.3(2)(b).

¹⁹⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.3(2)(c) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.6(2).

²⁰⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.3(2)(d) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2015 reg.3.

²⁰¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(8)(a) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²⁰² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(8)(b) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²⁰³ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.24.

penalties and other charges becoming due during a debt payment programme on the completion of that programme,²⁰⁴ the provisions relating to waiver of interest were effectively rendered unnecessary and were removed, but the provision for composition was retained.²⁰⁵ It was, however, subsequently omitted from the Debt Arrangement Scheme (Scotland) Regulations 2011 on the basis that it was rarely, if ever, used, and that if a creditor was prepared to compound part of the debt, this could be achieved by a subsequent variation of the approved debt payment programme.²⁰⁶ The Scottish Government's *Consultation on Bankruptcy Law Reform* published in February 2012 revisited the issue of composition, however, and sought views on the introduction of a further element of debt relief in defined circumstances.²⁰⁷ This was supported by respondents²⁰⁸ and new provisions relating to composition were accordingly introduced by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013. These are discussed further at para.21–136 onwards.

Proposals for payment

The application must set out the arrangements under which the debts in the debt payment programme are to be paid, including in particular the amount and frequency of the payments to be made by the debtor, the manner in which the payments are to be made, the manner in which the debts included in the programme are to be paid and the period of the debt payment programme.²⁰⁹ **21–55**

In the case of individual debtors, the amount of the payments will be calculated using the common financial tool. The application form is required to contain a statement of income and expenditure in the prescribed form as at the date of application completed in the style and format of the common financial statement and a statement that the proposed payments are in accordance with the common financial tool as assessed by the money adviser and any evidence or explanation required in applying the tool.²¹⁰ The use of the common financial tool in the context of the debt arrangement scheme has, however, given rise to some concerns, and the interim response to the 2016 review of the debt arrange- **21–56**

²⁰⁴ See further at para.21–134.

²⁰⁵ See Debt Arrangement Scheme (Scotland) Regulations 2004 reg.24 as amended by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007 reg.3(12), (13).

²⁰⁶ See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011. As to variation, see para.21–103 onwards.

²⁰⁷ Scottish Government, *Consultation on Bankruptcy Law Reform*, paras 10.4.7 and 10.4.8.

²⁰⁸ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses*, para.5.14.

²⁰⁹ Debt Arrangement And Attachment (Scotland) Act 2002 s.2(3)(b).

²¹⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(2B) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 with effect from 1 April 2015. The prescribed form in the case of individual debtors is Form 1 in Sch.1 to the Debt Arrangement Scheme (Scotland) Regulations 2011 as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The common financial statement is defined as the style and format for income and expenditure categories under that title (and, where relevant, related spreadsheets, budget sheets, trigger figures, guidance materials and notes) published by the Money Advice Trust and the common financial tool is defined as the method of assessing the amount of a debtor's assets, income, liabilities and expenditure provided for under s.5D of the Bankruptcy (Scotland) Act 1985 as modified in accordance with Sch.A1 of the Debt Arrangement Scheme (Scotland) Regulations 2011 as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The reference to s.5D of the Bankruptcy (Scotland) Act 1985 must now be read as a reference to s.89 of the Bankruptcy (Scotland) Act 2016. The common financial tool is discussed further in Ch.11 in the context of sequestration.

ment scheme sought views on a number of options relating to the continued use of the common financial tool in this context.²¹¹ There is also a separate consultation on the future of the common financial tool generally.²¹²

21–57 In the case of legal persons and other entities, the amount of the payments is not calculated using the common financial tool but the methodology will be similar and the application form includes details of the debtor's net income and expenditure.²¹³

21–58 The Debt Arrangement Scheme (Scotland) Regulations 2011 specify a number of methods by which payments can be made, not all of which may be relevant to every debtor, namely payment mandate to the debtor's employer²¹⁴; direct debit or standing order²¹⁵; smart card, swipe card, smart key or other type of payment card or key²¹⁶; electronic banking²¹⁷; and any other payment method approved by the debt arrangement scheme administrator where they are satisfied that successful completion of the debt payment programme is more likely to result from the use of that payment method.²¹⁸ Where the payment method is a mandate to the debtor's employer, the debtor must provide an appropriate instruction to the employer in the prescribed form.²¹⁹ The employer has a duty to comply with the instruction,²²⁰ and the Debt Arrangement Scheme (Scotland) Regulations 2011 provide that from the delivery of the instruction until it is recalled by either the debtor (where an alternative method of payment is substituted) or by notice from the debt arrangement scheme administrator or continuing money adviser (on revocation or completion of the programme), the employer is obliged to deduct the sum specified in the instruction on every payday and remit it to the payments distributor as soon as reasonably practicable.²²¹ The employer may charge a fee for operating the instruction equivalent to the employer's fee for operating diligence against earnings which is deducted from the balance due to the debtor.²²² Where an employer has failed without good cause to make a payment due under the instruction, they are liable to pay the amount which should have been deducted to the payments distributor on demand and may not subsequently recover that sum from the debtor.²²³ The employer's obligation to make a payment under an instruction is, however, extinguished one year after the date the liability to make the payment arose, unless court proceedings for payment have been commenced within that period.²²⁴ The debt arrangement scheme administrator has produced guidance for employers although there is no statutory requirement to have regard to this as there is in the case of money advisers and payments distributors.²²⁵

²¹¹ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.2.

²¹² See further Chs 2 and 11.

²¹³ See Form 1B in Sch.1 to the Debt Arrangement Scheme (Scotland) Regulations 2011 as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²¹⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.31(1)(a).

²¹⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.31(1)(b).

²¹⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.31(1)(c).

²¹⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.31(1)(d).

²¹⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.31(2).

²¹⁹ Debt Arrangement And Attachment (Scotland) Act 2002 s.6(1) and Debt Arrangement Scheme (Scotland) Regulations 2011 reg.32(1). The prescribed form is Form 3 in Sch.1 to the Debt Arrangement Scheme (Scotland) Regulations 2011.

²²⁰ Debt Arrangement And Attachment (Scotland) Act 2002 s.6(2).

²²¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.32(2), (3).

²²² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.32(4).

²²³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.32(5).

²²⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.32(6).

²²⁵ The guidance is available on the Debt Arrangement Scheme website, <http://www.dasscot-land.gov.uk> [Accessed 19 September 2017].

The debts included in the debt payment programme will normally be paid pro rata. The Debt Arrangement and Attachment (Scotland) Act 2002 makes provision for the priority in which debts are to be paid to be set out in regulations,²²⁶ but as yet no such provision has been made. **21–59**

As noted above, there are currently no limits on the period of a debt payment programme for individual debtors, but there is a limit of five years from the date of application in the case of other debtors. **21–60**

The application must include the name and address of the payments distributor for the debt payment programme.²²⁷ **21–61**

Additional requirements in case of entities

An application by a legal person, trust or unincorporated body must also: **21–62**

- (i) include evidence (including any founding documents) demonstrating the legal status of the debtor²²⁸;
- (ii) specify the full name and address of an individual who has been nominated to act on behalf of the debtor by the debtor with the agreement of the partners (in the case of a partnership), general partners and any limited partner who has at any time taken part in management (in the case of a limited partnership), trustees (in the case of a trust) or person authorised to act on behalf of the body (in the case of an unincorporated body)²²⁹;
- (iii) contain a report by the money adviser to the debt arrangement scheme administrator in the prescribed form, including a declaration, referred to as a declaration of viability, to the effect that the debtor is viable on the basis that, in the money adviser's opinion, the programme has a reasonable chance of being completed, the debtor can make all payments under the programme within a period of five years after the date of the application and that the debtor, where trading, is continuing to trade at the relevant date or is otherwise operating at the relevant date.²³⁰ For this purpose, the relevant date is the date of the application²³¹ and operating means that the debtor has officeholders or trustees in office or owns or holds property and is active in fulfilling the purposes for which it was established²³²; and
- (iv) in the case of a debtor which is a charity, include evidence that it has been intimated to the Office of the Scottish Charity Regulator.²³³

²²⁶ Debt Arrangement and Attachment (Scotland) Act 2002 s.7(2)(k).

²²⁷ Debt Arrangement and Attachment (Scotland) Act 2002 s.2(3)(c). Payments distributors are discussed at para.21–31 onwards.

²²⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(7)(a) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²²⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(7)(b) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²³⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(7)(c) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The prescribed form is Form 7 in Sch.1 to the Debt Arrangement Scheme (Scotland) Regulations 2011 as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²³¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(12) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²³² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(12) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²³³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(2C) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 read in conjunction with Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

Requirement for consent of creditors

21–63 The Debt Arrangement and Attachment (Scotland) Act 2002 provides that, subject to any contrary provision made in regulations, the application must incorporate the consent of all the debtor's creditors in the prescribed form.²³⁴ Such contrary provision was originally made in the Debt Arrangement Scheme (Scotland) Regulations 2004,²³⁵ and similar provision is now made in the Debt Arrangement Scheme (Scotland) Regulations 2011, which provide that, notwithstanding the provisions of s.2(4) of the Debt Arrangement and Attachment (Scotland) Act 2002 and the provisions of the regulations themselves which require, subject to certain provisos, the consent of all the debtor's creditors to an application,²³⁶ an application is competent notwithstanding that the required consent is not incorporated in the application form.²³⁷ Under the Debt Arrangement Scheme (Scotland) Regulations 2004, the money adviser advising the debtor would seek the consent of the relevant creditors prior to submitting the application form and details of the responses would be included in the application form itself.²³⁸ Under the Debt Arrangement Scheme (Scotland) Regulations 2011, a continuing money adviser will similarly seek the consent of the relevant creditors prior to submitting the application form, although the details of the responses are no longer included in the application form itself. Where there is no continuing money adviser, however, the consent of the creditors will be sought by the debt arrangement scheme administrator after submission of the application.²³⁹

21–64 “Creditor” is defined²⁴⁰ as meaning, unless the context otherwise requires, a creditor other than a creditor in respect of:

- (a) a continuing liability. A continuing liability is defined as a payment, other than arrears, due by a debtor in respect of: a periodic payment due under a loan agreement secured by a standard security (referred to as a mortgage payment); rent; an insurance premium; a duty, local or general tax, or rate; a domestic water or sewerage charge; any aliment, periodical allowance, child maintenance or child support; the supply of electricity, gas or fixed line telephone services; heating oil or solid fuel; a hire purchase or conditional sale agreement; a criminal fine; and a fee charged to the debtor by a money adviser.²⁴¹ Payment of continuing liabilities is, however, a standard condition of approval of a debt payment programme,²⁴² and originally provision was made for the debtor and a creditor to agree that a continuing liability be paid through the payments distributor.²⁴³ This provision has been omitted from the Debt Arrangement Scheme (Scotland) Regulations 2011, however, on the basis that it was rarely, if ever, used²⁴⁴;
- (b) a sum secured by a standard security, other than arrears; and

²³⁴ Debt Arrangement and Attachment (Scotland) Act 2002 s.2(4).

²³⁵ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.20(2)(c).

²³⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(1), (2).

²³⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(2)(c) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²³⁸ See Debt Arrangement Scheme (Scotland) Regulations 2004 Form 1.

²³⁹ See further at para.21–65.

²⁴⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1).

²⁴¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.6(1).

²⁴² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(c).

²⁴³ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.34.

²⁴⁴ See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011.

- (c) a contingent liability that has not become purified.

As noted above, a request to a creditor to consent to a debt payment programme is sent by the debt arrangement scheme administrator or, where there is a continuing money adviser, the continuing money adviser.²⁴⁵ A request sent by a continuing money adviser, electronically or otherwise, must be in the form provided by the debt arrangement scheme administrator for that purpose,²⁴⁶ and where the debtor is a legal person, trust or incorporated body, the request must include a declaration of viability.²⁴⁷ It was previously provided that if such a request was sent by post, it must be sent by first class recorded delivery,²⁴⁸ but this provision was removed by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013.²⁴⁹ The date of the request to creditors will be entered into the Debt Arrangement Scheme Register.²⁵⁰ 21-65

A creditor who is requested to consent to an application for a debt payment programme which provides for the payment of more than one debt and who does not respond to that request within 21 days of the date of the request is deemed to consent to the debt payment programme, irrespective of any assignment of the debt by that creditor.²⁵¹ The restriction of this provision to debt payment programmes which provide for the payment of more than one debt, which was added as a result of the extension of the scheme to (individual) debtors with a single debt, is important because it ensures that a debt payment programme for the payment of a single debt cannot be approved automatically in the absence of the positive consent of the creditor concerned, although it may still be approved in the absence of such consent if the debt arrangement scheme administrator considers it fair and reasonable.²⁵² It may be noted that the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 would have removed the existing provision for deemed consent and replaced it with provisions allowing the debt arrangement scheme administrator to dispense with the consent of any remaining creditors where a specified percentage of creditors actively consented within an extended period of 35 days.²⁵³ This was, however, one of the controversial elements of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 which, as noted above, were revoked before they came into force, and provision for deemed consent was subsequently retained as described. 21-66

It is specifically provided that the lack of consent of any unknown creditor will not of itself render the subsequent approval of a debt payment programme invalid, provided that the debtor did not know the identity of the creditor and could not reasonably have done so.²⁵⁴ The debt arrangement scheme administrator is required to maintain a record of creditor consents.²⁵⁵ 21-67

²⁴⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(3).

²⁴⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(4).

²⁴⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(3A) as added by the Debt Arrangement Scheme (Scotland) Amendments Regulations 2014. The declaration of viability is discussed at para.21-62.

²⁴⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(3).

²⁴⁹ Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.11(1)(a).

²⁵⁰ The Debt Arrangement Scheme Register is discussed in more detail at para.21-146 onwards.

²⁵¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(5) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.11(1)(b).

²⁵² As to approval, see further at para.21-80 onwards.

²⁵³ See Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 reg.13 and Executive Note accompanying them.

²⁵⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(6).

²⁵⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(7).

- 21-68** Where the rights to one or more debts included in the debt payment programme are assigned, the creditor is required to notify the debt arrangement scheme administrator immediately of the fact of the assignment and the details of the assignee.²⁵⁶
- 21-69** Where a creditor authorises another person to act on the creditor's behalf in relation to the debt arrangement scheme, the authorised representative is required to provide evidence of authority to act on behalf of the creditor to the debt arrangement scheme administrator and any continuing money adviser and the creditor is required to notify the debt arrangement scheme administrator and any continuing money adviser if the representative is no longer authorised.²⁵⁷
- 21-70** The debt arrangement scheme administrator has produced guidance for creditors although there is no statutory requirement to have regard to this as there is in the case of money advisers and payments distributors.²⁵⁸

Submission of application

- 21-71** The application may be submitted electronically or in paper form. Originally, the Debt Arrangement Scheme (Scotland) Regulations 2004 contained a specific provision allowing electronic submission as well as paper submission.²⁵⁹ The Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 would have required electronic submission, subject to the proviso that the debt arrangement scheme administrator might accept applications by other means where they considered it reasonable to do so,²⁶⁰ but, as noted above, these regulations were revoked before they came into force. The Debt Arrangement Scheme (Scotland) Regulations 2011 do not make any specific provision regarding electronic submission, but in practice, electronic submission via the debt arrangement scheme hub, established by the debt arrangement scheme administrator to allow the debt arrangement scheme to be administered in so far as possible electronically, is the norm.

Application fee

- 21-72** Prior to the Debt Arrangement Scheme (Scotland) Regulations 2011, there was no application fee for a debt payment programme. However, the Debt Arrangement Scheme (Scotland) Regulations 2011 make provision for a fee to be payable to the debt arrangement scheme administrator for consideration of an application for approval or variation of a debt payment programme.²⁶¹ This is intended to offset the debt arrangement scheme administrator's costs relating to debt payment programmes, which was previously met from the public purse, and allow free access to the debt arrangement scheme register.²⁶² The fee is not

²⁵⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23(8) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 201 reg.11(1)(c).

²⁵⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.23A as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 201 reg.11(2).

²⁵⁸ The guidance is available on the Debt Arrangement Scheme website, <http://www.dasscotland.gov.uk> [Accessed 19 September 2017].

²⁵⁹ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.20(2)(b).

²⁶⁰ Debt Arrangement Scheme (Scotland) Regulations 2009 reg.8(b).

²⁶¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.5(1).

²⁶² See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011. The Debt Arrangement Scheme Register is discussed further at para.21-146 onwards. The fees previously chargeable for accessing the Debt Arrangement Scheme Register were set out in the Debt Arrangement Scheme (Scotland) Regulations 2004 reg.5.

paid by the debtor, however, but by the creditors²⁶³; 2 per cent of the sums due to be paid to the creditors in each distribution is deducted therefrom by the payments distributor and remitted to the debt arrangement scheme administrator.²⁶⁴ It was noted above that a payments distributor may charge an administration fee to creditors participating in the debt payment programme which, including any value added tax, is no more than 8 per cent of the sum to be paid to them.²⁶⁵ Prior to the Debt Arrangement Scheme (Scotland) Regulations 2011, that administration fee was a maximum of 10 per cent of the sum to be paid to the creditors. The application fee to be paid to the debt arrangement scheme administrator does not, therefore, result in greater fees being paid by the creditors overall, but in a redistribution of those fees from the payments distributor alone to the payments distributor and the debt arrangement scheme administrator. The Scottish Government's *Consultation on Bankruptcy Law Reform* published in February 2012 sought views on the introduction of an application fee payable by the debtor on application in place of the current arrangements, but this was not supported by respondents²⁶⁶ and was not taken forward.

Effect of entry of application in debt arrangement scheme register

Details of the application will be entered in the debt arrangement scheme register.²⁶⁷ Originally, the entry of an application in the debt arrangement scheme register had no effect as such, but the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007 introduced provisions whereby the entry of an application in the debt arrangement scheme register triggered a moratorium on specified actions during a defined period commencing with the entry of the application in the register in order to allow the debtor to obtain the protection of a moratorium pending a decision on the application rather than only after the approval of an application.²⁶⁸ They also introduced provisions allowing a debtor to obtain the benefit of such a moratorium prior to the submission of an application by intimating to the debt arrangement scheme administrator the debtor's intention to seek the consent of creditors to a debt payment programme.²⁶⁹ These provisions were retained in the Debt Arrangement Scheme (Scotland) Regulations 2011 as enacted²⁷⁰ but the provisions allowing a debtor to obtain the benefit of a moratorium prior to the submission of an application were subsequently moved to the Bankruptcy (Scotland) Act 1985. The reason for this was the introduction by the Bankruptcy and Debt Advice (Scotland) Act 2014 of additional provisions allowing a debtor to obtain the benefit of a pre-application moratorium where the debtor intends to apply for sequestration or to grant a trust deed which is intended to become a protected trust deed. The main pre-application moratorium provisions for all procedures including the debt arrangement scheme were therefore consolidated in the Bankruptcy (Scotland) Act 1985. The original provisions triggering a moratorium on the entry of an application in the debt arrangement scheme register

21-73

²⁶³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.5(2).

²⁶⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.5(3), (4).

²⁶⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.17(1)(b), (2) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.8(2).

²⁶⁶ Accountant in Bankruptcy, *Consultation on Bankruptcy Reform: The Report of the Summary of Responses*, para.5.13.

²⁶⁷ The debt arrangement scheme register is discussed in more detail at para.21-146.

²⁶⁸ See the Debt Arrangement Scheme (Scotland) Regulations 2004 reg.31A as added by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007.

²⁶⁹ See the Debt Arrangement Scheme (Scotland) Regulations 2004 regs 22(2A) and 31A as added by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007.

²⁷⁰ See the Debt Arrangement Scheme (Scotland) Regulations 2011 regs 20(3) and 30.

were then repealed,²⁷¹ seemingly on the basis that they were no longer necessary, but it was subsequently realised that this would mean that it would be necessary to utilise the pre-application moratorium provisions in all cases where it was desired to obtain the benefit of a moratorium at any time before an application for a debt payment programme was decided. These provisions were therefore re-instated by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2015,²⁷² with appropriate provision for co-ordination with the new provisions on the pre-application moratorium where relevant.

21-74 The new pre-application moratorium provisions are discussed in detail in Ch.5. As noted there, they provide that a debtor may not give a notice under the provisions within 12 months of having previously given such a notice.²⁷³ However, the Debt Arrangement Scheme (Scotland) Regulations 2011 provide that where a joint debt payment programme has been revoked on specified grounds or on the death of one of the debtors, a debtor who intends to apply for a debt payment programme may give a notice under the provisions within 12 months of having previously given such a notice.²⁷⁴ In addition, where a joint debt payment programme is revoked on specified grounds, that revocation itself triggers a moratorium period of six weeks immediately following the revocation.²⁷⁵ The extent of the moratorium in that case is the same as that which applies under the re-instated provisions for a moratorium following the entry of an application in the debt arrangement scheme register.

21-75 The re-instated provisions for a moratorium following the entry of an application in the debt arrangement scheme register provide for the debtor to obtain a moratorium during the period immediately following the entry of the application in the debt arrangement scheme register and ending on the earliest of certain specified dates.²⁷⁶ These are:

- (a) the date on which a notice that the debt payment programme is approved is entered in the debt arrangement scheme register²⁷⁷;
- (b) the date occurring 14 days after the date on which notice of rejection of the debt payment programme is entered in the debt arrangement scheme register²⁷⁸;
- (c) the date occurring 28 days after the date on which an application for review is entered in the debt arrangement scheme register²⁷⁹; and
- (d) the date on which an intimation of withdrawal of the application in respect of the debt payment programme is entered in the debt arrangement scheme register.²⁸⁰

21-76 During that period, it is provided that it is not competent to serve a charge for payment in respect of, or to commence or execute any diligence to

²⁷¹ See the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²⁷² Debt Arrangement Scheme (Scotland) Amendment Regulations 2015 (SSI 2015/216).

²⁷³ Bankruptcy (Scotland) Act 2016 ss.195(2) and 196(2).

²⁷⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(3) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²⁷⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(1)(c).

²⁷⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(1)(ba) and (2A).

²⁷⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(2A)(a).

²⁷⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(2A)(b).

²⁷⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(2A)(c).

²⁸⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(2A)(d). Withdrawal is discussed at para.21-79.

enforce payment of, any debt, or for a creditor to petition for the debtor's sequestration,²⁸¹ or for a court to grant a warrant for the sale of attached land or make a satisfaction order in relation to a residual attachment.²⁸² In addition, it is provided that it is not competent to release arrested funds in accordance with the provisions for automatic release of arrested funds, but the period of the moratorium is then disregarded in calculating the time when the arrested funds are to be released.²⁸³

An issue has arisen as to what exactly is meant by the phrase “to petition for sequestration” in the context of these provisions. In a sheriff court case decided on the pre-application moratorium provisions before they were moved to the Bankruptcy (Scotland) Act 1985, which were at that time in exactly the same terms as the provisions under discussion here, it was held that it prevented the lodging of a petition for sequestration while the moratorium was in effect, but did not prevent an award of sequestration being made on a petition lodged before the commencement of the moratorium.²⁸⁴ This position is now reflected in the new pre-application moratorium provisions in the Bankruptcy (Scotland) Act 2016 which, as discussed in Ch.5, refer specifically to the presentation of a petition for sequestration. In a more recent sheriff court case on the provisions under discussion here, however, it was held, without reference to the earlier decision, that the provision that it was not competent to petition for sequestration prevented an award of sequestration being made on a petition for sequestration but did not prevent the lodging of a petition for sequestration and the granting of a warrant to cite.²⁸⁵ There is therefore conflicting authority which will require the decision of a higher court or legislative change to resolve. **21-77**

It may be noted that the extent of the moratorium which flows from the entry of an application in the debt arrangement scheme register is not exactly the same as the extent of the moratorium which flows from a notice given under the pre-application moratorium provisions, even if the interpretation of the phrase “to petition for sequestration” in the earlier case were to be followed in the context of the provisions under discussion. For the purposes of co-ordination with the new provisions on the pre-application moratorium, therefore, it is provided that the provisions which apply on the entry of an application in the debt arrangement scheme register do not apply during any period where the pre-application moratorium applies.²⁸⁶ The provisions which apply on the entry of an application in the debt arrangement scheme register therefore apply only where there has been no pre-application moratorium or an application for a debt payment programme has been submitted only after the expiry of any such moratorium. **21-78**

²⁸¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 and see further at para.21-77.

²⁸² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(3). At the time of writing, however, the provisions relating to land attachment and residual attachment are not yet in force.

²⁸³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(4).

²⁸⁴ *Milne, Petitioner* 14 May 2012 Peterhead Sheriff Court, available at <http://www.scotcourts.gov.uk/opinions/MILNE.html> [Accessed 19 September 2017].

²⁸⁵ *Mackin, Petitioner*, 2015 S.C. GLA 73. The inter-relationship of the debt arrangement scheme and sequestration is a matter of difficulty: see further discussion on this point in Chs 7 and 8.

²⁸⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(2B).

Withdrawal of application

- 21-79** A debtor may withdraw an application for a debt payment programme at any time before it is approved or rejected.²⁸⁷ It is specifically provided that in the case of a legal person, trust or unincorporated body, this may be done by the nominated person or a money adviser on the debtor's behalf.²⁸⁸

DECISION ON APPLICATION

Approval of debt payment programme

- 21-80** Where all creditors have consented (or been deemed to consent) to the application, the debt arrangement scheme administrator must approve the debt payment programme, subject to the proviso that, in the case of a debt payment programme for an individual, the debt payment programme may only be approved in accordance with the common financial tool.²⁸⁹ Approval is therefore effectively automatic. In any other case, the debt arrangement scheme administrator must approve the debt payment programme if it is fair and reasonable.²⁹⁰
- 21-81** Originally, the provisions for dealing with cases where all creditors did not consent to an application were much more complex. The Debt Arrangement Scheme (Scotland) Regulations 2004 as enacted provided that the debt arrangement scheme administrator could dispense with the consent of a creditor where the amount due by the debtor to that creditor was 50 per cent or less of the total debt included in the programme and the amount due to all creditors who refused to consent did not exceed 60 per cent of the total debt included in the programme.²⁹¹ Provision was also made for a creditor to object to an application where they considered that the debtor's estate should be sequestrated or the debtor was in possession of heritable property with substantial equity.²⁹² As now, in cases where approval was not automatic, the debt arrangement scheme administrator was required to approve a debt payment programme where it was fair and reasonable,²⁹³ but in any case where the consent of a non-consenting creditor could not be dispensed with, or where a creditor objected, they were required to apply to the sheriff for a determination of the application rather than determine it themselves.²⁹⁴ The sheriff was required to approve the debt payment programme if it was fair and reasonable,²⁹⁵ and in making their decision, was required to have regard to the same factors as those to which the debt arrangement scheme administrator would have had regard and any other

²⁸⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(4).

²⁸⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.20(4A)(b) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

²⁸⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.24(1) and (1A) as amended and inserted respectively by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 with effect from 1 April 2015. A debt payment programme for an individual would include a joint debt payment programme.

²⁹⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(1).

²⁹¹ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.22(4).

²⁹² Debt Arrangement Scheme (Scotland) Regulations 2004 reg.23.

²⁹³ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.26.

²⁹⁴ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.27(2). The procedure was set out in the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002 (SSI 2002/560) as amended by the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) Amendment (The Debt Arrangement Scheme (Scotland) Regulations 2004) 2004 (SSI 2004/505).

²⁹⁵ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.27(1).

factor they considered appropriate.²⁹⁶ The sheriff's decision was therefore effectively substituted for that of the debt arrangement scheme administrator in these cases. The position was simplified, however, by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007, which removed the provisions on dispensing with consent, creditor objections and referral to the sheriff in such cases.²⁹⁷ Consequently, as is now the case, in all cases where approval was not automatic, the decision on the application was made by the debt arrangement scheme administrator based on whether the debt payment programme was fair and reasonable.

As noted above, the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 would have removed the provision relating to deemed consent and replaced it with provisions allowing the debt arrangement scheme administrator to dispense with the consent of any remaining creditors where a specified percentage of creditors actively consented within an extended period of 35 days.²⁹⁸ Approval of a debt payment programme would then have been automatic where all creditors had either actively consented or their consent had been dispensed with, and in any other case, the debt arrangement scheme administrator would have been required to approve the debt payment programme if it was fair and reasonable.²⁹⁹ These changes, however, were one of the controversial elements of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009, and following their revocation, the Debt Arrangement Scheme (Scotland) Regulations 2011 retained the position which obtained following the changes made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007. As will be seen, however, the extent to which creditors have consented, deemed or otherwise, is a factor which the debt arrangement scheme administrator must take into account in determining whether a debt payment programme is fair and reasonable. **21-82**

Fair and reasonable test

In determining whether a debt payment programme is fair and reasonable, the debt arrangement scheme administrator must have regard to: **21-83**

- (a) where the debtor is an individual, the common financial tool³⁰⁰;
- (b) where the debtor is an individual, any statement or evidence included in the application to satisfy the debt arrangement scheme administrator as to the application of the common financial tool³⁰¹;
- (c) the total amount of the debt³⁰²;
- (d) the period over which a programme will operate³⁰³;

²⁹⁶ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.27(3).

²⁹⁷ The relevant provisions of the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002 as amended by the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) Amendment (The Debt Arrangement Scheme (Scotland) Regulations 2004) 2004 have not, however, been repealed, presumably as a result of an oversight.

²⁹⁸ Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 reg.13 and Executive Note accompanying them.

²⁹⁹ See Debt Arrangement Scheme (Scotland) Amendment Regulations 2009 reg.11 and Executive Note accompanying them.

³⁰⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(za) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁰¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(zb) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁰² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(a).

³⁰³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(b).

- (e) the amount of any equity in land³⁰⁴;
- (f) the method and frequency of payments³⁰⁵;
- (g) any earlier proposed programme which was not approved³⁰⁶;
- (h) any previous conjoined arrestment order, protected trust deed, sequestration, bankruptcy in England and Wales or bankruptcy restrictions order or undertaking given in Scotland, England or Wales which would have prevented an application but no longer does so³⁰⁷;
- (i) the involvement of a debtor in a debt payment arrangement (including a debt payment programme under the debt arrangement scheme), a time to pay direction or order under the Debtors (Scotland) Act 1987 or a time order under the Consumer Credit Act 1974³⁰⁸;
- (j) the extent to which creditors have consented (deemed or otherwise)³⁰⁹
- (k) any comment made by the money adviser³¹⁰; and
- (l) any asset of the debtor that could be realised to pay the debts to be included in the programme.³¹¹

21–84 The debt arrangement scheme administrator may also take into account:

- (a) any debt for which both a legal person, trust or unincorporated body *and* an individual who is a partner (in the case of a partnership), a general partner or a limited partner who has at any time taken part in management (in the case of a limited partnership), a trustee (in the case of a trust) or a person authorised to act on behalf of the body (in the case of an unincorporated body) is liable³¹²; and
- (b) any other factor which they consider appropriate.³¹³

Standard and discretionary conditions

21–85 Where a debt payment programme is approved, automatically or otherwise, it is subject to specified standard conditions.³¹⁴ These require the debtor to:

- (a) make the first payment under the programme within 42 days of the date on which the programme is approved³¹⁵;
- (b) make all payments under the programme as they fall due³¹⁶;
- (c) pay a continuing liability when due for payment³¹⁷;

³⁰⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(c).

³⁰⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(d).

³⁰⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(e).

³⁰⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(f).

³⁰⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(g).

³⁰⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(h).

³¹⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(i).

³¹¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(2)(j).

³¹² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(8)(c) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The debt may be taken into account in relation to an application by a legal person, trust or unincorporated body or an individual.

³¹³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.25(3).

³¹⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(1).

³¹⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(a) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.12. The period was previously one month.

³¹⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(b).

³¹⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(c). Continuing liabilities are discussed at para.21–64.

- (d) make no payments to creditors taking part in the programme other than payments under the programme and payments in respect of continuing liabilities³¹⁸;
- (e) apply for or obtain credit only within the limits provided for in the regulations or as provided for by an approved variation of the programme³¹⁹;
- (f) notify the debt arrangement scheme administrator or any continuing money adviser of a change of address or a material change of circumstances.³²⁰ In the latter case, the notification must be made within seven days of becoming aware of the change in the case of an individual and within 14 days of becoming aware of the change in the case of a legal person, trust or unincorporated body.³²¹ In the case of a legal person, trust or unincorporated body, a material change of circumstances includes information which includes affects the declaration of viability³²²;
- (g) provide the debt arrangement scheme administrator or any continuing money adviser with such information or evidence of the debtor's income, assets or liabilities as has been requested within 10 days of receiving a written request therefor³²³;
- (h) make all payments in respect of any credit obtained within the limits provided for in the regulations³²⁴;
- (i) give all notices and intimations which the debtor is required to give³²⁵;
- (j) complete and submit a tax or duty return or declaration as required and pay the relevant tax or duty³²⁶;
- (k) notify the debt arrangement scheme administrator as soon as reasonably practicable of a money adviser ceasing to act for the debtor for any reason other than the money adviser's resignation or the suspension or revocation of the money adviser's approval³²⁷; and
- (l) in the case of a legal person, trust or unincorporated body: (i) declare all assets owned by the debtor to the money adviser at the 12 monthly review; (ii) refrain from selling any non-trading asset during the programme unless the debtor's money adviser has been notified of the proposed sale and expected return for the benefit of creditors and has agreed to it in advance of the sale; and (iii) make all payments due under the programme within five years of the date of application for the programme.³²⁸ For this purpose, a non-trading asset is defined as any asset owned by the debtor other than: (i) current or circulating

³¹⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(d).

³¹⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(c). The limits on obtaining credit are discussed at para.17 35 onwards and variation of the debt payment programme is discussed further at para.21–98 onwards.

³²⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(f).

³²¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(f) read with Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(3)(b) as inserted by the Debt Arrangement Scheme (Scotland) Regulations 2014.

³²² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(3)(a) as inserted by the Debt Arrangement Scheme (Scotland) Regulations 2014. The declaration of viability is discussed at para.21–62.

³²³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(g).

³²⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(h). The provisions on obtaining credit are discussed at para.21–98 onwards.

³²⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(i).

³²⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(j).

³²⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(k).

³²⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(2)(l) as inserted by the Debt Arrangement Scheme (Scotland) Regulations 2014.

assets, for instance, stock in trade or inventory; (ii) an article acquired by a trading debtor to be sold on (with or without adaptation) or used in a process of manufacturing items for sale by the debtor in the ordinary course of trade; (iii) an article of a perishable nature or which is likely to deteriorate substantially and rapidly in condition or value; (iv) a dwelling-house or mobile home other than one used for the business or operations of the debtor; (v) an article within a dwelling-house or mobile home other than implements, tools of trade, books or other equipment reasonably required for the use of the debtor or any employee of the debtor in the practice of the debtor's profession, trade or business or for the purposes for which the debtor was established.³²⁹

21-86 Where a debt payment programme is approved, automatically or otherwise, it may also be made subject to one or more of a number of specified discretionary conditions.³³⁰ The discretionary conditions are:

- (a) that the debtor must realise an asset other than an excepted asset and distribute the proceeds among the creditors.³³¹ An excepted asset is defined as a dwelling-house or mobile home occupied by the debtor as the debtor's sole or main residence or an asset that is exempt from attachment under s.11 of the Debt Arrangement and Attachment (Scotland) Act 2002 or is not a non-essential asset under Sch.2 of that Act.³³² As noted above, the debt arrangement scheme does not normally anticipate the realisation of assets, but this may in some cases be appropriate and/or necessary to bring the proposed debt payment programme within the parameters which would allow it to be approved as fair and reasonable. In order to protect the debtor, however, it has not hitherto been permitted to require realisation of the debtor's sole or main residence or assets which are exempt from diligence. However, the interim response to the 2016 review of the debt arrangement scheme proposes to introduce a discretionary condition allowing realisation of the debtor's dwelling-house in certain circumstances³³³;
- (b) that the debtor must sign and deliver a payment instruction to an employer³³⁴; and
- (c) any other reasonable condition intended to secure completion of the programme.³³⁵

Notice of approval

21-87 Where a debt payment programme is approved, a notice of approval will be entered into the debt arrangement scheme register³³⁶ and the debt payment

³²⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.27(4) as inserted by the Debt Arrangement Scheme (Scotland) Regulations 2014.

³³⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 regs 24(2) (automatic approval), 25(4) (approval by the debt arrangement scheme administrator) and 28(1) (discretionary conditions).

³³¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.28(2)(a).

³³² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.28(3). The assets which are exempt from attachment or are not non-essential assets are discussed in Ch.11.

³³³ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.3.

³³⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.28(2)(b). Payments instructions are discussed at para.21-58.

³³⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.28(2)(c).

³³⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.26(1). The debt arrangement scheme register is discussed in more detail at para.21-146 onwards.

programme takes effect from midnight on the immediately preceding day.³³⁷ There is, therefore, an element of retrospection in the programme taking effect. The debt arrangement scheme administrator is required to send notice in writing of the approval to any continuing money adviser or to the debtor³³⁸ and to intimate in writing any discretionary condition attached to the approval to the debtor and the money adviser who made the application.³³⁹ It is further provided that a continuing money adviser or the debt arrangement scheme administrator must notify the approval of the programme to:

- (a) the debtor³⁴⁰;
- (b) each creditor known to the continuing money adviser or debt arrangement scheme administrator³⁴¹;
- (c) the clerk of a court that has made a conjoined arrestment order, a time to pay direction or time to pay order under the Debtors (Scotland) Act 1987 or a time order under the Consumer Credit Act 1974³⁴²;
- (d) the debtor's employer, where payments are to be made under an earnings arrestment.³⁴³ It is thought that the reference to an earnings arrestment is erroneous and the reference should be to a payment instruction; and
- (e) the payments distributor.³⁴⁴

Where the debtor is a charity, any notification given under these provisions must also be given to the Office of the Scottish Charity Regulator.³⁴⁵ It should be noted that the provisions may involve a degree of duplication. **21-88**

Rejection of debt payment programme

Where an application for a debt payment programme is rejected, the debt arrangement scheme administrator must send notice in writing of the rejection to any continuing money adviser or to the debtor³⁴⁶ and must specify the **21-89**

³³⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.26(2).

³³⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(1). In the case of a debtor who is a legal person, trust or unincorporated body, the notice may be sent to the nominated person: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(10) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³³⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(3)(a). In the case of a debtor who is a legal person, trust or unincorporated body, the notice may be sent to the nominated person: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(10) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁴⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(4)(a)(i). In the case of a debtor who is a legal person, trust or unincorporated body, the notice may be sent to the nominated person: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(10) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁴¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(4)(a)(ii) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The notice must be in Form 2 (as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.18(2)) or Form 2B (as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 with effect from 1 April 2015) of Sch.I to the Debt Arrangement Scheme (Scotland) Regulations 2011 as appropriate.

³⁴² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(4)(a)(iii).

³⁴³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(4)(a)(iv).

³⁴⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(4)(a)(v).

³⁴⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(11) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁴⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(1). In the case of a debtor who is a legal person, trust or unincorporated body, the notice may be sent to the nominated person: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(10) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

reason for the rejection.³⁴⁷ The notice of rejection will be entered into the debt arrangement scheme register.³⁴⁸ It is further provided that a continuing money adviser or the debt arrangement scheme administrator must notify the rejection to:

- (a) the debtor³⁴⁹;
- (b) the money adviser who made the application³⁵⁰; and
- (c) each creditor known to the continuing money adviser or debt arrangement scheme administrator.³⁵¹

21–90 Where the debtor is a charity, any notification given under these provisions must also be given to the Office of the Scottish Charity Regulator.³⁵²

Review and appeal

21–91 Prior to changes made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013, a decision of the debt arrangement scheme administrator to approve or reject an application or to attach a discretionary condition to a debt payment programme was subject to appeal,³⁵³ but the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 introduced provisions for review of such decisions by the debt arrangement scheme administrator prior to any appeal. In accordance with these provisions, a debtor or a money adviser acting on behalf of a debtor may apply for review of the debt arrangement scheme administrator's decision to refuse to approve a debt payment programme on any ground which may be raised in an appeal³⁵⁴; a creditor named in the application may apply for review of the debt arrangement scheme administrator's decision to dispense with the creditor's consent or to approve a debt payment programme on any ground which may be raised in an appeal³⁵⁵; and a debtor, a money adviser acting on behalf of the debtor, a creditor participating in a debt payment programme or a creditor who has applied for a variation of a debt payment programme on specified grounds³⁵⁶ may apply for a review of the debt arrangement scheme administrator's deci-

³⁴⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(2).

³⁴⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(1)(f). The debt arrangement scheme register is discussed in more detail at para.21–146 onwards.

³⁴⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(4)(b)(i). In the case of a debtor who is a legal person, trust or unincorporated body, the notice may be sent to the nominated person: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(10) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁵⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(4)(b)(ii).

³⁵¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.29(4)(b)(iii). In contrast to the provisions for notifying approval of a debt payment programme to creditors, there is no form for this purpose.

³⁵² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(11) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁵³ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47 as enacted.

³⁵⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

³⁵⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(2) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17. The provision for review of the debt arrangement scheme administrator's decision to dispense with the creditor's consent appears to be otiose given that there is no longer specific provision for dispensing with a creditor's consent.

³⁵⁶ The specified grounds are those in reg.37(1)(c) (a debt due at the date of approval of the programme was omitted from the programme or wrongly assessed due to a mistake, oversight or other reasonable cause) and (f) (a future or contingent debt known but not quantifiable at the date of approval of the programme is quantified and due for payment). As to the grounds for variation generally, see para.21–108.

sion to attach a discretionary condition to the debt payment programme on any ground which may be raised in an appeal.³⁵⁷ A debtor or a creditor may appeal to the sheriff against the debt arrangement scheme administrator's decision on such a review on a point of law.³⁵⁸ Reviews and appeals are discussed in more detail below.

EFFECT OF DEBT PAYMENT PROGRAMME

Effect generally

Where a debt payment programme has been approved, the debts specified in the application for approval are to be paid in accordance with the programme.³⁵⁹ **21-92**

Interest, fees, etc.

Approval of a debt payment programme effectively results in the payment of any interest, fees, penalties or other charges which are not owed at the date on which the application for the debt payment programme was made but which would otherwise become payable after that date being suspended for the duration of the debt payment programme: such charges are not payable unless and until the debt payment programme is revoked and they cease to be owed or payable at all if and when the debt payment programme is completed.³⁶⁰ These provisions also apply to any debt in respect of which an offer of composition is accepted or deemed to be accepted in the same way as to a completed programme.³⁶¹ **21-93**

Arrestments

Approval of a debt payment programme has the effect of recalling any arrestment of the debtor's income or property from the time it takes effect, and the debt arrangement scheme administrator is required to send notice of recall to each employer or party in possession of funds or property arrested as the case may be.³⁶² For the purpose of this provision, debts which are being paid under a debt payment programme by a legal person, trust or unincorporated body are treated as if they are also being paid under an approved debt payment programme by an individual who is a partner (in the case of a partnership), a general partner or a limited partner who has at any time taken part in management (in the case of a limited partnership), a trustee (in the case of a trust) or a person authorised to act on behalf of the body (in the case of an unincorporated body).³⁶³ **21-94**

³⁵⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(3) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

³⁵⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47C(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17. For a case in which such an appeal had been made at an earlier stage, see *Accountant in Bankruptcy, Applicant* unreported 12 November 2014 Edinburgh Sheriff Court.

³⁵⁹ See Debt Arrangement and Attachment (Scotland) Act 2002 s.4(1).

³⁶⁰ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.4(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(3). Revocation is discussed further at para.21-118 onwards and completion is discussed further at para.21-132 onwards.

³⁶¹ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.4(1A) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(4). Composition is discussed further at para.21-136 onwards.

³⁶² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(a). The time a debt payment programme takes effect is discussed at para.21-87 onwards.

³⁶³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(9) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

Trust deeds

21–95 It is provided that where the debtor has granted a trust deed which is not a protected trust deed, approval of a debt payment programme has the effect on the trust deed as if an award of sequestration of the debtor's estate on a debtor application had been granted as at the date of approval of the programme (but in relation to the scheme under Pt 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 and the Debt Arrangement Scheme (Scotland) Regulations 2011).³⁶⁴ This provision is not free from difficulty. It is intended to result in the trust deed effectively ceasing to exist.³⁶⁵ It is, however, ambiguous, and may not achieve that effect on either possible reading of the provision. One reading of the provision is that the effect of the approval of a debt payment programme on the trust deed is the same as the effect of the debtor's sequestration on a trust deed, and it is understood that this is what was intended. In that case, however, the meaning of the words in parenthesis is unclear. Furthermore, the question of the effect of sequestration on a trust deed is in itself not free from difficulty. As noted hereafter,³⁶⁶ unless a trust deed itself provides for its termination on a subsequent sequestration, the accepted position now seems to be that although the trustee under a trust deed must hand over the trust assets to a trustee in sequestration, the trust created by the trust deed is not destroyed but only suspended until the sequestration process is complete, with the result that the trust will revive after the sequestration. If the effect of an approved debt payment programme on a trust deed is the same as the effect of sequestration on that trust deed, therefore, unless the trust deed provides for its termination on the subsequent approval of a debt payment programme, the trust deed would revive after the debt payment programme was completed or, it is thought, revoked. It is true that in the case of completion of the debt payment programme, the debts included in the programme will have been paid in full or, in the case of interest, fees, penalties and other charges, cease to be payable. However, prior to the changes introduced by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014, it was not necessary for a debt payment programme to include all debts owed by the debtor, with the result that a trust deed might include debts not included in the debt payment programme, and if the proposed changes discussed above are enacted, the position will be similar. Furthermore, the debtor's assets and future income would remain subject to the revived trust deed. The alternative reading of the provision is that the effect of the approval of a debt payment programme on the trust deed is the same as the effect of an award of sequestration of the debtor's estate on a debt payment programme. The effect of an award of sequestration of the debtor's estate on a debt payment programme is provided for by reg.40 of the Debt Arrangement Scheme (Scotland) Regulations 2011 as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013, which requires the debt arrangement scheme administrator to revoke a debt payment programme, inter alia, on an award of sequestration of the debtor's estate.³⁶⁷ As already noted, however, a trust deed for creditors cannot be revoked. If, therefore, the intention is that a trust deed should cease to exist on the subsequent approval of a debt payment programme, it would have been better to make specific provision to that effect in clear terms.

³⁶⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.35.

³⁶⁵ See Debt Arrangement Scheme, *Guidance for Money Advisers*, para.8.9.7, which assumes that it has this effect.

³⁶⁶ See Ch.22.

³⁶⁷ Revocation is discussed further at para.21–118 onwards.

Moratorium on diligence, etc.

Approval of a debt payment programme results in a moratorium on specified actions during the subsistence of the debt payment programme, and for the purpose of these provisions, debts which are being paid under a debt payment programme by a legal person, trust or unincorporated body are treated as if they are also being paid under an approved debt payment programme by an individual who is a partner (in the case of a partnership), a general partner or a limited partner who has at any time taken part in management (in the case of a limited partnership), a trustee (in the case of a trust) or a person authorised to act on behalf of the body (in the case of an unincorporated body).³⁶⁸ It is provided that it not competent:

- (a) to serve a charge for payment in respect of any debt included in the debt payment programme or any other debt owed to a creditor who has been given notice of the approval of the debt payment programme in the prescribed form³⁶⁹;
- (b) to commence or execute any diligence to enforce payment of any such debt, subject to certain exceptions.³⁷⁰ The exceptions are that it is competent to auction an attached article where notice of public auction has been given to the debtor or the article has been removed from a dwelling-house following exceptional attachment or notice of such removal has been given³⁷¹; to implement a decree of forthcoming³⁷²; and to implement a decree or order for sale of a ship or a share of a ship or cargo³⁷³;
- (c) to commit a debtor to prison under s.4 of the Civil Imprisonment (Scotland) Act 1882 in respect of any such debt, except for the purposes of s.40A of the Child Support Act 1991³⁷⁴;
- (d) for a creditor to found on any such debt in presenting or concurring in the presentation of a petition for sequestration of the debtor's estate³⁷⁵;
- (e) for the court in respect of any debt to make an order granting warrant for the sale of attached land³⁷⁶ or a satisfaction order in relation to a residual attachment.³⁷⁷ At the time of writing, however, the provisions relating to land attachment and residual attachment are not in force; and
- (f) to release arrested funds in accordance with the provisions for automatic release of arrested funds.³⁷⁸ Where the debt payment programme is subsequently revoked, however, the period between its approval and revocation is then to be disregarded in calculating the time when the arrested funds are to be released.³⁷⁹

³⁶⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(9) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁶⁹ See Debt Arrangement and Attachment (Scotland) Act 2002 s.4(2)(a) and (5).

³⁷⁰ See Debt Arrangement and Attachment (Scotland) Act 2002 s.4(2)(b) and (5).

³⁷¹ See Debt Arrangement and Attachment (Scotland) Act 2002 s.4(2A)(a).

³⁷² See Debt Arrangement and Attachment (Scotland) Act 2002 s.4(2A)(b).

³⁷³ See Debt Arrangement and Attachment (Scotland) Act 2002 s.4(2A)(c).

³⁷⁴ See Debt Arrangement and Attachment (Scotland) Act 2002 s.4(2)(c) and (5).

³⁷⁵ Debt Arrangement and Attachment (Scotland) Act 2002 s.4(3) and (5). The reference to concurring in the presentation of a petition for sequestration would appear to be incorrect, in that concurrence by a creditor is now relevant only in certain cases where the debtor applies for sequestration by debtor application, and odd, in that a debtor application would not be prevented by approval of a debt payment programme.

³⁷⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.34(1)(a).

³⁷⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.34(1)(b).

³⁷⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.34(2).

³⁷⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.34(2).

- 21-97** The running of prescription in relation to the relevant debts is, however, suspended for the period of the debt payment programme.³⁸⁰

Restrictions on credit

- 21-98** No person or body may give credit to the debtor except in the following cases³⁸¹:

- (a) the credit is approved following a variation of the debt payment programme³⁸²;
- (b) the credit is further credit given as part of a cyclical loan arrangement operating at the date of approval of the debt payment programme where the debtor's payment does not vary as a result of the credit being given, for example, a revolving credit agreement or a current account mortgage³⁸³;
- (c) trade credit incurred by the debtor in the ordinary course of business, provided the debtor has given the lender notice in writing of the approval of the debt payment programme when applying for or before obtaining the credit³⁸⁴;
- (d) credit for an emergency repair, provided the debtor has given the lender notice in writing of the approval of the debt payment programme when applying for or before obtaining the credit.³⁸⁵
An emergency repair is defined as one which is required to maintain: (i) the debtor's dwelling-house in wind- and water-tight condition (in the case of an individual); (ii) a building required only or principally for the debtor's work (in the case of a legal person, trust or unincorporated body); (iii) any item that is not a non-essential asset under Sch.2 of the Debt Arrangement and Attachment (Scotland) Act 2002 in reasonable working order; or (iv) a vehicle required by the debtor for travelling to work or other essential purpose³⁸⁶; and
- (e) where the debtor is an individual, credit for reasonable funeral expenses for an immediate family member, provided the debtor has given the lender notice in writing of the approval of the debt payment programme when applying for or before obtaining the credit.³⁸⁷

- 21-99** If a creditor does give credit to the debtor other than in these cases, it is not competent to enforce payment of the debt by serving a charge for payment, commencing any diligence or petitioning for sequestration of the debtor's estate during the debt payment programme,³⁸⁸ but the running of prescription in relation to the debt is suspended for the period of the debt payment programme.³⁸⁹

³⁸⁰ Debt Arrangement and Attachment (Scotland) Act 2002 s.4(4).

³⁸¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(b). As noted at para.21-85, it is a standard condition of approval of a debt payment programme that the debtor applies for or obtains credit only within the limits provided for in the regulations or as provided for by an approved variation of the programme and makes all payments in respect of any such credit obtained. Variation is discussed at para.21-103 onwards.

³⁸² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(b)(i). Variation is discussed further at para.21-103 onwards.

³⁸³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(b)(ii).

³⁸⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(b)(iii) and (2).

³⁸⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(b)(iv) and (2).

³⁸⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(6) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. Assets which are not non-essential assets are discussed in Ch.11.

³⁸⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(b)(v) (as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014) and (2).

³⁸⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(3).

³⁸⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(4).

It may be noted that the interim response to the 2016 review of the debt arrangement scheme noted that most respondents to the consultation considered that the provisions on credit were too restrictive, especially when compared with the less restrictive provisions on a debtor obtaining credit in sequestration.³⁹⁰ It therefore proposes to amend the provisions to mirror the provisions in bankruptcy subject to certain provisos.³⁹¹ 21–100

Obligations on creditors

Creditors are forbidden from persuading a debtor to withdraw from a debt payment programme or to make additional payments in respect of any debt included in the programme.³⁹² They are also under an obligation to provide a statement of all liabilities of the debtor on request by the debt arrangement scheme administrator or any continuing money adviser³⁹³ and to notify the debt arrangement scheme administrator or any continuing money adviser of any liability where the creditor has security against a co-obligant of the debtor.³⁹⁴ 21–101

Subsequent sequestration or trust deed

The approval of a debt payment programme does not prevent the debtor from subsequently applying for sequestration of the debtor's estates or granting a trust deed, but any resulting award of sequestration or the achievement of protection of the trust deed will result in the automatic revocation of the debt payment programme.³⁹⁵ 21–102

VARIATION

Application for variation

An application to vary a debt payment programme may be made to the debt arrangement scheme administrator.³⁹⁶ In the case of an individual debtor, the application may be made by the debtor or a money adviser acting on behalf of the debtor³⁹⁷ and, in the case of a joint debt payment programme, must be made by both debtors jointly.³⁹⁸ In the case of a legal person, trust or unincorporated body, the application may only be made by a money adviser acting on behalf of the debtor.³⁹⁹ An application to vary a debt payment programme may also be 21–103

³⁹⁰ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.4. The restrictions on obtaining credit in sequestration are discussed in Ch.17.

³⁹¹ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017).

³⁹² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(c). As noted at para.21–85, it is a standard condition of approval of a debt payment programme that the debtor makes no payments to creditors taking part in the programme other than payments under the programme and payments in respect of continuing liabilities.

³⁹³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(d)(i).

³⁹⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.33(1)(d)(ii).

³⁹⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.40. Revocation is discussed further at para.21–118 onwards.

³⁹⁶ See Debt Arrangement and Attachment (Scotland) Act 2002 s.5(1) and Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁹⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(1)(a).

³⁹⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(5)(a) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

³⁹⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(1) and (5)(b)(i) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

made to the debt arrangement scheme administrator by a creditor, but only where the creditor has made a reasonable attempt to agree the variation with the debtor first.⁴⁰⁰

- 21–104** The debt arrangement scheme administrator may *ex proprio motu* propose a variation of a debt payment programme where a liability or part of a liability of the debtor is discharged as a result of the creditor applying compensation, provided that they have made a reasonable attempt to agree a variation between the debtor and the creditor.⁴⁰¹
- 21–105** The debt arrangement scheme administrator must vary a debt payment programme where there has been an offer of composition but not every creditor has accepted or been deemed to accept it: in such circumstances, the debt arrangement scheme administrator must vary the debt payment programme in accordance with such acceptances and deemed acceptances as there are.⁴⁰² The provisions on composition are discussed further below.
- 21–106** An application for variation made by the debtor is required only to be in writing, while an application by a money adviser acting on behalf of the debtor or by a creditor must be in the prescribed form.⁴⁰³ An application in relation to a legal person, trust or unincorporated body must include a declaration of viability.⁴⁰⁴
- 21–107** An application for variation may seek the variation of any condition which is attached to the approval of the debt payment programme or a previous variation of the programme.⁴⁰⁵

Grounds for variation

- 21–108** The grounds on which an application for a variation may be made are:

- (a) on agreement between the debtor and each creditor participating in the programme⁴⁰⁶;
- (b) on agreement between the debtor and a creditor that a liability of the debtor is to be discharged⁴⁰⁷;
- (c) in order that interest, fees, penalties and other charges are not payable as provided for in the Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011.⁴⁰⁸ This ground allows an application to be made to vary a debt payment

⁴⁰⁰ See Debt Arrangement and Attachment (Scotland) Act 2002 s.5(1) and Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(1)(b), (2).

⁴⁰¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36A(1), (2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.13(1).

⁴⁰² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46D(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁴⁰³ See Debt Arrangement and Attachment (Scotland) Act 2002 s.5(4) and Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(3). The prescribed form, where applicable, is Form 4 (as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.18(2)) or Form 4B (as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014) in the Schedule to the Debt Arrangement Scheme (Scotland) Regulations 2011 as appropriate.

⁴⁰⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(5)(b)(ii) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁰⁵ Debt Arrangement and Attachment (Scotland) Act 2002 s.5(3). The conditions attached to a variation of a debt payment programme are discussed at para.21–113.

⁴⁰⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(a).

⁴⁰⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(b).

⁴⁰⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(c).

programme to provide for the suspension of interest, fees, penalties and other charges arising after the variation and for such charges to cease to be owed and payable on the completion of the programme where the debt payment programme is one to which the provisions for suspension of interest, fees, penalties and other charges during the debt payment programme and for such charges to cease to be owed and payable on the completion of the programme contained in the Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 do not apply automatically. Similar provision was previously made following the introduction of the provisions for suspension of interest, fees, penalties and other charges during the debt payment programme and for such charges to cease to be owed and payable on the completion of the programme by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007.⁴⁰⁹ An application on this ground will therefore be relevant only in relation to a debt payment programme in respect of which a request for the consent of creditors was made before the coming into force of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007 on 30 June 2007: in all other cases, the suspension of interest, fees, penalties and other charges during the debt payment programme and the provision for such charges to cease to be owed and payable on the completion of the programme will already apply automatically⁴¹⁰;

- (d) on a material change in circumstances of the debtor.⁴¹¹ Such a change may, of course, be for the better or for the worse. Where the change is for the better, the debtor may or may not apply for a variation, but the permissive language of the provisions means that there is no compulsion to do so. If the debtor does not apply, a creditor may do so if the creditor becomes aware of the change of circumstances, but this is likely to be a matter of chance notwithstanding that it is a standard condition of approval of a debt payment programme that the debtor notifies any continuing money adviser or the debt arrangement scheme administrator of any material change of circumstances within a specified time of becoming aware of the change.⁴¹² This may be seen as a weakness in the legislation. If the change is for the worse, and is such as to allow an individual debtor to satisfy the conditions for a payment holiday, discussed below, an application for variation may be made on that ground instead;
- (e) where a debt due at the date of approval of the programme was omitted from or wrongly assessed for the programme as a result of a mistake, oversight or other reasonable cause⁴¹³;
- (f) where liability of a debtor is discharged by a creditor applying compensation (set off)⁴¹⁴;
- (g) where a future or contingent debt which was known but not quantifiable at the date of approval of the programme is quantified and due for payment⁴¹⁵;
- (h) where a debtor requires credit to meet an essential requirement⁴¹⁶;

⁴⁰⁹ See Debt Arrangement Scheme (Scotland) Amendment Regulations 2007 reg.3(2).

⁴¹⁰ See Debt Arrangement Scheme (Scotland) Amendment Regulations 2007 reg.4.

⁴¹¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(d).

⁴¹² See discussion of standard conditions at para.21–85.

⁴¹³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(c).

⁴¹⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(ca) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.13(2)(a).

⁴¹⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(f).

⁴¹⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(g).

- (i) where an individual debtor wishes to take a payment holiday in defined circumstances.⁴¹⁷ This provision was introduced by the Debt Arrangement Scheme (Scotland) Regulations 2011 and has been refined by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013. Under this provision, the debtor may defer payments for a period not exceeding six months where specified circumstances have resulted in a reduction in the debtor's disposable income of 50 per cent or more with an equivalent period being added to the end of the programme.⁴¹⁸ These circumstances are:
 - (i) a period of unemployment or a change of employment⁴¹⁹;
 - (ii) a period of leave from employment for the purposes of maternity, paternity, adoption or caring for a dependent relative⁴²⁰;
 - (iii) a period of illness⁴²¹;
 - (iv) divorce, dissolution of civil partnership or separation from a spouse or civil partner⁴²²; and
 - (v) the death of a person for whom the debtor shared care (financial responsibilities or otherwise).⁴²³

Where the conditions for a payment holiday are not satisfied, but the change in the debtor's circumstances is material, an application for variation may be made on that ground instead. As noted, at present these provisions apply only to an individual debtor. However, the interim response to the 2016 review of the debt arrangement scheme proposes to introduce a similar provision in business debt payment programmes.⁴²⁴

Fee for application

- 21–109** As noted above, the Debt Arrangement Scheme (Scotland) Regulations 2011 make provision for a fee to be payable to the debt arrangement scheme administrator for consideration of an application for approval or variation of a debt payment programme.⁴²⁵ This means that following a variation which results in a change in the amount to be paid by the debtor under the programme, the fee will be calculated on the amount to be paid as so varied.

⁴¹⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(h) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴¹⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(h) as amended by the Debt Arrangement Scheme (Scotland) Regulations 2013 reg.13(2)(b). Prior to amendment, the provision provided for a payment holiday for a set period of six months; the amended provision therefore provides more flexibility. "Disposable income" for this purpose means disposable income calculated on the same basis as in the original application for a debt payment programme: reg.37(4) as amended by the Debt Arrangement Scheme (Scotland) Regulations 2013 reg.18(1).

⁴¹⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(h).

⁴²⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(h).

⁴²¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(h).

⁴²² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(h).

⁴²³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.37(1)(h).

⁴²⁴ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.4. The restrictions on obtaining credit in sequestration are discussed in Ch.17.

⁴²⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.5(1).

Procedure

The debt arrangement scheme administrator is required to intimate an application for variation or a proposal for variation made by the debt arrangement administrator under reg.36A to the debtor, the payments distributor, each creditor taking part in the programme and any continuing money adviser.⁴²⁶ Provision is made for details of an application for variation to be entered into the debt arrangement scheme register,⁴²⁷ but no corresponding provision appears to have been made in the case of a proposal for variation made by the debt arrangement administrator under reg.36A.

Approval or rejection of variation

The debt arrangement scheme administrator must approve an application for variation made on any of the first three grounds for variation set out above.⁴²⁸ In any other case, the debt arrangement scheme administrator must approve the application for variation if it is fair and reasonable.⁴²⁹ Originally, provision was made for the debt arrangement scheme administrator to refer an application for variation in such a case to the sheriff for determination where they considered it appropriate,⁴³⁰ but this provision was removed by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007.⁴³¹ In determining whether a variation is fair and reasonable, the debt arrangement scheme administrator must have regard to:

- (a) the same factors to which they must have regard when determining if an application for approval of a debt payment programme is fair and reasonable⁴³²;
- (b) the views of the debtor⁴³³ and, in the case of a joint payment programme, the other debtor⁴³⁴;
- (c) the views of a creditor taking part in the programme and the creditor making the application⁴³⁵;
- (d) the views of any money adviser who has provided advice to the debtor⁴³⁶;

⁴²⁶ See Debt Arrangement and Attachment (Scotland) Act 2002 s.5(2) and Debt Arrangement Scheme (Scotland) Regulations 2011 reg.36(4) and reg.36A(3) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.13(1). In the case of a debtor who is a legal person, trust or unincorporated body, the notice may be sent to the nominated person: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(10) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴²⁷ The Debt Arrangement Scheme Register is discussed in more detail at para.21–146.

⁴²⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(1); see also in relation to the third ground Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.3.

⁴²⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(2).

⁴³⁰ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.39(3). The relevant procedure was set out in the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002 (SSI 2002/560) as amended by the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) Amendment (The Debt Arrangement Scheme (Scotland) Regulations 2004) 2004 (SSI 2004/505).

⁴³¹ The relevant provisions of the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002 as amended by the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) Amendment (The Debt Arrangement Scheme (Scotland) Regulations 2004) 2004 have not, however, been repealed, presumably as a result of an oversight.

⁴³² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(3)(a)(i).

⁴³³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(3)(a)(ii).

⁴³⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(3)(a)(iii).

⁴³⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(3)(a)(iv).

⁴³⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(3)(a)(v).

- (e) whether any expenditure of the debtor declared in assessing disposable income appears to be necessary expenditure⁴³⁷; and
- (f) any previous payment holiday.⁴³⁸

21-112 They may also have regard to any other factor they consider appropriate.⁴³⁹

21-113 Approval of a variation may be made subject to any of the discretionary conditions which may be attached to the initial approval of a debt payment programme.⁴⁴⁰

Notification of decision

21-114 The debt arrangement scheme administrator is required to intimate in writing the reasons for, and effect of, the approval or rejection of a variation and any discretionary condition attached to a variation to the debtor, the money adviser who made the application on behalf of the debtor, the payments distributor, the debtor's employer where there is a payment instruction in operation, the creditors taking part in the programme, the creditor who applied for the variation and any continuing money adviser.⁴⁴¹ A continuing money adviser is also required to notify the debtor's employer where there is a payment instruction in operation.⁴⁴² It may be noted that prior to the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013, there was no provision for notification of the debtor's employer where there was a payment instruction in cases where there was no continuing money adviser. This was presumably an oversight and the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 introduced a requirement for such notification by the debt arrangement scheme administrator. However, since the separate requirement for notification by a continuing money adviser has also been retained, this will result in duplication in cases where there is a continuing money adviser.

21-115 Where a variation is approved, details of the variation will also be entered into the debt arrangement scheme register.⁴⁴³ The rejection of an application for variation, however, will not be entered into the debt arrangement scheme register. This may cause uncertainty where a search of the register discloses an application for variation but no further notice, since the application could have been rejected or may still be pending.

Review and appeal

21-116 Prior to changes made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013, a decision of the debt arrangement scheme administrator to approve or refuse to approve an application to vary a debt payment programme

⁴³⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(3)(a)(vi).

⁴³⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(3)(a)(vii).

⁴³⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(3)(b).

⁴⁴⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.38(4). Discretionary conditions are discussed at para.21-86.

⁴⁴¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.39(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.13(3). In the case of a debtor who is a legal person, trust or unincorporated body, the notice may be sent to the nominated person: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(10) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁴² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.39(2). Payment instructions are discussed at para.21-58.

⁴⁴³ The debt arrangement scheme register is discussed in more detail at para.21-146 onwards.

was subject to appeal,⁴⁴⁴ but the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 introduced provisions for review of such decisions by the debt arrangement scheme administrator prior to any appeal. In accordance with these provisions, a debtor, a money adviser acting on behalf of a debtor, a creditor participating in a debt payment programme or a creditor who has applied for a variation of a debt payment programme on specified grounds⁴⁴⁵ may apply for a review of the debt arrangement scheme administrator's decision to approve or refuse to approve a variation of, or attach a discretionary condition to, the debt payment programme on any ground which may be raised in an appeal.⁴⁴⁶ A debtor or a creditor may appeal to the sheriff against the debt arrangement scheme administrator's decision on such a review on a point of law.⁴⁴⁷ Reviews and appeals are discussed in more detail below.

Effect of variation

Where a debt payment programme has been varied, the debts specified in the application for variation must be paid in accordance with the programme.⁴⁴⁸ **21-117**

REVOCATION

Revocation by debt arrangement scheme administrator

The debt arrangement scheme administrator is required to revoke a debt payment programme in the following circumstances: **21-118**

- (a) Where an award of sequestration is made on a debtor application or where a creditor presented or concurred in the presentation of a petition for sequestration before approval of the programme.⁴⁴⁹
- (b) Where a trust deed granted by the debtor becomes protected.⁴⁵⁰
- (c) On the death of an individual debtor.⁴⁵¹ In the case of a joint debt payment programme, this means the death of either debtor.⁴⁵²

⁴⁴⁴ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47 as enacted.

⁴⁴⁵ The specified grounds are those in reg.37(1)(e) (a debt due at the date of approval of the programme was omitted from the programme or wrongly assessed due to a mistake, oversight or other reasonable cause) and (f) (a future or contingent debt known but not quantifiable at the date of approval of the programme is quantified and due for payment). As to the grounds for variation generally, see at para.21-108.

⁴⁴⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(3) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

⁴⁴⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47C(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

⁴⁴⁸ Debt Arrangement and Attachment (Scotland) Act 2002 s.4(1).

⁴⁴⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.40(a) and (aa) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.14(1). As noted above, the approval of a debt payment programme prevents a creditor petitioning for sequestration, but does not prevent an award of sequestration being made on a petition presented before approval of the programme or prevent the debtor from applying for sequestration.

⁴⁵⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.40(b). As noted above, the approval of a debt payment programme does not prevent a debtor from granting a trust deed for creditors.

⁴⁵¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.40A(1), (2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.14(2) and amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁵² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.40A(2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.14(2) and amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

Application for revocation

- 21–119** An application may also be made to the debt arrangement scheme administrator for the revocation of a debt payment programme.⁴⁵³ In the case of an individual debtor, the application may be made by the debtor or a money adviser acting on behalf of the debtor⁴⁵⁴ and, in the case of a joint debt payment programme, must be made by both debtors jointly, except where the application is made on the ground that the parties are no longer in one of the relationships which allow a joint debt payment programme to be entered into or no longer consent to the joint payment programme, in which case the application may be made by one of the debtors only.⁴⁵⁵ In the case of a legal person, trust or unincorporated body, the application may be made by a money adviser or nominated person acting on behalf of the debtor⁴⁵⁶ or by a money adviser acting under specified provisions.⁴⁵⁷ Originally, a money adviser was required to seek revocation where no payments had been made under the programme for 12 months.⁴⁵⁸ The money advice sector, however, regarded this requirement as contrary to the role of the money adviser in acting for the debtor, and it was removed by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007.⁴⁵⁹
- 21–120** A creditor taking part in a debt payment programme may also apply to the debt arrangement scheme administrator for the revocation of the debt payment programme.⁴⁶⁰
- 21–121** An application by the debtor is required only to be in writing, but an application by a money adviser or nominated person on behalf of the debtor or by a creditor must be in the prescribed form.⁴⁶¹

Grounds for revocation

- 21–122** The debt arrangement scheme administrator may revoke a debt payment programme on any of the available grounds for revocation whether or not an application for revocation has been made.⁴⁶² The grounds for revocation are:

⁴⁵³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.41(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁵⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.41(1)(a) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁵⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.41(3). The grounds for revocation generally are discussed below.

⁴⁵⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.41(1) and (3)(b)(i) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁵⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.41(1) and (3)(b)(ii) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The specified provisions are those in reg.12A(b) or (c), i.e. that the money adviser on carrying out a 12 month review is unable to make a declaration of viability because they consider that the debtor cannot meet the requirements for such a declaration or that the money adviser has become aware of information which causes them to believe that one of the grounds for revocation exists. The declaration of viability is discussed at para.21–62. The grounds for revocation are discussed at para.21–122.

⁴⁵⁸ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.11(1).

⁴⁵⁹ The provision was replaced by provisions allowing debt arrangement scheme administrator, whether on an application or otherwise, to revoke a debt payment programme where no payments had been made under it for a continuous period of six months. As will be seen below, however, these provisions were not carried forward into the Debt Arrangement Scheme (Scotland) Regulations 2011.

⁴⁶⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.41(1)(b).

⁴⁶¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.41(2) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The prescribed form, where applicable, is Form 5 (as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.18(1)) or Form 5B (as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014) in the Schedule to the Debt Arrangement Scheme (Scotland) Regulations 2011.

⁴⁶² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(1).

- (a) the debtor has failed, without reasonable cause, to satisfy a standard or discretionary condition attached to the debt payment programme⁴⁶³;
- (b) the debtor has made a statement in an application under the Debt Arrangement Scheme (Scotland) Regulations 2011 which the debtor knows to be untrue⁴⁶⁴;
- (c) a payment under the programme has become due at a time when there remains unpaid a sum amounting to not less than the aggregate of payments due in a period of two months beginning after the last payment⁴⁶⁵;
- (d) in the case of a joint debt payment programme, the parties are no longer in one of the relationships which allow a joint debt payment programme to be entered into or no longer consent to the joint payment programme⁴⁶⁶; and
- (e) in the case of a legal person, trust or unincorporated body, the format of the debtor changes *or* a money adviser is unable to make a declaration of viability on carrying out a 12 monthly review because they consider the debtor no longer meets the requirements for such a declaration *or* the consent of a partner (in the case of a partnership), a general partner or a limited partner who has at any time taken part in management (in the case of a limited partnership), a trustee (in the case of a trust) or a person authorised to act on behalf of the body (in the case of an unincorporated body) to the debt payment programme is withdrawn.⁴⁶⁷ For this purpose, the format of the debtor changing is defined as meaning, in the case of a partnership or limited partnership with less than five partners, where the membership of the partnership changes; in the case of a trust with less than five trustees, where one of the trustees is divested of their interest in the trust; and in the case of a corporate body or unincorporated body, where there is a material change in the objects or membership of the body.⁴⁶⁸

Where the debt arrangement scheme administrator proposes to revoke a debt payment programme, they must give written notice to the debtor, each creditor taking part in the programme, any creditor who has made an application for variation of the programme and any continuing money adviser or money adviser who has made an application for revocation on behalf of the debtor, and the debt payment programme may not be revoked until the expiry of a period of at least four weeks from the date on which notice is given.⁴⁶⁹ Any continuing money adviser given such notice is required to notify all creditors taking part in the programme,⁴⁷⁰ although this appears to involve an element of duplication.

⁴⁶³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(2)(a).

⁴⁶⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(2)(b).

⁴⁶⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(2)(c) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.14(3). Prior to amendment, this ground provided for revocation where a payment under the programme had become due at a time when there remained unpaid a sum amounting to not less than the aggregate of two such payments.

⁴⁶⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(2)(d).

⁴⁶⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(2)(c) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁶⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(4) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁶⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(2). In the case of a debtor who is a legal person, trust or unincorporated body, the notice may be sent to the nominated person: see Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(10) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁷⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.42(3).

Decision to revoke

- 21-124** In deciding whether to revoke a debt payment programme, the debt arrangement scheme administrator must have regard to any statement made by or on behalf of the debtor; the nature of any failure or untrue statement by the debtor; any factor tending to indicate whether or not the programme will be successful; and any representations made by the debtor or creditors within the period of four weeks following the notice of the debt arrangement scheme administrator's proposal to revoke the programme.⁴⁷¹ The debt arrangement scheme administrator may also have regard to any other factor which they consider appropriate in all the circumstances.⁴⁷²

Notification of revocation

- 21-125** Where the debt payment programme is revoked, the debt arrangement scheme administrator is required to intimate the revocation and the reasons for it in writing to the debtor, a money adviser who made the application on behalf of the debtor, any continuing money adviser, the payments distributor, the creditors taking part in the programme, any creditor who applied for revocation and the debtor's employer if there is a payment instruction in operation.⁴⁷³ Any continuing money adviser is required to notify the creditors taking part in the programme, the debtor's employer if there is a payment instruction in operation, the debtor and the payments distributor,⁴⁷⁴ although again this appears to involve a degree of duplication. Where the debtor is a charity, any notification given under these provisions must also be given to the Office of the Scottish Charity Regulator.⁴⁷⁵

Effect of revocation

- 21-126** As a result of amendments made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 and the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014, it is now provided that a revocation has no effect for a specified period immediately following the date on which the programme is revoked, being a period of six weeks in the case of revocation on the death of an individual debtor and 14 days in any other case.⁴⁷⁶ Where there is an application for review of the decision to revoke the programme, the revocation has no effect for a period of 28 days after the date on which that application is made.⁴⁷⁷
- 21-127** With one exception, the revocation of a debt payment programme renders payable any interest, fees, penalties and other charges the payment of which was suspended during the debt payment programme (either *ab initio* or

⁴⁷¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.43(1).

⁴⁷² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.43(2).

⁴⁷³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.44(1).

⁴⁷⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.44(2) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.14(4). Payment instructions are discussed at para.21-58.

⁴⁷⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(11) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁷⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.44A(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.14(5) and substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁷⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.44A(2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.14(5). Review is discussed further at para.21-130.

following its variation to that effect).⁴⁷⁸ The exception is where a joint debt payment programme is revoked on the grounds that the eligibility conditions for such a programme no longer apply and a debtor applies for another debt payment programme within 21 days of the notification of the revocation of the joint debt payment programme.⁴⁷⁹ The amount of interest, fees, penalties or other charges due on revocation is the amount detailed in the application for approval of the debt payment programme, unless either the debtor or the creditor requires the debt arrangement scheme administrator to determine the amount, in which case it is the amount so determined.⁴⁸⁰ Prior to changes made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013, such a determination was subject to appeal,⁴⁸¹ but as a result of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013, there is now provision for the review of such a determination prior to any appeal.⁴⁸²

The revocation of a debt payment programme where any of the debts being paid under the programme is constituted by a decree or document of debt as defined by s.10 of the Debt Arrangement and Attachment (Scotland) Act 2002 constitutes the apparent insolvency of the debtor, unless it is shown that at the time of the revocation, the debtor was able and willing to pay their debts as they became due or that, but for their property being affected by a restraint order or subject to a confiscation or charging order, they would be able to do so.⁴⁸³ **21-128**

The revocation of a joint debt payment programme on the ground that the parties are no longer in one of the relationships which allow a joint debt payment programme to be entered into or no longer consent to the joint payment programme triggers a moratorium on specified actions for a period of six weeks immediately following the revocation.⁴⁸⁴ **21-129**

Review and appeal

Prior to changes made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013, a decision by the debt arrangement scheme administrator to revoke a debt payment programme was subject to appeal,⁴⁸⁵ but the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 introduced provisions for the review of such a decision prior to any appeal.⁴⁸⁶ In accordance with these provisions, a debtor, a money adviser acting on behalf of a debtor, a creditor participating in a debt payment programme or a creditor who has applied for a variation of a debt payment programme on specified **21-130**

⁴⁷⁸ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.4(1), (2).

⁴⁷⁹ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.4(4).

⁴⁸⁰ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.4(3).

⁴⁸¹ See Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1) as enacted.

⁴⁸² Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5). Reviews and appeals are discussed in more detail at para.21-30.

⁴⁸³ Bankruptcy (Scotland) Act 2016 s.16(1)(h), (2). Apparent insolvency is discussed in Ch.1.

⁴⁸⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.30(1)(c). The extent of the moratorium is discussed further at para.21-74.

⁴⁸⁵ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47 as enacted.

⁴⁸⁶ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(3) as substituted by the Debt Arrangement Scheme (Scotland) Regulations 2013. Appeals are discussed in more detail at para.21-157.

grounds⁴⁸⁷ may apply for a review of the debt arrangement scheme administrator's decision to revoke the debt payment programme on any ground which may be raised in an appeal.⁴⁸⁸ A debtor or a creditor may appeal to the sheriff against the debt arrangement scheme administrator's decision on such a review on a point of law.⁴⁸⁹ Reviews and appeals are discussed in more detail below.

Debt arrangement scheme register

- 21-131** There is no requirement for the details of either an application for revocation or a proposal for revocation where the debt arrangement scheme administrator proposes to revoke the debt payment programme *ex proprio motu* to be entered in the debt arrangement scheme register, with the result that anyone searching the register will be unaware of the potential revocation. Similarly, there is no requirement for details of a revocation to be entered in the debt arrangement scheme register, and indeed details of the debt payment programme will be removed from the register on revocation except in the case of a revocation of a joint debt payment programme where they will be retained during the period of the ensuing moratorium. Again, the result is that anyone searching the register may remain unaware that a debt payment programme previously existed and has been revoked. This appears to be a weakness in the legislation.

Completion

- 21-132** On completion of a debt payment programme in accordance with its terms, the payments distributor is required to send notice of the completion in writing to the debt arrangement scheme administrator, any continuing money adviser, the debtor and the creditors taking part in the programme.⁴⁹⁰ The debt arrangement scheme administrator or continuing money adviser must in turn intimate the completion in writing to the debtor's employer if there is a payment instruction in operation.⁴⁹¹ Where the debtor is a charity, any notification given under these provisions must also be given to the Office of the Scottish Charity Regulator.⁴⁹²
- 21-133** Where every creditor accepts or is deemed to accept an offer of composition in respect of all the debts included in a debt payment programme, the programme is regarded as completed.⁴⁹³ Composition is discussed further below.
- 21-134** On the completion of a debt payment programme, any interest, fees, penalties and other charges the payment of which was suspended during the debt payment programme (either ab initio or following its variation to that effect)

⁴⁸⁷ The specified grounds are those in reg.37(1)(e) (a debt due at the date of approval of the programme was omitted from the programme or wrongly assessed due to a mistake, oversight or other reasonable cause) and (f) (a future or contingent debt known but not quantifiable at the date of approval of the programme is quantified and due for payment). The grounds for variation are discussed at para.21-108.

⁴⁸⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(3) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

⁴⁸⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47C(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

⁴⁹⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46(1).

⁴⁹¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46(2) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.19(2). Payment instructions are discussed at para.21-58.

⁴⁹² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.22A(11) as inserted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁴⁹³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46C as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

cease to become owed or payable, thereby affording the debtor a limited amount of debt relief in respect of those sums.⁴⁹⁴

There is no requirement for the completion to be entered in the debt arrangement scheme register: the details of the programme will simply be removed. **21-135**

COMPOSITION

As noted above, there was originally provision for a debtor and a creditor to agree a composition or waiver of interest in relation to any debt to be included in a debt payment programme in advance of the submission of an application.⁴⁹⁵ Following the introduction of the provisions for automatic debt relief in relation to any interest, fees, penalties and other charges becoming due during a debt payment programme on the completion of that programme,⁴⁹⁶ the provisions relating to waiver of interest were effectively rendered unnecessary and were removed, but the provision for composition was retained.⁴⁹⁷ It was, however, subsequently omitted from the Debt Arrangement Scheme (Scotland) Regulations 2011 on the basis that it was rarely, if ever, used, and that if a creditor was prepared to compound part of the debt, this could be achieved by a subsequent variation of the approved debt payment programme.⁴⁹⁸ The Scottish Government's *Consultation on Bankruptcy Law Reform* published in February 2012 revisited the issue of composition, however, and sought views on the introduction of a further element of debt relief in defined circumstances.⁴⁹⁹ This was supported by respondents⁵⁰⁰ and new provisions relating to composition were accordingly introduced by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013. These provisions do not, however, apply where the debtor is a legal person, trust or unincorporated body.⁵⁰¹ **21-136**

In terms of the provisions, the debt arrangement scheme administrator or a continuing money adviser may, with the consent of the debtor, make an offer of composition to each creditor taking part in the debt payment programme in specified circumstances.⁵⁰² The circumstances are that the offer is made after a period of 12 years beginning with the approval of the debt payment programme and 70 per cent of the total amount of debt due under the debt payment programme when it was approved has been paid.⁵⁰³ In calculating the period of **21-137**

⁴⁹⁴ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.4(1) (as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(3)) and (2).

⁴⁹⁵ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.24.

⁴⁹⁶ See further at para.21-134.

⁴⁹⁷ See Debt Arrangement Scheme (Scotland) Regulations 2004 reg.24 as amended by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007 reg.3(12), (13).

⁴⁹⁸ See Executive Note accompanying the Debt Arrangement Scheme (Scotland) Regulations 2011. Variation is discussed further at para.21-103 onwards.

⁴⁹⁹ Scottish Government, *Consultation on Bankruptcy Law Reform*, paras 10.4.7 and 10.4.8.

⁵⁰⁰ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses*, para.5.14.

⁵⁰¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46A(1A) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁵⁰² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46A(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁵⁰³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46A(1)(a), (b) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

12 years, the period of any payment holiday is not included.⁵⁰⁴ An offer of composition must be in the prescribed form.⁵⁰⁵

- 21-138** Where a creditor accepts that offer of composition in respect of a debt or debts included in the programme, the debtor's liability to repay that debt or debts is discharged.⁵⁰⁶ A creditor who does not respond to the offer of composition within 21 days after the date of the offer is deemed to have accepted it.⁵⁰⁷ The debt arrangement scheme administrator is required to maintain a record of acceptances by creditors.⁵⁰⁸
- 21-139** Where every creditor accepts or is deemed to accept the offer of composition in respect of all the debts in the programme, the programme is regarded as completed and the debt arrangement scheme administrator is required to send notice in writing of the completion of the programme to the debtor, any continuing money adviser, the payments distributor and, if there is a payment instruction under reg.32, the debtor's employer.⁵⁰⁹ In any other case, the debt arrangement scheme administrator is required to vary the debt payment programme in accordance with such acceptances and deemed acceptances as there are⁵¹⁰ and to intimate in writing the effect of such variation to the debtor, any continuing money adviser, the payments distributor, all creditors continuing to take part in the programme and, if there is a payment instruction under reg.32, the debtor's employer.⁵¹¹ These provisions may be regarded as favouring creditors who refuse to accept an offer of composition at the expense of creditors who do: it remains to be seen whether creditors may therefore be reluctant to accept an offer of composition if they consider that other creditors may not do so and thereby gain an advantage.
- 21-140** The interim response to the 2016 review of the debt arrangement scheme noted that most respondents to the consultation agreed that the provisions on composition should change, but there was no consensus on what the provisions should be.⁵¹² It therefore proposes no change at present. As noted above, there is currently no provision for composition in a business debt payment programme. The consultation paper sought views on the introduction of composition in business debt payment programmes, but the interim response does not make any proposals in this respect. It is thought, however, that there is in fact an even stronger case for composition in a business debt payment programme.

⁵⁰⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46A(3) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁵⁰⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46A(2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15. The prescribed form is Form 6 in the Schedule to the Debt Arrangement Scheme (Scotland) Regulations 2011 as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.18(2)(b).

⁵⁰⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46B(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁵⁰⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46B(2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁵⁰⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46B(3) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁵⁰⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46C as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁵¹⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46D(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁵¹¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.46D(2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.15.

⁵¹² Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.8.

CORRECTION OF ACCIDENTAL ERRORS

The debt arrangement scheme administrator may correct an accidental error in a determination made by them under the Debt Arrangement Scheme (Scotland) Regulations 2011.⁵¹³ This is, however, subject to the proviso that such a correction may not be made after 28 days from the date on which the error was made nor where an application for review has been made under reg.47 and no decision on that application has been made.⁵¹⁴ A correction has effect as if the relevant determination had been made in the correct form on the date on which it was originally made⁵¹⁵; in the case of a debt payment programme revoked in error, it restores the relevant debt programme as if it had not been revoked.⁵¹⁶ The debt arrangement scheme administrator must notify the correction to any person notified of the original determination in writing.⁵¹⁷ **21-141**

A debtor, a money adviser acting on behalf of the debtor, a creditor participating in a debt payment programme or a creditor who has applied for a variation of a debt payment programme on specified grounds⁵¹⁸ may apply for a review of the debt arrangement scheme administrator's decision to correct an accidental error in any determination and restore a debt payment programme on any ground which may be raised in an appeal.⁵¹⁹ A debtor or a creditor may appeal to the sheriff against the debt arrangement scheme administrator's decision on such a review on a point of law.⁵²⁰ Reviews and appeals are discussed further below. **21-142**

Since the provisions on correction of accidental errors are expressed to apply to a determination made by the debt arrangement scheme administrator under the Debt Arrangement Scheme (Scotland) Regulations 2011, they would appear not to apply to a determination made by them under any other provisions, for example, a determination under the Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011. **21-143**

DISPENSING POWER

The debt arrangement scheme administrator may relieve any person from the consequences of any failure to comply with a provision of the Debt Arrangement **21-144**

⁵¹³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.4A(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.5.

⁵¹⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.4A(4) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.5. Applications for review under reg.47 are discussed further at para.21-151 onwards.

⁵¹⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.4A(3)(a) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.5.

⁵¹⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.4A(3)(b) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.5.

⁵¹⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.4A(2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.5.

⁵¹⁸ The specified grounds are those in reg.37(1)(e) (a debt due at the date of approval of the programme was omitted from the programme or wrongly assessed due to a mistake, oversight or other reasonable cause) and (f) (a future or contingent debt known but not quantifiable at the date of approval of the programme is quantified and due for payment). As to the grounds for variation generally, see para.21-108.

⁵¹⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(3) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

⁵²⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47C(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

Scheme (Scotland) Regulations 2011, which is due to a mistake, oversight or other reasonable cause.⁵²¹

21–145 There is no provision for any review of or appeal against the debt administrator's decision under this provision. It is thought, however, that such a decision would be subject to judicial review.

THE DEBT ARRANGEMENT SCHEME REGISTER

21–146 There is a public register of debt payment programmes known as the debt arrangement scheme register.⁵²² The register is maintained by the debt arrangement scheme administrator and is permitted to be wholly or partly in electronic form.⁵²³

21–147 The register contains information on the following⁵²⁴

- (a) intimations of intention to apply for a debt payment programme⁵²⁵;
- (b) applications for approval of a debt payment programme⁵²⁶;
- (c) intimations of withdrawal of an application for approval of a debt payment programme⁵²⁷;
- (d) the date of any request to creditors to consent to an application for approval of a debt payment programme⁵²⁸;
- (e) approved debt payment programmes⁵²⁹;
- (f) notices of approval or rejection of an application for approval of a debt payment programme⁵³⁰;
- (g) applications for variation of an approved debt payment programme⁵³¹;
- (h) variations of approved debt payment programmes⁵³²;
- (i) corrections of accidental errors⁵³³;
- (j) variations of approved debt payment programmes on composition⁵³⁴;
- (k) applications for review under reg.47⁵³⁵; and
- (l) appeals to the sheriff.⁵³⁶

⁵²¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.4.

⁵²² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.18(1) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.19(1), which inserted the word "public" to clarify that the register was indeed a public register.

⁵²³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.18(2).

⁵²⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(1), (2) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.9 and the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁵²⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(a) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 with effect from 1 April 2015.

⁵²⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(b).

⁵²⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(c).

⁵²⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(d).

⁵²⁹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(e).

⁵³⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(f).

⁵³¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(g).

⁵³² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(h).

⁵³³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(ha) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.9(a).

⁵³⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(hb) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.9(a).

⁵³⁵ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(hc) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.9(a).

⁵³⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(2)(i) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.9(b).

The register includes, for each debtor who has given intimation of an intention to apply for a debt payment programme, applied for the approval of a debt payment programme or is participating in an approved debt payment programme, and for each partner (in the case of a partnership), general partner or limited partner who has at any time taken part in management (in the case of a limited partnership), trustee (in the case of a trust) or person authorised to act on behalf of the body (in the case of an unincorporated body) who has consented to a debt payment programme by a debtor, that person's full name (including any former name), date of birth, home address or addresses, business name and address (if any) and the business address of any continuing money adviser.⁵³⁷ **21-148**

Originally, a fee was payable for inspecting the register, except in the case of a money adviser inspecting the register on behalf of a debtor.⁵³⁸ As noted above, however, following the introduction of the fee payable for an application for approval or variation of a debt payment programme, the register may now be inspected electronically free of charge. **21-149**

REVIEW AND APPEAL

Background

Prior to changes made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013, certain decisions of the debt arrangement scheme administrator were subject to appeal to the sheriff.⁵³⁹ The Scottish Government's *Consultation on Bankruptcy Law Reform* published in February 2012 sought views on the creation of an intermediate administrative review or appeals process prior to any appeal to the sheriff to allow a debtor or creditor to challenge a decision of the debt arrangement scheme administrator.⁵⁴⁰ The proposal was for an internal review followed, where necessary, by a referral to an independent panel.⁵⁴¹ The principle of a review prior to appeal was supported by respondents⁵⁴² and provision for such review was accordingly made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013. **21-150**

Review

In accordance with these provisions, an application for review may be made in the following circumstances: **21-151**

- (a) a debtor or a money adviser acting on behalf of a debtor may apply for review of the debt arrangement scheme administrator's decision to refuse to approve a debt payment programme on any ground which may be raised in an appeal⁵⁴³;
- (b) a creditor named in an application for a debt payment programme may apply for review of the debt arrangement scheme administrator's

⁵³⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.19(3) as amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014.

⁵³⁸ Debt Arrangement Scheme (Scotland) Regulations 2004 reg.5.

⁵³⁹ See Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47 as enacted.

⁵⁴⁰ Scottish Government, *Consultation on Bankruptcy Reform* (2012), para.10.4.6.

⁵⁴¹ Scottish Government, *Consultation on Bankruptcy Reform* (2012), para.10.4.6.

⁵⁴² Accountant in Bankruptcy, *Consultation on Bankruptcy Reform: The Report of the Summary of Responses*, Executive Summary.

⁵⁴³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

decision to dispense with the creditor's consent to the programme or to approve a debt payment programme on any ground which may be raised in an appeal.⁵⁴⁴ The provision for review of the debt arrangement scheme administrator's decision to dispense with the creditor's consent appears to be otiose, however, given that there is no longer specific provision for dispensing with a creditor's consent, although in practical terms, that is the effect of approval of a debt payment programme in the absence of consent by all creditors;

- (c) a debtor, a money adviser acting on behalf of the debtor, a creditor participating in a debt payment programme or a creditor who has applied for a variation of a debt payment programme on specified grounds⁵⁴⁵ may apply for a review of the debt arrangement scheme administrator's decision to attach a discretionary condition to the debt payment programme, to approve or refuse to approve a variation of the debt payment programme, to revoke the debt payment programme or to correct an accidental error in any determination and restore an erroneously revoked debt payment programme on any ground which may be raised in an appeal⁵⁴⁶; and
- (d) a debtor or a creditor may apply for review of a determination of the debt arrangement scheme administrator of the amount of interest, fees, penalties and other charges which, but for the provisions allowing debt relief in relation to such items on successful completion of a debt payment programme, would become payable after the date of approval or variation of a debt payment programme on any ground which may be raised in an appeal.⁵⁴⁷

21-152 An application for review must be made in writing within 14 days after the date of intimation of the relevant decision to the debtor or creditor.⁵⁴⁸ It has been held that the debt arrangement scheme administrator should not accept an application for review of a decision to refuse an application for a debt payment programme where an award of sequestration has been made prior to the making of the application for review.⁵⁴⁹

21-153 The debt arrangement scheme administrator must intimate the application in writing to the debtor, any creditor named in the application for a debt payment programme, the money adviser who made the application for the programme, each creditor taking part in the programme and any continuing money adviser.⁵⁵⁰

⁵⁴⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(2) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

⁵⁴⁵ The specified grounds are those in reg.37(1)(e) (a debt due at the date of approval of the programme was omitted from the programme or wrongly assessed due to a mistake, oversight or other reasonable cause) and (f) (a future or contingent debt known but not quantifiable at the date of approval of the programme is quantified and due for payment). The grounds for variation generally are discussed at para.21-108.

⁵⁴⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(3) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17.

⁵⁴⁷ Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5).

⁵⁴⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(4) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5).

⁵⁴⁹ *Accountant in Bankruptcy, Applicant* unreported 12 November 2014 Edinburgh Sheriff Court.

⁵⁵⁰ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47(5) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011

The debt arrangement scheme administrator must review the decision at issue on the basis of the information provided by the applicant and any written representations received from the debtor, creditor or money adviser.⁵⁵¹ The review must be carried out within 28 days of the application.⁵⁵² **21-154**

On review, the debt arrangement scheme administrator may confirm, amend or alter the original decision or revoke it and substitute a new one.⁵⁵³ They must then intimate in writing the outcome of the review and its effect to the debtor, any creditor named in the application for a debt payment programme, the money adviser who made the application for the programme, each creditor taking part in the programme, any continuing money adviser, the payments distributor and, if there is a payment instruction under reg.32, the debtor's employer.⁵⁵⁴ **21-155**

The interim response to the 2016 review of the debt arrangement scheme proposes to make a number of non-legislative changes with a view to improving the review process.⁵⁵⁵ **21-156**

Appeal

A debtor or a creditor may appeal to the sheriff against the debt arrangement scheme administrator's decision on review on a point of law.⁵⁵⁶ An appeal is by way of summary application and must be lodged within 14 days of the date of the intimation of the decision appealed against.⁵⁵⁷ It is made to the sheriff of the sheriff court district in which the debtor habitually resides.⁵⁵⁸ **21-157**

reg.5(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5).

⁵⁵¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47A(b) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5).

⁵⁵² Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47A(a) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5).

⁵⁵³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47B(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5).

⁵⁵⁴ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47B(2) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5).

⁵⁵⁵ Accountant in Bankruptcy, *Interim Response: Debt Arrangement Scheme 2016 Review Consultation* (June 2017), Annex A, para.9.

⁵⁵⁶ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47C(1) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(1A) as substituted by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.3(5).

⁵⁵⁷ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47C(2) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(2).

⁵⁵⁸ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.2(1) and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(3).

21–158 Originally, provision was made for a further appeal to the sheriff principal on a point of law in certain cases,⁵⁵⁹ but this was removed by the Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007, making an appeal to the sheriff final in all cases.⁵⁶⁰ This remains the current position.⁵⁶¹

⁵⁵⁹ The cases in which a further appeal to the sheriff principal was allowed were: (i) an appeal by the debtor against a decision of the sheriff to refuse to approve a debt payment programme; and (ii) an appeal by a creditor participating in a debt payment programme against a decision of the sheriff to approve a debt payment programme: see Debt Arrangement Scheme (Scotland) Regulations 2004 reg.50(4) and (5).

⁵⁶⁰ Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007 reg.3(32)(a), (b) and (c).

⁵⁶¹ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.47C(3) as added by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013 reg.17 and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011 reg.5(4).

CHAPTER 22

TRUST DEEDS FOR CREDITORS

INTRODUCTION

A trust deed for creditors is a voluntary deed by which a debtor conveys specified assets to a named trustee to be administered for the benefit of creditors and settlement of debts. Trust deeds have their foundations in the common law, but certain aspects of trust deeds are now regulated by statute and, where certain statutory criteria are satisfied, including the assets to be conveyed to the trustee, a trust deed may become protected with specified consequences. Not all trust deeds become protected, whether because the trust deed was never intended to become protected or because it failed to become protected despite an intention to make it so. In practice, however, very few trust deeds do not become protected, intentionally or otherwise. **22-01**

The current statutory provisions relating to protected trust deeds are to be found mainly in the Bankruptcy (Scotland) Act 2016 and the Protected Trust Deeds (Forms) (Scotland) Regulations 2016.¹ The Bankruptcy (Scotland) Act 2016 also contains a number of provisions relating to trust deeds as defined for the purposes of that Act, whether protected or not, and a number of other provisions relating to trust deeds can be found in other legislation such as the Insolvency Act 1986. Trust deeds also come within the scope of the Trusts (Scotland) Act 1921 and the Trusts (Scotland) Act 1961. The other aspects of trust deeds remain matters for the common law. **22-02**

BACKGROUND AND DEVELOPMENT OF THE LAW

Trust deeds for creditors are the traditional alternative to sequestration. The two processes are distinct although they share many features.² Trust deeds have traditionally been regarded as having certain advantages over sequestration, although they also have certain disadvantages, some of which are mitigated where the trust deed becomes protected. Trust deeds have also, however, been controversial. **22-03**

As noted above, trust deeds have their foundations in the common law. In 1910, the Cullen Committee, which had been appointed in October 1908, **22-04**

“to enquire into and report upon the effects of the provisions of the laws at present in force in Scotland in relation to bankruptcy, compositions, and arrangements by insolvent debtors with their creditors . . .”,³

¹ Protected Trust Deeds (Forms) (Scotland) Regulations 2016 (SSI 2016/398).

² See, for example, *Donnelley v Royal Bank of Scotland*, 2016 S.C. GLA 13 per Sheriff Reid at [44] (not challenged on this point on appeal); *Patullo v Massey* unreported 6 May 2016 Edinburgh Sheriff Court, a decision of Sheriff Holligan.

³ *Report of the Committee appointed by the Secretary for Scotland to inquire into the Bankruptcy Law of Scotland and its Administration* (Cd. 5201, 1910), para.1.

noted that there was no statutory regulation or official supervision of trust deeds⁴ and considered that the question of whether there should be such statutory regulation and, if so, to what extent, was one of the most important questions to which the evidence it had received had been directed, although that evidence had disclosed widely divergent views.⁵ The committee accepted that the nature of trust deeds was such that they were attended by a number of defects which did not attend sequestration, in particular the fact that the creditors generally had no say in the selection of the trustee or effective control of their administration; the fact that there was no means of subjecting the debtor to compulsory examination; the fact that there was no mechanism for resolving disputes as to creditors' claims other than an action at common law; the fact that there was no provision for audit of the trustee's accounts and fixing their remuneration and the fidelity of their management could be tested only by an ordinary action; and the fact that no majority of the creditors acceding to a trust deed could force the minority to accede and a non-acceding creditor could resort to sequestration if qualified to do so.⁶ It also noted, however, that notwithstanding these disadvantages, trust deeds remained vastly more popular than sequestration because of their inherent advantages, in particular the fact that the absence of any fixed machinery allowed "a freedom and elasticity" to the administration which was conducive to speed in distribution and in many cases gave greater benefit to creditors and the fact of the comparative privacy of a trust deed.⁷ It therefore rejected various proposals which had been put to it for the introduction of "a variety of statutory regulations" relating to trust deeds, on the basis that the continued popularity of trust deeds seemed to show that their advantages outweighed their disadvantages and that, as these advantages sprang from freedom from regulation, they would be largely neutralised by the introduction of such proposals.⁸ It therefore made only one recommendation for the introduction of legislation in the form of a recommendation for a statutory provision relating to the auditing of the trustee's accounts and the fixing of their remuneration where the trust deed either made no provision for this or such provision as was made was not implemented.⁹ Such provision was duly enacted by the Bankruptcy (Scotland) Act 1913.¹⁰

- 22-05 That provision remained the only statutory provision relating to trust deeds until the Bankruptcy (Scotland) Act 1913 was replaced by the Bankruptcy (Scotland) Act 1985. The Scottish Law Commission in its *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* in 1982¹¹ had examined the law relating to trust deeds as it then stood, and noted that there were a number of disadvantages of trust deeds, in particular, the requirement for the trustee to complete title to the various items of the debtor's estate by the appropriate

⁴ *Report of the Committee appointed by the Secretary for Scotland to inquire into the Bankruptcy Law of Scotland and its Administration* (Cd. 5201, 1910), paras 14, 56.

⁵ *Report of the Committee appointed by the Secretary for Scotland to inquire into the Bankruptcy Law of Scotland and its Administration* (Cd. 5201, 1910), para.56.

⁶ *Report of the Committee appointed by the Secretary for Scotland to inquire into the Bankruptcy Law of Scotland and its Administration* (Cd. 5201, 1910) para.57. The concept of accession is dealt with at para.22-19.

⁷ *Report of the Committee appointed by the Secretary for Scotland to inquire into the Bankruptcy Law of Scotland and its Administration* (Cd. 5201, 1910), para.58.

⁸ *Report of the Committee appointed by the Secretary for Scotland to inquire into the Bankruptcy Law of Scotland and its Administration* (Cd. 5201, 1910), paras 61, 62.

⁹ *Report of the Committee appointed by the Secretary for Scotland to inquire into the Bankruptcy Law of Scotland and its Administration* (Cd. 5201, 1910), paras 63, 64.

¹⁰ Bankruptcy (Scotland) Act 1913 s.185.

¹¹ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982).

method in order to make the estate secure from the diligence of creditors who did not accede to the trust deed; the possibility of challenge of the trust deed as an illegal preference by a non-acceding creditor; the possibility that a non-acceding creditor, or indeed the debtor, might apply for the sequestration of the debtor's estates notwithstanding the existence of the trust deed; and the lack of a requirement for publicity of the trust deed.¹² It also noted that its Working Party, whose report formed the basis of its *Memorandum on Insolvency, Bankruptcy and Liquidation in Scotland* published in 1971,¹³ while recognising that trust deeds provided a simple, informal and commonly used alternative to sequestration, had been persuaded that their disadvantages were such that they should be replaced by a system of voluntary bankruptcy.¹⁴ As a consequence, it had embarked on further consultation with interested bodies in 1974 seeking views on whether trust deeds should be banned or retained and, if retained, whether with or without further regulation.¹⁵ In the light of the varied responses to that consultation, it had undertaken further informal consultation, as a result of which it concluded that the case for banning trust deeds had not been made out.¹⁶ It considered that the fact that trust deeds had been, and might continue to be, the preferred method of winding up an insolvent person's estate was in itself a strong argument for their retention, in addition to which trust deeds had the attraction of the avoidance of the formalities, strict time limits and at least some of the expense of sequestration, as well as the fact that the debtor would not be subject to the disabilities or stigma flowing from sequestration.¹⁷ In terms of the appropriate level of statutory regulation of trust deeds, like the Cullen Committee before it, it considered that restraint should be exercised in introducing any further regulation in order not to detract from the acknowledged advantages of trust deeds, but in order to address some of the acknowledged disadvantages of trust deeds, it did recommend the strengthening of the existing provision in the Bankruptcy (Scotland) Act 1913 and the introduction of some additional provisions, including a procedure whereby a trust deed could become protected with the result that non-acceding creditors would be bound by it.¹⁸ The Bankruptcy (Scotland) Act 1985 therefore introduced a number of additional provisions relating to trust deeds as defined for the purpose of that Act, including provisions applying a number of the provisions applying in sequestration either to all trust deeds or to protected trust deeds; an enhanced provision for the auditing of the trustee's accounts and the fixing of their remuneration; provisions for the registration of a notice of inhibition, the effect of the lodging of a claim under the trust deed on limitation of actions and the valuation of claims; and a procedure whereby a trust deed which satisfied specified conditions could become protected if a specified majority of creditors acceded to the trust deed with the result that, with limited exceptions, a non-acceding creditor had no higher right to recover their debt than an acceding creditor.¹⁹

¹² Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 24.4–24.7.

¹³ Scottish Law Commission, *Memorandum No. 16, Insolvency, Bankruptcy and Liquidation in Scotland* (1971).

¹⁴ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.24.8.

¹⁵ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.24.11.

¹⁶ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 24.11–24.12.

¹⁷ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), para.24.13.

¹⁸ Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 24.14–24.33.

¹⁹ These provisions, so far as still relevant, are discussed further below.

22-06 The requirement for positive accession on the part of creditors before a trust deed could become protected, however, meant that in practice relatively few trust deeds became protected, and so as part of a number of other reforms to bankruptcy law, the Bankruptcy (Scotland) Act 1993 amended the procedure to provide for a trust deed to become protected provided a specified majority of creditors did not object to it, with the result that the number of protected trust deeds increased dramatically.²⁰ Subsequent concerns that some protected trust deeds might not be genuinely for the benefit of creditors and about the lack of regulation of protected trust deeds led to a consultation by the Scottish Office in 1998 on, *inter alia*, protected trust deeds which set out a number of proposals for reform.²¹ No legislative change followed at that time, however, in the light of pending devolution. The issues in relation to protected trust deeds were, however, revisited in the Scottish Executive's consultation paper *Personal Bankruptcy Reform in Scotland: A Modern Approach*²² issued in November 2003 which, *inter alia*, set out a number of proposals for increased transparency and monitoring of protected trust deeds.²³ The subsequent consultation paper and draft Bill issued in July 2004, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation*,²⁴ noted that most of these proposals had received wide support and would be taken forward by way of regulations.²⁵ The subsequent consultation on a draft of the proposed regulations²⁶ took the opportunity to review the relative advantages and disadvantages of sequestration, protected trust deeds and the new debt arrangement scheme and concluded that in principle, protected trust deeds remained a useful tool which had a place in a reformed and integrated system of debt management and debt relief²⁷ but did

²⁰ For a summary of the background including the figures involved, see the Scottish Office, *A Consultation Follow-Up: Protected Trust Deeds and Other Issues* (July 1998), para.18; see also Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), Ch.2, available at <http://www.scotland.gov.uk/Resource/Doc/89955/0021680.pdf> [Accessed 19 September 2017].

²¹ The Scottish Office, *A Consultation Follow-Up: Protected Trust Deeds and Other Issues* (July 1998), para.16 onwards.

²² Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0030743.pdf> [Accessed 19 September 2017].

²³ Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), Ch.8.

²⁴ Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), available at <http://www.scotland.gov.uk/Resource/Doc/203606/0054275.pdf> [Accessed 19 September 2017].

²⁵ Scottish Executive, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation* (July 2004), paras 6.1–6.7.

²⁶ See Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), available at <http://www.scotland.gov.uk/Resource/Doc/89955/0021680.pdf> [Accessed 19 September 2017] and Scottish Executive, *Protected Trust Deeds: Partial Regulatory Impact Assessment* (January 2006), available at <http://www.scotland.gov.uk/Resource/Doc/92494/0022197.pdf> [Accessed 19 September 2017]. For the responses to the consultation, see Scottish Executive, *Protected Trust Deeds—Consultation on Draft Regulations and Partial Regulatory Impact Assessment: Analysis of responses* (June 2006), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0031324.pdf> [Accessed 19 September 2017]. There was also a supplementary consultation on the specific issue of the ranking of debts owed to credit unions in protected trust deeds: see Accountant in Bankruptcy, *Credit Union Debts in Protected Trust Deeds: Supplementary Consultation on Draft Regulations* (March 2007), available at <http://www.gov.scot/Resource/Doc/174118/0048563.pdf> [Accessed 19 September 2017] and, for the responses to that consultation, see consultation responses available at <http://www.gov.scot/Publications/2007/07/23145252/0> [Accessed 19 September 2017] and Accountant in Bankruptcy, *Credit Union Debts in Protected Trust Deeds: Report on Public Consultation*, available at <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000581.pdf> [Accessed 19 September 2017].

²⁷ Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), para.3.54.

require further reform.²⁸ The provisions of Sch.5 of the Bankruptcy (Scotland) Act 1985 relating to protected trust deeds were duly replaced with an enabling provision allowing the Scottish Ministers to make regulations in relation to specified matters relating to protected trust deeds²⁹ and the Protected Trust Deeds (Scotland) Regulations 2008³⁰ were enacted to give effect to the reforms. At the same time, the supervisory functions of Accountant in Bankruptcy (AiB) were extended to include the supervision of trustees under protected trust deeds.³¹

This was not to be the end of trust deed reform, however. Fears of a rise in repossession resulting from the credit crunch and recession which followed the financial crisis of 2008 led the Scottish Executive to establish in January 2009 a Debt Action Forum which issued its report in June 2009.³² The report touched on a number of matters relating to protected trust deeds, including the possible extension of the provisions for protection of a debtor's family home in sequestration to protected trust deeds; the possible exclusion (with creditor consent) of specified assets which would otherwise require to be included in the trust deed in order for it to become protected; possible amendments to the approval procedure; and the development of a simplified protected trust deed. At the same time, a review of the effect of the changes brought about by the Protected Trust Deeds (Scotland) Regulations 2008 was published,³³ which concluded that protected trust deeds remained an effective debt relief mechanism for some people but also made further recommendations for reform. The Debt Action Forum report ultimately resulted in the passing of the Home Owner and Debtor Protection (Scotland) Act 2010. Part 2 of that Act contained, inter alia, a number of provisions relating to trust deeds, including amending the definition of trust deed for the purposes of the Bankruptcy (Scotland) Act 1985 to encompass a trust deed which, broadly speaking, excluded the whole or part of the debtor's dwelling-house from the assets conveyed to the trustee; allowing a trust deed which excluded the whole or part of the debtor's dwelling-house from the assets conveyed to the trustee to become protected; and extending the provisions for protection of a debtor's family home in sequestration to trust deeds whether protected or not. These provisions, together with a number of other provisions in Pt 2 relating to sequestration, had been included on the basis that they were uncontroversial, although in fact they proved to be anything but.³⁴ The Home Owner and Debtor Protection (Scotland) Act 2010 received Royal Assent on 18 March 2010 and the provision extending the provisions for protection of a debtor's family home in sequestration to trust deeds came into force on 7 September 2010, while the other provisions, including consequential changes to the Protected Trust Deeds (Scotland) Regulations 2008,³⁵ came into force on 15 November 2010.

²⁸ Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), paras 3.58–3.59.

²⁹ See Bankruptcy (Scotland) Act 1985 s.5, para.5 as substituted for paras 5–13 by the Bankruptcy and Diligence etc. (Scotland) Act 2007.

³⁰ Protected Trust Deeds (Scotland) Regulations 2008 (SSI 2008/143).

³¹ See Bankruptcy (Scotland) Act 1985 s.1A(1)(a)(ii) as inserted by the Bankruptcy and Diligence etc. (Scotland) Act 2007. As to the supervisory functions of AiB, see further Ch.4.

³² See Debt Action Forum Final Report (June 2009), available at <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000813.pdf> [Accessed 19 September 2017].

³³ Accountant in Bankruptcy, *Protected Trust Deed Review 2009* (June 2009), available at <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000821.pdf> [Accessed 19 September 2017].

³⁴ See Local Government and Communities Committee, *Stage 1 Report on the Home Owner and Debtor Protection (Scotland) Bill*, in particular para.133 onwards, available at <http://archive.scottish.parliament.uk/s3/committees/lgc/reports-09/lgr09-16-01.htm> [Accessed 19 September 2017].

³⁵ See the Protected Trust Deeds (Scotland) Amendment Regulations 2010 (SSI 2010/398).

22–08 The provisions of the Home Owner and Debtor Protection (Scotland) Act 2010 relating to trust deeds were still not, however, the final word on trust deed reform. A further review of protected trust deeds was published in March 2010³⁶ and a working group on protected trust deeds was established by AiB, which met for the first time in March 2010 and published its final report in June 2010.³⁷ The working group's purpose, in the light of ongoing concerns in particular about the costs of protected trust deeds generally and the lack of return to creditors, was to review the existing protected trust deed arrangements, examine evidence from AiB's review of protected trust deeds and any other relevant evidence, and make recommendations for any appropriate legislative and non-legislative measures to ensure that protected trust deeds were fit for purpose and struck the correct balance between debtors and creditors.³⁸ Its report contained recommendations for further reform in a number of areas and was followed by a consultation entitled *Protected Trust Deeds – Improving the Process* in October 2011.³⁹ The report on that consultation was published in May 2012,⁴⁰ but in the meantime the Scottish Government had issued its *Consultation on Bankruptcy Law Reform* in February 2012,⁴¹ which contained yet further proposals for reform intended to be considered together with the responses to the 2011 consultation as part of wider bankruptcy reform. The summary of responses to the 2012 consultation, published in August 2012,⁴² showed broad support for some, but not all, of the proposed changes, and the Scottish Government's response, published in November 2012,⁴³ indicated an intention to take forward a number of reforms to protected trust deeds, some by way of regulation and some by way of primary legislation.

22–09 Before any further reform was implemented, however, the Scottish Law Commission published its *Report on the Consolidation of Bankruptcy Legislation in Scotland* in May 2013.⁴⁴ It noted that respondents to the consultation paper which preceded it had drawn attention to the fact that much of the legislation which was core to the daily practice of the law was subordinate legislation and this was seen to be a major issue.⁴⁵ At least in so far as the law concerning protected trust deeds was concerned, the Scottish Law Commission agreed: it said that it was a complex body of law entirely appropriate to primary legislation and much too important to be relegated to subordinate legislation.⁴⁶

³⁶ Accountant in Bankruptcy, *Protected Trust Deed Review 2010* (March 2010), available at <http://www.aib.gov.uk/protected-trust-deed-review-2010> [Accessed 19 September 2017].

³⁷ Protected Trust Deeds Working Group, *Final Report* (June 2010), available at <http://www.aib.gov.uk/protected-trust-deed-working-group-final-report> [Accessed 19 September 2017].

³⁸ Protected Trust Deeds Working Group, *Final Report* (June 2010), Annex A (Terms of Reference).

³⁹ Scottish Government, *Protected Trust Deeds—Improving the Process* (October 2011), available at <http://www.gov.scot/Resource/Doc/360299/0121805.pdf> [Accessed 19 September 2017].

⁴⁰ Accountant in Bankruptcy, *Report on Public Consultation: Protected Trust Deeds—Improving the Process* (May 2012), available at <http://www.gov.scot/Resource/0039/00393396.pdf> [Accessed 19 September 2017].

⁴¹ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), available at <http://www.gov.scot/Resource/0038/00388465.pdf> [Accessed 19 September 2017].

⁴² Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 19 September 2017].

⁴³ *The Scottish Government's Response to: The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 19 September 2017].

⁴⁴ Scottish Law Commission, *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, 2013).

⁴⁵ Scottish Law Commission, *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, 2013), para.2.77.

⁴⁶ Scottish Law Commission, *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, 2013), para.2.78.

It therefore recommended that the law concerning protected trust deeds, other than the various forms, should be enacted in primary legislation and integrated with the other provisions on trust deeds which had remained in the Bankruptcy (Scotland) Act 1985.⁴⁷ It did not attempt to give effect to this recommendation in the draft Bill published as part of the report, however, in view of the anticipated reforms to protected trust deeds referred to above.⁴⁸

Later that year, the Protected Trust Deeds (Scotland) Regulations 2013⁴⁹ duly replaced the Protected Trust Deeds (Scotland) Regulations 2008 with effect from 28 November 2013. They were subsequently amended in a number of respects, and further changes were made by the Bankruptcy and Debt Advice (Scotland) Act 2014 and other secondary legislation made under that Act. Following these changes, the Scottish Law Commission's recommendation was implemented, and the substantive provisions relating to protected trust deeds were incorporated into the Bankruptcy (Scotland) Act 2016 while the forms were set out in the Protected Trust Deeds (Forms) (Scotland) Regulations 2016. 22-10

There remains, however, the prospect of further reform. A further review of protected trust deeds took place in 2016, including a consultation seeking views on the changes introduced by the Protected Trust Deeds (Scotland) Regulations 2013⁵⁰ and a summary of the responses to the consultation was published in July 2016.⁵¹ There have, however, been no further developments at the time of writing. 22-11

It can thus be seen that trust deeds have undergone a sustained period of reform. In contrast to the light-touch approach taken initially by the Cullen Committee and by the Scottish Law Commission in its report in 1982, this has resulted in an increasing level of statutory regulation over time, particularly in the case of protected trust deeds. This has reduced at least some of the traditionally perceived advantages of this form of procedure as exemplified by the Cullen Committee and the Scottish Law Commission. On the other hand, the introduction of the concept of the protected trust deed itself and some of the subsequent reforms, such as the extension of further provisions applying in sequestration to protected trust deeds, has also helped to address some of the traditional disadvantages of trust deeds. 22-12

Trust deeds clearly remain controversial, however, and despite the return of the substantive provisions relating to protected trust deeds to the primary legislation, where the Scottish Law Commission rightly took the view that they belong, the structure of the law on trust deeds may still be considered unsatisfactory. As Sheriff Holligan has recently noted in a case concerning the re-appointment of a trustee under a protected trust deed after the administration of the trust deed had been completed and the debtor and trustee discharged, there are fundamental uncertainties surrounding trust deeds for creditors.⁵² He said: 22-13

“It seems to me that in some respects trust deeds for creditors are in a somewhat anomalous position. The legal structure straddles both the law

⁴⁷ Scottish Law Commission, *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, 2013), recommendation 38.

⁴⁸ Scottish Law Commission, *Report on the Consolidation of Bankruptcy Legislation in Scotland* (Scot. Law Com. No.232, 2013), para.2.79.

⁴⁹ Protected Trust Deeds (Scotland) Regulations 2013 (SSI 2013/318).

⁵⁰ Accountant in Bankruptcy, *Protected Trust Deed Consultation 2016* (March 2016).

⁵¹ Accountant in Bankruptcy, *Protected Trust Deed Consultation 2016: The Report of the Summary of Responses* (July 2016).

⁵² *Patullo v Massey* unreported 6 May 2016 Edinburgh Sheriff Court.

of trusts and the law of insolvency. The matter is yet further complicated by the [statutory provisions] which supplement such common law rules as do exist. Trust deeds have a long history and have been utilised as an alternative to statutory sequestration for many years but much of the underlying structure has not received the benefit of recent analysis. At its inception, and there may be a different view when there are acceding creditors, a trust deed is a unilateral deed by the debtor. The trustee is a trustee for creditors, not for the debtor. Applying the traditional analysis of an *inter vivos* to a trust deed for creditors has its difficulties, not least of which is determining when the trust ends.”

- 22–14** That case, and other recent case law on the issue discussed later in this chapter, illustrates the difficulties which can arise. It may therefore be that the time has come to replace the existing uneasy mix of common law and statute with a complete statutory code designed to regulate all aspects of trust deeds for creditors, protected or otherwise, and it has been suggested to the Scottish Law Commission that a review of the structure of the law on protected trust deeds would be a suitable subject for its next programme of law reform. Whether that suggestion is accepted remains to be seen.

TRUST DEEDS GENERALLY

Contents of trust deed

- 22–15** A trust deed for creditors would traditionally contain, *inter alia*, provisions relating to the assets to be conveyed to the trustee including, where relevant, contributions from income; the ingathering, management and realisation of these assets and the trustee’s powers; the administration of the trust generally; the debtor’s obligations; the replacement of the trustee where necessary; the expenses of the trust deed and the remuneration of the trustee; the submission and ranking of claims and the distribution of the estate; reversion of any assets remaining to the debtor; the discharge of the debtor and the trustee; and the end of the trust deed.
- 22–16** In principle, the provisions of a trust deed can be tailored to the debtor’s specific circumstances, in particular in relation to the assets to be conveyed to the trustee. In practice, however, if it is intended to make the trust deed protected, the trust deed will require to satisfy the relevant statutory criteria, including as to the assets to be conveyed to the trustee, and, if it does become protected, certain aspects of the administration of the trust will thereafter be regulated by the relevant statutory provisions. In addition, certain aspects of trust deeds which fall within the definition of a trust deed for the purposes of the Bankruptcy (Scotland) Act 2016 will be regulated by that Act whether the trust deed is protected or not, and other aspects of trust deeds, protected or otherwise, may be regulated by other statutory provisions. In practice, therefore, a trust deed, in particular a trust deed which is intended to become protected, will require to be drafted carefully with the relevant statutory provisions in mind. This section discusses trust deeds generally, while the provisions of the Bankruptcy (Scotland) Act 2016 relating to all trust deeds which fall within the definition of a trust deed for the purposes of that Act and to protected trust deeds are discussed further below.

Purpose of trust deed

- 22–17** As noted above, a trust deed is generally granted for the benefit of the debtor’s creditors and the settlement of debts. Although the trust deed is granted by the

debtor, therefore, the trustee acts in the interests of, and is accountable to, the creditors, not the debtor.⁵³

The trustee

The trustee must be a qualified insolvency practitioner,⁵⁴ and as such will require to comply with the statutory requirements for caution and record-keeping which apply to insolvency practitioners.⁵⁵ The trustee is not disqualified from acting as such as a result of having advised the debtor prior to the signing of the trust deed.⁵⁶ A well-drafted trust deed will contain provisions for the replacement of the trustee, whether on resignation, death or otherwise, as well as for the assumption of an additional trustee or trustees where appropriate. In the absence of such provisions in the trust deed itself, recourse may be had to the Trusts (Scotland) Act 1921, which contains provisions for the assumption, resignation and removal of trustees and the appointment of new trustees in specified circumstances.⁵⁷ 22-18

Accession to trust deed

Creditors may accede to the trust deed. Accession in this context means agreeing to join in the common measures provided for in the trust deed and not to disturb or interrupt them.⁵⁸ Accession may be express or implied⁵⁹; it is a question of fact and no writing or other formality is necessary.⁶⁰ In the case of a written accession, it is sufficient if it is signed by the creditor or the creditor's agent with the creditor's authority.⁶¹ In the absence of an express written accession, a distinction may need to be drawn between such accession as will bar a creditor from taking separate action to pursue their debt and such accession as will bind them to the terms of the trust deed as a whole.⁶² Accession such as will bar a creditor from taking separate action has been held to be implied from such conduct as may lead other creditors into believing that the creditor has acceded,⁶³ including attending a meeting of creditors in person or by representative and either concurring in or failing to dissent from a resolution passed at such a meeting,⁶⁴ from the 22-19

⁵³ *Pattullo v Massey* unreported 6 May 2016 Edinburgh Sheriff Court. See also Bell, *Commentaries*, 383; *Nicholson v Johnstone and Wright* (1872) 11 M. 179 per Lord Deas at 185; *Archer Car Sales (Airdrie) Ltd v Gregory's Trustee*, 1993 S.L.T. 223.

⁵⁴ Insolvency Act 1986 ss.388(2)(b), (3) and 389(1). Insolvency practitioners are discussed further in Ch.4.

⁵⁵ See Insolvency Act 1986 s.390(3) and the Insolvency Practitioners Regulations 2005 (SI 2005/524) as amended, discussed further in Ch.4. There are also specific provisions in relation to record-keeping in the case of a protected trust deed: see further at para.22-144.

⁵⁶ See *Archer Car Sales (Airdrie) Ltd v Gregory's Trustee*, 1993 S.L.T. 223.

⁵⁷ For the use of these provisions or their statutory predecessors to enable the court to appoint a new trustee and an interim trustee respectively on the petition of a creditor following the death of the trustee under the trust deed, see *Royal Bank of Scotland, Petitioners* (1893) 20 R. 741 and *Mitchell, Petitioner*, 1937 S.L.T. 474.

⁵⁸ Bell, *Commentaries*, ii, 393.

⁵⁹ Bell, *Commentaries*, ii, 393.

⁶⁰ *Henry v Strachan & Spence* (1897) 24 R. 1045.

⁶¹ *Henry v Strachan & Spence* (1897) 24 R. 1045. See also *Jardine v Nisbet* (1904) 20 Sh Ct Rep 323.

⁶² Bell, *Commentaries*, ii, 393.

⁶³ Bell, *Commentaries*, ii, 393, approved in *Athya v Clydesdale Bank* (1881) 18 S.L.R. 287 at 288 per Lord Young; see also *Borthwick v Shepherd* (1832) 11 S.1.

⁶⁴ Bell, *Commentaries*, ii, 393, see also *Anderson v Starkey, Fletcher and Co* (1813) 17 FC 246, *Lea v Landale* (1828) 6 S. 350, *Renton v Scott* (1854) 24 R. 1030 and *Wilson v Speirs*, 1926 S.L.T. (Sh Ct) 52. Cf *Somerville & Co v Miller* (1887) 3 Sh Ct Rep 293 where it was held that the attendance of an agent at a meeting of creditors did not, in the circumstances, result in the accession of the principal to the trust deed.

acceptance of an obligation from the trustees to pay a debt out of the estate⁶⁵ and from a creditor's verbal expression of approval of the trust deed together with their attendance at a sale of the debtor's effects by the trustee at which they purchased some of the effects,⁶⁶ while it has been held not to be implied from the submission of a claim to the trustee⁶⁷ or even the willingness to accept payment of a dividend⁶⁸ or from action against the trustee to recover the debt⁶⁹ or from an acknowledgement of the trust deed reserving the creditor's rights where the creditor considered its security to be sufficient and did not submit a claim or accept a dividend⁷⁰ or where the creditor consented to the debtor's property being exposed for sale by the trustee but without precluding the creditor from taking separate measures if so advised.⁷¹ Accession such as will bind the creditor to the terms of the trust deed, in particular to the discharge of the debtor, while it may be inferred from circumstances, requires cogent evidence.⁷² It has been held that such accession could be implied where a creditor had signed an absolute discharge of the debtor,⁷³ where a creditor had attended a meeting of creditors at which it was resolved that a trust deed would be granted and had made no objection to the subsequent trust deed, which contained a clause stipulating for the debtor's discharge, for three and a half years,⁷⁴ where a creditor had signed a receipt for the payment of a dividend which stipulated that the dividend was accepted on the conditions as to the debtor's discharge contained in the trust deed,⁷⁵ and where a creditor had signed an informal accession to a trust deed without reading the trust deed, which provided for the discharge of the debtor,⁷⁶ but not where a creditor had submitted a claim but not signed a formal deed of accession or taken any benefit from the trust deed or otherwise acquiesced in a clause in the trust deed discharging the debtor⁷⁷ or from the mere drawing of a dividend, even where there was such a stipulation in the trust deed.⁷⁸ Bell considered that accession presupposed two conditions: fairness on the part of others concerned in the agreement and assent by all creditors equally.⁷⁹ Thus, where some creditors were induced to consent by the giving or promise of certain advantages, the other creditors will be entitled to reduce the contract or demand the return of what has been given for the benefit of all the creditors.⁸⁰ It has been held, however, that an acceding creditor may be bound even though not all the creditors have acceded.⁸¹ Accession in the case of a protected trust deed is discussed further below.

⁶⁵ *Earl of Breadalbane v Macdonald* (1824) 2 S. 621.

⁶⁶ *Marianski v Wiseman* (1871) 9 M. 673. See also *Hartley, Green & Co v Watson & Mathers* (1887) 3 Sh Ct Rep 73.

⁶⁷ *Hamilton v Duke of Queensbury's Executors* (1834) 12 S. 766; *Athya v Clydesdale Bank* (1881) 18 S.L.R. 287; *Davidson v The Union Bank* (1881) 19 S.L.R. 15.

⁶⁸ *Davidson v The Union Bank* (1881) 19 S.L.R. 15.

⁶⁹ *Campbell v McDonald's Trustees* (1829) 4 F. 1127.

⁷⁰ *Heritable Securities Investment Association Ltd v Wingates* (1891) 29 S.L.R. 904.

⁷¹ *Kerr's Trustees v Russell* (1832) 11 S. 219.

⁷² Bell, *Commentaries*, ii, 394–395.

⁷³ *Blyth v Chisolm* (1833) 11 S. 512.

⁷⁴ *McKinnon v Risk* (1890) 6 Sh Ct Rep 77.

⁷⁵ *Mortimer v Perry, Junior & Co* (1887) 3 Sh Ct Rep 375.

⁷⁶ *Jardine v Nisbet* (1904) 20 Sh Ct Rep 323.

⁷⁷ *Duffus v Ross* (1874), Guthrie's *Select Cases in the Sheriff Court* (Edinburgh: T&T Clark, 1879–1894), Vol. 1, 79.

⁷⁸ *Barnett & Co v Russell* (1901) 17 Sh Ct Rep 55; *Travers & Son v Bird* (1886) 2 Sh Ct Rep 3; *Long v Wilson* (1886) 2 Sh Ct Rep 4; *Ogilvie & Son v Taylor* (1887) 14 R. 399. See also *RH v AB* (1907) 23 Sh Ct Rep 213.

⁷⁹ Bell, *Commentaries*, ii, 395.

⁸⁰ Bell, *Commentaries*, ii, 395.

⁸¹ *Larkin v Morrow* (1932) 48 Sh Ct Rep 59. Cf *Lyell v Christie* (1823) 2 S. 288, where it was held that a creditor who had claimed and drawn dividends under a trust deed which was to be binding only where all the creditors had acceded was not bound by it where that condition had not been fulfilled.

Conveyance to trustee

A trust deed can convey only assets which are capable of voluntary transfer by the debtor. It has already been noted in the context of sequestration that certain provisions which prevent the vesting of estate or effect a transfer of rights on sequestration also apply where the debtor has granted a trust deed (protected or otherwise). The trust deed does not of itself give the trustee title to the assets conveyed by it, and where the trustee wishes to obtain title, they must complete title in the manner appropriate to each asset, i.e. by registering a title in the case of heritage, by taking delivery in the case of moveables and by intimation in the case of incorporeal property.⁸² Bell states that completion of title by the trustee is necessary in order to protect the assets from the diligence of non-acceding creditors.⁸³ The case law relating to diligence by non-acceding creditors is, however, complex and in some cases contradictory.⁸⁴ In the early case of *Snee & Co v Anderson's Trustee*,⁸⁵ a case involving an action of reduction of a trust deed under the Bankruptcy (Scotland) Act 1696,⁸⁶ it was said that no disposition by a bankrupt debtor could disable creditors from doing diligence⁸⁷ and dicta to this effect continue to be found in much later cases.⁸⁸ However, there are also early cases in which diligence against moveables was held to be ineffective in a question with the trustee under the trust deed where the trustee had taken possession⁸⁹ although effective in a question where the trustee had not done so.⁹⁰ Then there is a series of cases which laid the foundations of what came to be known as the radical right doctrine, in which it was held that the transfer of heritage to a trustee for the behoof of creditors even where followed by the trustee's infestment did not divest the granter so as to disable non-acceding creditors from carrying out diligence, of which the case of *Campbell v Edderline's Creditors*⁹¹ has come to be regarded as the leading case.⁹² There are also, however, contrary cases⁹³ and a number of other authorities to the effect that the granter of the trust deed is indeed divested and, assuming the

⁸² Bell, *Commentaries*, ii, 386. Cf *Craig v Gray's Co* (1901) 17 Sh Ct Rep 113, where it was held that a trust for creditors, so far as relating to corporeal moveables, is completed by delivery of the deed of trust.

⁸³ Bell, *Commentaries*, ii, 386; see also Scottish Law Commission, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (Scot. Law Com. No.68, 1982), paras 24.4–24.7, referred to above. The position of acceding creditors is discussed further below.

⁸⁴ For a detailed analysis, see Gretton, GL, "Radical Rights and Radical Wrongs: A Study in the Law of Trusts, Securities and Insolvency", 1986 J.R. 51, 192.

⁸⁵ *Snee & Co v Anderson's Trustee* (1734) Mor 1206.

⁸⁶ The challenge of a trust deed under this and other provisions is discussed further at para.22–40.

⁸⁷ See also *Peters v Dunlop's Trustees* (1767) Mor 1218.

⁸⁸ See, for example, *Kyd v Waterson* (1880) 7 R. 884 at 887 per Lord Young.

⁸⁹ See *Wilson v McVicar* (1762) Mor 1214 and *Wylde v Hannah* (1828) 6 S. 510. In the former case, there is a note to the case that the arresting creditor may have acceded to the trust, but in *Henderson v Henderson's Trustee* (1882) 10 R. 185, Lord Rutherford Clark considered that the decision did not proceed on that ground and that the facts set out in the note would not have amounted to accession. See also the later case of *Lamb & Simpson v Robertson* (1898) 14 Sh Ct Rep 255.

⁹⁰ See, for example, *Borthwick v Grant* (1829) 7 S. 420, *Fraser v Frisby* (1830) 8 S. 982, *Gibson v Wilson* (1841) 3 D. 974, *MacLachlan v McGregor & Son* (1886) 2 Sh Ct Rep 250 and *Doughty v Wells* (1906) 14 S.L.T. 299. See also *Mess v Hays* (1898) 1 F. (HL) 22.

⁹¹ *Campbell v Edderline's Creditors* (1801) 12 FC 480.

⁹² See also *Forbes-Leith v Livingston* (1759) Mor 1212; *Macmillan v Campbell* (1831) 9 S. 551, affirmed (1834) 7 W & S 441; *Globe Insurance Co v Murray* (1854) 17 D. 216; *Gilmour v Gilmours* (1873) 11 M. 853; *Marquess of Huntly v Earl of Fife* (1887) 14 R. 1091. As noted above, the cases and the development of the radical right doctrine which they embody are analysed in detail in Gretton, GL, "Radical Rights and Radical Wrongs: A Study in the Law of Trusts, Securities and Insolvency", 1986 J.R. 51, 192.

⁹³ See, in particular, *Renton v Girvan* (1833) 12 S. 266; *William & James v MacLaine's Trustees* (1872) 10 M. 362; *National Bank v Union Bank* (1885) 13 R. 380.

trust deed is what might be described as a “normal” trust deed for the benefit of creditors equally and the estate has been reduced into possession by the trustee, non-acceding creditors will be bound by the trust deed in the same way as acceding creditors and prevented from carrying out diligence against the trust assets, (although not from recourse to sequestration).⁹⁴ In the case of a protected trust deed, it is specifically provided that a non-acceding creditor has no higher right to recover their debt than an acceding creditor and there are certain specific restrictions on creditor action.⁹⁵ With regard to acceding creditors, however, it should be noted that in certain circumstances, a creditor who has acceded to the trust deed may nonetheless be entitled to carry out diligence: it has been held that an acceding creditor was entitled to adjudge the trust estate where the trustee had taken no steps to realise the estate⁹⁶ and that an acceding creditor was entitled to pursue an action of mails and duties where the trustee under the trust deed had died and no replacement trustee had been elected in accordance with the trust deed.⁹⁷

Effect of trust deed on prior diligence, etc.

- 22–21** A trust deed does not generally affect prior diligence although, as discussed further below, the granting of a trust deed which falls within the definition of a trust deed in the Bankruptcy (Scotland) Act 2016 renders the debtor apparently insolvent with the result that certain diligences executed within a specified period before and after apparent insolvency will be equalised,⁹⁸ and where a trust deed becomes protected, there are specified effects on certain prior diligences.
- 22–22** A time to pay direction or order made under the Debtors (Scotland) Act 1987 ceases to have effect on the granting of a trust deed whereby the debtor’s estate is conveyed to a trustee for the benefit of their creditors generally.⁹⁹
- 22–23** It has been held that a trust deed constitutes a disposal for the purposes of s.72(1) of the Housing (Scotland) Act 1987 with the result that a debtor who purchased the house she occupied as tenant at a discount under the “right to buy” provisions of that Act was held liable to repay part of the discount.¹⁰⁰

Powers of trustee

- 22–24** The trustee will have the powers contained in the Trusts (Scotland) Act 1921 and the Trusts (Scotland) Act 1961 except in so far as contrary provision is made in the trust deed. Where the trust deed falls within the definition of a trust deed for the purposes of the Bankruptcy (Scotland) Act 2016, they will also have the powers conferred on a trustee under a trust deed by that Act: these are discussed further in the following section. In addition, the trust deed will commonly confer a wide range of powers on the trustee and will often give the

⁹⁴ See *Nicholson v Johnstone and Wright* (1872) 11 M. 179; *Henderson v Henderson’s Trustee* (1882) 10 R. 185; *Lamb’s Trustees v Reid* (1883) 11 R. 76. Recourse to sequestration is discussed further at para.22–34.

⁹⁵ See further below.

⁹⁶ *Earl of Breadalbane v Macdonald* (1824) 2 S. 621.

⁹⁷ *Littlejohn v Hamilton* (1833) 11 S. 701.

⁹⁸ See Ch.15.

⁹⁹ Debtors (Scotland) Act 1987 s.12(2)(b).

¹⁰⁰ *Souter v Aberdeen City Council* unreported 15 December 1999 Inner House, available at <http://www.scotcourts.gov.uk/search-judgments/judgment?id=ff7187a6-8980-69d2-b500-ff0000d74aa7> [Accessed 19 September 2017].

trustee the same powers as a trustee in sequestration under the Bankruptcy (Scotland) Act 2016 so far as it may competently do so.

The trustee will have the power to challenge prior transactions of the debtor at common law where the trust deed contains such a power and has been acceded to by a creditor or creditors or where a creditor or creditors has otherwise conferred a title to challenge on the trustee.¹⁰¹ The trustee does not, however, have the power to challenge prior transactions of the debtor under the statutory provisions in the Bankruptcy (Scotland) Act 2016 unless the trust deed is protected, in which case they have the power to challenge prior transactions under some, but not all, of the statutory provisions,¹⁰² or a creditor or creditors has conferred a title to challenge on the trustee and one of the other events which allow a challenge to be made has occurred. **22-25**

Liability of trustee

Where the trustee carries on the business of the debtor or otherwise adopts or enters into contracts during the administration of the trust, they may incur personal liability.¹⁰³ They may also be liable to the creditors for negligence in the conduct of the business.¹⁰⁴ **22-26**

Where the trustee carries on litigation, they may be held personally liable for expenses¹⁰⁵ and are not entitled to insert a qualification that they will not be liable for the expenses when sisting themselves to an action.¹⁰⁶ **22-27**

Creditors' claims and distribution to creditors

The trust deed will generally provide for the submission and adjudication of creditors' claims and distribution of the estate. Such provisions, however, are not binding on non-acceding creditors,¹⁰⁷ although non-acceding creditors are entitled to a dividend despite not having acceded to the trust deed and may sue the trustee for its payment.¹⁰⁸ A creditor whose claim has been rejected may sue the trustee and the debtor in order to constitute the claim.¹⁰⁹ There are certain statutory provisions relating to creditors' claims in the case of trust deeds as defined in the Bankruptcy (Scotland) Act 2016 and protected trust deeds which are discussed further below. **22-28**

Audit of trustee's accounts and trustee's remuneration and outlays

The trust deed will generally provide for the audit of the trustee's accounts and the determination of their remuneration and outlays. There are certain statutory provisions relating to these matters in the case of trust deeds as defined in the Bankruptcy (Scotland) Act 2016 and protected trust deeds which are discussed further below. **22-29**

¹⁰¹ *Fleming's Trustees v McHardy* (1892) 19 R. 542.

¹⁰² See further below in relation to protected trust deeds.

¹⁰³ *William Ford and Sons v Stephenson* (1888) 16 R. 24; *Moncreiffe v Ferguson* (1896) 24 R. 47.

¹⁰⁴ *Houston v Sale* (1909) 25 Sh Ct Rep 25.

¹⁰⁵ *Robertson* (1823) 2 S. 553.

¹⁰⁶ *Buchanan v Corbett and Co* (1827) 5 S. 805.

¹⁰⁷ Bell, *Commentaries*, ii, 383; *Mitchell v Hunter* (1901) 17 Sh Ct Rep 208.

¹⁰⁸ *Thomas Ogilvie & Son v Taylor* (1887) 14 R. 399. See also *Lamb's Trustee v Reid* (1883) 11 R. 76; *Mitchell v Hunter* (1901) 17 Sh Ct Rep 208; *Mitchell v Thomson* (1912) 28 Sh Ct Rep 210.

¹⁰⁹ *Crerar v Dow* (1906) 22 Sh Ct Rep 311.

Discharge of the debtor

- 22–30** The trust deed will generally provide for the discharge of the debtor. Such a provision will, however, be effective only where the creditors have acceded to it as discussed above, unless the trust deed is protected, in which case there are specific provisions for the debtor's discharge which are discussed further below.
- 22–31** The debtor's discharge, unless it operates practically as a discharge on composition, does not terminate the trust or reinvest any remaining estate in the debtor.¹¹⁰ The issue of the effect of the debtor's discharge and the related issue of the ending of the trust created by the trust deed has, however, caused some difficulty in a number of recent cases where assets have emerged following the conclusion of the administration of the trust deed.¹¹¹ The cases all concerned assets in the form of compensation due to the debtor for the mis-selling of payment protection insurance. In each case, unbeknown at the time to those involved, the right to compensation formed part of the debtor's estate at the time the trust deed was granted, but the compensation was paid after the conclusion of the administration of the trust deed and the discharge of the debtor and the trustee. In *Dooneen Ltd v Mond*, Lord Jones held at first instance that as a matter of construction of the trust deed, the trust had been brought to an end prior to the payment of the compensation with the result that the debtor was entitled to retain it and the creditors had no claim on it.¹¹² His decision was upheld on appeal.¹¹³ The Inner House noted that at common law, a discharge of the debtor does not affect the estate, which continues to be subject to the trust until claims have been settled in full, unless there is composition, abandonment or a judicial sequestration. In this case, however, the effect of the terms of the trust deed was to the same effect as a discharge on composition, terminating the trust and reinvesting the debtor in any remaining estate, including the compensation. It is understood that the decision of the Inner House has been appealed to the Supreme Court. In *Donnelley v Royal Bank of Scotland Plc*, Sheriff Reid held at first instance that in the absence of any averments of a discharge on composition, full payment of the debtor's debts or abandonment of the claim for compensation, the debtor's discharge could not be held to have ended the trust or reinvested her in the remaining estate, with the result that a creditor was entitled to set off the sums due to the debtor by way of compensation against the balance of the sums due to the creditor by the debtor.¹¹⁴ His decision was reversed on appeal, however, on the basis that the terms of the trust deed, which were identical to that in *Dooneen Ltd v Mond*, must be regarded as having the same result as in that case.¹¹⁵ It is understood that the decision of the Sheriff Appeal Court has been appealed to the Inner House of the Court of Session, but that appeal has

¹¹⁰ *Flett v Mustard*, 1936 S.C. 269. Cf *Gilmour v Gilmours* (1873) 11 M. 853, referred to above, where it was held that a reconveyance of property was not necessary because the granter of the trust deed was not divested of the property; as noted above, however, other authorities accept the divestiture of the granter.

¹¹¹ See *Dooneen Ltd v Mond* [2016] CSOH 23, upheld on appeal [2016] CSIH 59; *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13, reversed on appeal [2017] SAC (Civ) 1; *Pattullo v Massey* unreported 6 May 2016 Edinburgh Sheriff Court; *Hill v Frame* unreported 12 May 2016 Hamilton Sheriff Court. For a much earlier case which also involved an asset discovered after the completion of the administration of the estate, see *Whyte v Knox* (1858) 20 D. 970, where it was held that where the debtor and the trustee had been discharged, in the absence of a reduction of the discharge or relevant allegations of fraud, the creditors were not entitled to claim the proceeds of a life insurance policy after the death of the debtor where it was alleged that the existence of the policy had been concealed from them.

¹¹² *Dooneen Ltd v Mond* [2016] CSOH 23.

¹¹³ *Dooneen Ltd v Mond* [2016] CSIH 59.

¹¹⁴ *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13.

¹¹⁵ *Donnelley v Royal Bank of Scotland Plc* [2016] SAC (Civ) 1.

been sisted to await the outcome of the appeal to the Supreme Court in the case of *Dooneen Ltd v Mond*. In *Pattullo v Massey*,¹¹⁶ Sheriff Holligan granted an undefended application for declarator that the compensation payment formed part of the debtor's estate and for the re-appointment of the trustee under the trust deed, who had been discharged. He was referred inter alia to the first instance decisions in *Dooneen Ltd v Mond* and *Donnelley v Royal Bank of Scotland Plc* and had the terms of the trust deed before him, but in the absence of any argument that the trust was at an end and the right to compensation had reverted in the debtor, the application was granted. Finally, in *Hill v Frame*,¹¹⁷ Sheriff Waldron refused an application for the re-appointment of the trustee under the trust deed which had been made under s.63 of the Bankruptcy (Scotland) Act 1985 on the basis that that provision applied only on sequestration. She went on to consider, however, the issue of whether the trust was at an end, and concluded, albeit obiter, that the terms of the trust deed in that case were such as to have resulted in the termination of the trust with the result that the compensation fell to be retained by the debtor. The cumulative effect of these decisions as they stand at the time of writing is that the effect of the debtor's discharge and the related question of whether the trust has terminated falls to be determined by the terms of the trust deed, and where the terms of the trust deed are such that the debtor's discharge is to the same effect as a discharge on composition and the trust is terminated, the debtor will be reinvested in any remaining estate which cannot thereafter be claimed by the creditors. It remains to be seen whether the Supreme Court will affirm this position or not.

Discharge of trustee

The trust deed will generally provide for the discharge of the trustee. The most effective form of discharge is a written discharge by all the creditors with the concurrence of the debtor.¹¹⁸ A non-acceding creditor is not bound to discharge the trustee,¹¹⁹ but the trustee is entitled to their discharge from the acceding creditors.¹²⁰ A trustee who cannot obtain their discharge from the creditors may seek their discharge in an action of multiplepounding and exoneration.¹²¹ There are detailed statutory provisions in relation to the discharge of the trustee in the case of a protected trust deed which are discussed further below. 22–32

Termination of the trust

It has been said that “[o]ne of the mysteries is, when does the trust deed end?”¹²² The trust deed may make specific provision for the termination of the trust it has created or this may be inferred from the terms of the trust deed as in the cases discussed above. The termination of the trust is important because if it is not terminated when the trustee's administration is complete for practical purposes, this may give rise to difficulties, for example, where the trust deed includes *acquirenda* and where there are continuing obligations on the debtor and the trustee, including any obligation on the debtor to make contributions from income. In order to avoid such difficulties, therefore, it is suggested that a trust deed should always make specific provision for the termination of the trust as appropriate. 22–33

¹¹⁶ *Pattullo v Massey* unreported 6 May 2016 Edinburgh Sheriff Court.

¹¹⁷ *Hill v Frame* unreported 12 May 2016 Hamilton Sheriff Court.

¹¹⁸ Bell, *Commentaries*, ii, 504.

¹¹⁹ *Mitchell v Thomson* (1912) 28 Sh Ct Rep 210.

¹²⁰ *Horton & Ritchie v Walker* (1909) 25 Sh Ct Rep 83.

¹²¹ Bell, *Commentaries*, ii, 504; *Kyd v Waterson* (1880) 7 R. 884 at 886 per Lord Ormisdale.

¹²² McBryde, WW, “Trust Deeds for Creditors”, 1993 JLS 261 at 262.

Effect of sequestration on trust deed

- 22–34** As noted above, a trust deed does not prevent a subsequent sequestration of the debtor's estates, although where the trust deed is protected, the circumstances in which the debtor's estates may be sequestrated are limited.¹²³ In any other case, the debtor may apply for sequestration where the relevant criteria allowing a debtor application are met.¹²⁴ A non-acceding creditor may petition for sequestration where the relevant criteria for a creditor petition are met¹²⁵ while an acceding creditor may also do so in certain circumstances.¹²⁶ Where the trust deed is within the definition of a trust deed for the purposes of the Bankruptcy (Scotland) Act 2016 and the trust deed has been granted by a living individual, a deceased individual or a partnership, the trustee under the trust deed may petition for sequestration where the relevant criteria for such a petition are met.¹²⁷ The trust deed may also confer a mandate on the trustee to petition for sequestration, although the effectiveness of such a mandate has been doubted, albeit obiter.¹²⁸
- 22–35** The effect of a subsequent sequestration on the trust deed, however, is not without difficulty. Bell stated that a subsequent sequestration superseded the trust deed and that the trustee under the trust deed was required to denude in favour of the trustee in sequestration¹²⁹ and in the case of *McAlister v Swinburne*¹³⁰ it was held that the effect of the sequestration was to divest the trustee under the trust deed of the trust estate and that the trust was "at an end, extinguished and destroyed for all purposes whatsoever".¹³¹ In the case of *Salaman v Rosslyn's Trustees*,¹³² however, while it was accepted that the subsequent sequestration superseded the trust deed, the Lord Justice Clerk, with whom a number of the other judges agreed, stated that the sequestration did not destroy the trust created by the trust deed, but suspended its operation only.¹³³ It may be argued that this case is a special case which can be distinguished from the normal case of a trust deed for creditors, on the basis that the trust in that case had wider purposes and was not simply a trust deed for creditors: Lord Moncrieff noted that it was a trust which was partly a trust for creditors, partly a trust for the management and maintenance of the granter and his family during his life and partly a trust for the widow and his family after his death, although he still took the view that it was just such a trust deed as would necessarily be superseded by sequestration,¹³⁴ while Lord Young characterised the trust as a family trust rather than an arrangement between an insolvent and his creditors at all.¹³⁵ If, however, *Salaman v Rosslyn's Trustees* is regarded as good authority for the proposition that the trust created by any trust deed for creditors is merely suspended during sequestration, this may give rise to difficult issues in practice, for example, where there are trust assets not dealt with in the sequestration, where the trust deed includes *acquirenda*, where there are continuing obligations on the debtor and the trustee under the trust deed, including any obligation

¹²³ See further below.

¹²⁴ See, for example, *McAlister v RW Swinburne and Co* (1874) 1 R. 958. The relevant criteria are discussed in Ch.7.

¹²⁵ The relevant criteria are discussed in Ch.7.

¹²⁶ See *Jopp v Hay* (1845) 7 D. 260; *Campbell and Beck v Macfarlane* (1862) 24 D. 1097.

¹²⁷ The relevant criteria are discussed in Ch.7.

¹²⁸ See *Toni, Petitioner*, 2002 S.L.T. (Sh Ct) 159.

¹²⁹ Bell, *Commentaries*, ii, 391.

¹³⁰ *McAlister v Swinburne* (1874) 1 R. 958.

¹³¹ *McAlister v Swinburne* (1874) 1 R. 958 at 961–962 per Lord President Inglis.

¹³² *Salaman v Rosslyn's Trustees* (1900) 3 F. 298.

¹³³ *Salaman v Rosslyn's Trustees* (1900) 3 F. 298 at 310.

¹³⁴ *Salaman v Rosslyn's Trustees* (1900) 3 F. 298 at 318.

¹³⁵ *Salaman v Rosslyn's Trustees* (1900) 3 F. 298 at 312.

on the debtor to make contributions from income, and in relation to the discharge of the debtor and the trustee under the trust deed. Such issues would not arise if the older authorities to the effect that the trust is extinguished were followed. In practice, of course, even if *Salaman v Rosslyn's Trustees* is correct, there may be no trust purposes left to be fulfilled following the sequestration, in particular where the assets conveyed by the trust deed are the same as those in the sequestration. In order to avoid any potential difficulties from the possible revival of a trust deed after sequestration, however, it is suggested that the trust deed should always make provision for its termination on a subsequent sequestration.

McBryde observes that it might well be asked why a subsequent sequestration should affect the trust at all where there has been a valid transfer of property to the trustee under the trust deed followed, where appropriate, by completion of title by the trustee, since in those circumstances the trust assets would no longer be part of the debtor's estate at the date of sequestration; he goes on to say that while the law may be regarded as settled, the underlying principle that a trust deed does not prevent a subsequent sequestration appears to conflict in some cases with the principles applicable to the ownership of assets.¹³⁶ This cannot be disputed, and is undoubtedly unsatisfactory in principle. It seems, however, to be a consequence of the anomalous nature of trust deeds for creditors. 22–36

Where a trust deed is superseded by a sequestration, an issue arises as to how the costs of the administration of the trust to date, including the trustee's fees, should be dealt with. Once again, this issue is not free from difficulty, and the cases do not give a consistent account. In *Thomson v Tough's Trustee*,¹³⁷ it was held that where the trustee under the trust deed had completed a contract of the debtor, he was entitled to the benefit of the remaining payment to be made under that contract to recoup his expenses, and the trustee in sequestration was not entitled to take the remaining payment and thereby "oust" the trustee under the trust deed and reduce him to the status of "a mere creditor entitled to a ranking in the sequestration". In *McLachlan & Son v Keith and Co*,¹³⁸ it was held that the trustee under the trust deed had a right of retention over the trust estate in his possession in security of his obligations and advances as trustee and must be settled with before he was bound to denude in favour of the trustee in sequestration (saving the latter's right to an accounting), while in *Salaman v Rosslyn's Trustees*,¹³⁹ Lord Traynor stated that the trustees under the trust deed were bound to denude in favour of the trustee in sequestration "on payment or satisfaction of such right or lien or indemnity as they might have" and Lord Moncrieff stated that the trustees could not be called on to denude until they were reimbursed for outlays and expenses incurred for the benefit of the trust estate.¹⁴⁰ In the earlier case of *Dall v Drummond*,¹⁴¹ however, it was held that the trustee under the trust deed was not entitled to retain the estate in security of his claims against it after the date when the trustee in sequestration was confirmed as such, although he was entitled to commission up to that date. In *Mess v Hay*,¹⁴² the issue was the ranking of the claim submitted by the trustee 22–37

¹³⁶ McBryde, WW, *Bankruptcy*, 2nd edn (Edinburgh: W. Green, 1995), para.20–74.

¹³⁷ *Thomson v Tough's Trustee* (1880) 7 R. 1032.

¹³⁸ *McLachlan & Son v Keith & Co* (1886) 2 Sh Ct Rep 142. See also dicta in *MacGregor v MacLennan's Trustee* (1898) 25 R. 482 (which involved a testamentary trust superseded by a sequestration).

¹³⁹ *Salaman v Rosslyn's Trustees* (1900) 3 F. 298.

¹⁴⁰ *Salaman v Rosslyn's Trustees* (1900) 3 F. 298 at 318 per Lord Traynor and 319 per Lord Moncrieff.

¹⁴¹ *Dall v Drummond* (1870) 8 M. 1006.

¹⁴² *Mess v Hay* (1898) 1 F. (HL) 22.

under the trust deed in the subsequent sequestration, and it was held that the trustee under the trust deed did not have a preferential claim in the sequestration for his remuneration and outlays on the facts, no creditors having acceded to the trust deed and the trustee never having had possession of the estate in his own right with the result that there was nothing over which a lien could be exercised. In the later case of *Miln's JF v Spence's Trustee*,¹⁴³ Lord Fleming accepted that the trustees under the trust deed had a lien over the actual trust deed with the result that, on handing it over to the judicial factor subject to reservation of their rights of lien or otherwise, they had a preferential claim in the trust estate which had been put into the hands of the judicial factor, although only after payment of the expenses of the administration of the judicial factory. In sequestration, of course, the effect of any lien over documents handed over to the trustee in sequestration is specifically preserved by statute¹⁴⁴ and the rights of the trustee in sequestration are specifically made subject to any preference of the holder of a lien over any title deed or document handed to the trustee under the statutory provisions.¹⁴⁵ The rights of the trustee in sequestration are, however, also subject *seperatim* to the right of any secured creditor, which includes a creditor with any right of lien, retention or preference, which is preferable to the rights of the trustee in sequestration.¹⁴⁶ In a more recent case, *Sands v Pringle*,¹⁴⁷ it was held, albeit with no discussion of the older cases, that the trustee under the trust deed was entitled to be paid his remuneration and outlays out of the sequestrated estate on the basis that he had a lien for payment of these over at least part of the trust estate, and although that estate had vested in the trustee in sequestration, the effect of the lien was preserved by the statute with the result that in distributing the estate, the trustee in sequestration was required to discharge the lien by paying the remuneration and outlays of the trustee under the trust deed. In the most recent reported case, however, which did examine the earlier cases but not *Sands v Pringle*, it was held that the trustee under the trust deed did not have a lien for his remuneration and outlays on the basis that any such right of lien did not arise merely by virtue of the trustee under the trust deed having held office as such but only where the trustee had documents or title deeds over which he could claim a lien and was required to relinquish these to the trustee in sequestration, who would then be required to give effect to the lien notwithstanding the delivery of the relevant documents in accordance with the relevant statutory provisions.¹⁴⁸ This seems too narrow an approach, however, and it is suggested that the approach in *Sands v Pringle* is more consistent with the approach in the majority of the earlier cases and is to be preferred as giving appropriate recognition to the rights of the trustee under the trust deed in respect of the earlier administration of the estate.

Trust deeds and the debt arrangement scheme

- 22–38** A trust deed does not prevent the debtor from applying for a debt payment programme unless the trust deed is protected.¹⁴⁹ The potential problems which may arise where the debtor applies for a debt payment programme during the subsistence of a trust deed which is not protected are discussed further in the context of the debt arrangement scheme.¹⁵⁰

¹⁴³ *Miln's JF v Spence's Trustee*, 1927 S.L.T. 425.

¹⁴⁴ Bankruptcy (Scotland) Act 2016 s.108(5) and (6), discussed in Ch.13.

¹⁴⁵ Bankruptcy (Scotland) Act 2016 s.129(9)(b).

¹⁴⁶ Bankruptcy (Scotland) Act 2016 s.129(9)(a).

¹⁴⁷ *Sands v Pringle* unreported 3 December 2008 Elgin Sheriff Court.

¹⁴⁸ *Pattullo v McAreavey*, 2010 W.L. 1608631.

¹⁴⁹ See further below in relation to protected trust deeds and also Ch.21.

¹⁵⁰ See Ch.21.

Revocation of trust deed

A trust deed will generally be irrevocable by the debtor following its delivery to the trustee, but it has been held that a trust deed could be revoked where nothing had followed on delivery and no creditor had acceded to or become aware of the trust deed.¹⁵¹ **22-39**

Challenge of trust deed

A trust deed for creditors could be challenged as a gratuitous alienation under the Bankruptcy Act 1621 or a fraudulent preference under the Bankruptcy Act 1696 or at common law.¹⁵² It is thought that a trust deed might still be potentially challengeable as a gratuitous alienation under s.98 of the Bankruptcy (Scotland) Act 2016, but is unlikely to be potentially challengeable as an unfair preference under s.99 of the Bankruptcy (Scotland) Act 2016 on the basis that a trust deed would not normally have the effect of creating a preference in favour of one creditor to the prejudice of the general body of creditors as required by that section.¹⁵³ It is thought that it might still be potentially challengeable at common law on the basis that it is an interference with the rights of the creditors.¹⁵⁴ Reduction of a trust deed might also be sought by the debtor. In the case of *Dunn v Roxburgh*,¹⁵⁵ the debtor sought to reduce a trust deed granted by him on the basis that he had been induced to grant it by fraudulent or negligent representations, but failed to make appropriate relevant averments in support of his case. **22-40**

Effect of granting trust deed on debtor

It has already been noted in the context of sequestration that some of the disqualifications which flow from sequestration may also apply in other circumstances, including on the granting of a trust deed (protected or otherwise). Each provision varies, and must therefore be checked to discover to what, if any, extent it applies. One of the advantages of a trust deed, however, is that there may be fewer such disqualifications than in the case of sequestration. **22-41**

THE BANKRUPTCY (SCOTLAND) ACT 2016 AND TRUST DEEDS GENERALLY

As noted above, the Bankruptcy (Scotland) Act 2016 contains a number of provisions relating to trust deeds as defined for the purposes of that Act, whether protected or not. **22-42**

Definition

A trust deed for the purposes of the Bankruptcy (Scotland) Act 2016 is defined as: **22-43**

- (a) a voluntary trust deed granted by or on behalf of the debtor whereby the debtor's estate (other than such of that estate as would not, under any provision of the Bankruptcy (Scotland) Act 2016 or any other enactment, vest in the trustee if the debtor's estate were sequestrated)

¹⁵¹ See *Nicholson v Johnstone and Wright* (1872) 11 M. 179 at 185 per Lord Deas; *Oliver v McCormick*, 1895 2 S.L.T. 410; *Craig v Gray's Co* (1901) 17 Sh Ct Rep 113.

¹⁵² *Mackenzie v Calder* (1868) 6 M. 833.

¹⁵³ Gratuitous alienations and unfair preferences are discussed further in Ch.14.

¹⁵⁴ *Mackenzie v Calder* (1868) 6 M. 833.

¹⁵⁵ *Dunn v Roxburgh* [2013] CSOH 42.

is conveyed to the trustee for the benefit of the debtor's creditors generally¹⁵⁶; and

- (b) any other trust deed which would fall within that definition but for the exclusion from the estate conveyed to the trustee of the whole or part of the debtor's dwelling-house where a secured creditor holds a security over it *and* the fact that the debtor's estate is not conveyed to the trustee for the benefit of the creditors generally because the secured creditor has, at the debtor's request, agreed before the trust deed is granted not to claim under the trust deed for any of the debt in respect of which the security is held.¹⁵⁷ For this purpose, the debtor's dwelling-house is defined as a dwelling-house (including any yard, garden, outbuilding or other pertinents) which, on the day immediately preceding the date on which the trust deed was granted, was owned or leased under a long lease by the debtor (alone or in common with any other person) *and* was the sole or main residence of the debtor.¹⁵⁸ It is specifically provided that a dwelling-house is not precluded from being the debtor's sole or main residence by the fact that it is used to any extent by the debtor for the purposes of any profession, trade or business.¹⁵⁹

22-44 This definition has changed over time and, accordingly, deserves some comment. In the Bankruptcy (Scotland) Act 1985 as originally enacted, a trust deed was defined as

"a voluntary trust deed granted by or on behalf of the debtor whereby his estate is conveyed to the trustee for the benefit of his creditors generally".¹⁶⁰

22-45 The definition was amended by the Bankruptcy (Scotland) Act 1993 to provide that a trust deed was

"a voluntary trust deed granted by or on behalf of the debtor whereby his estate (other than such of his estate as would not, under s.33(1) of [the Bankruptcy (Scotland) Act 1985], vest in the . . . trustee if his estate were sequestrated) is conveyed to the trustee for the benefit of his creditors generally".¹⁶¹

22-46 The amended definition was intended to give effect to the intention that the assets to be conveyed to the trustee under a trust deed falling within the definition should be equivalent to the assets which vest in a trustee in sequestration, but it did not quite achieve this since some estate was excluded from vesting in

¹⁵⁶ Bankruptcy (Scotland) Act 2016 s.228(1). The estate which would not vest in a trustee in sequestration is discussed in Ch.11. It is thought that the reference to a trust deed being granted on behalf of a debtor relates to a trust deed being granted on behalf of a debtor who is an entity whose estate may be sequestrated, rather than an individual debtor, and that a trust deed in respect of an individual debtor could only be granted by the debtor rather than on the debtor's behalf, for example, by the debtor's attorney, even where the attorney has been given a mandate to that effect: the effectiveness of a mandate to petition for sequestration was doubted in *Toni, Petitioner*, 2002 S.L.T. (Sh Ct) 159 and it is suggested that the same principle would apply by analogy in relation to a trust deed for creditors.

¹⁵⁷ Bankruptcy (Scotland) Act 2016 s.228(1).

¹⁵⁸ Bankruptcy (Scotland) Act 2016 s.228(3) Long lease is given the same meaning as in s.9(2) of the Land Registration etc. (Scotland) Act 2012.

¹⁵⁹ Bankruptcy (Scotland) Act 2016 s.228(4).

¹⁶⁰ Bankruptcy (Scotland) Act 1985 as enacted s.73(1) and s.5(2)(c).

¹⁶¹ Bankruptcy (Scotland) Act 1985 s.73(1) and s.5(4A) as amended/added respectively by the Bankruptcy (Scotland) Act 1993.

a trustee in sequestration by provisions other than s.33(1).¹⁶² Following the enactment of other provisions excluding estate from vesting in a trustee in sequestration, such as the provisions excluding certain pensions from vesting in a trustee in sequestration in the Welfare Reform and Pensions Act 1999, the gap between intention and reality became wider.¹⁶³ This was recognised when the reforms which led to the enactment of the Protected Trust Deed (Scotland) Regulations 2008 were being implemented, with the result that it was provided that a trust deed could become protected only where it conveyed to the trustee

“all the debtor’s estate (other than property listed in s.33(1) of the [Bankruptcy (Scotland) Act 1985] or which would be excluded from vesting in a trustee of a sequestered estate under any other provision of that Act or other enactment”).¹⁶⁴

This still, however, left a discrepancy between the definition of a trust deed in the Bankruptcy (Scotland) Act 1985, which had not been further amended, and the definition of a trust deed which was eligible to become a protected trust deed in terms of the Protected Trust Deed (Scotland) Regulations 2008. This was only finally resolved when the definition of a trust deed in the Bankruptcy (Scotland) Act 1985 was further amended by the Bankruptcy and Debt Advice (Scotland) Act 2014, although the amended wording in the Bankruptcy (Scotland) Act 1985 and the wording in the Protected Trust Deeds (Scotland) Regulations 2013 (which replaced the Protected Trust Deeds (Scotland) Regulations 2008) was still not identical. **22–47**

In the meantime, the definition of a trust deed had also been amended to take account of the reforms introduced by the Home Owner and Debtor Protection (Scotland) Act 2010 referred to above. As noted, one of these reforms was to allow to become protected a trust deed which excludes from the assets conveyed to the trustee the whole or part of a debtor’s dwelling-house which is subject to a security, notwithstanding that the trust deed does not then convey to the trustee all of the assets which it would otherwise have required to convey to be eligible for protection. This was achieved by amending the definition of a trust deed in both the Bankruptcy (Scotland) Act 1985 and the Protected Trust Deeds (Scotland) Regulations 2008, the same definition being carried forward into the Protected Trust Deeds (Scotland) Regulations 2013. **22–48**

Following the incorporation of the substantive provisions relating to protected trust deeds into the Bankruptcy (Scotland) 2016, there is now only one definition of trust deed which applies for the purposes of both the provisions which apply to trust deeds whether protected or not and the provisions for protected trust deeds. **22–49**

Although there is nothing to prevent a company or any other entity whose estates cannot be sequestrated from granting a trust deed for creditors, it is thought that such a trust deed would not fall within the definition, and a trust deed granted by such a debtor cannot become protected.¹⁶⁵ A trust deed granted **22–50**

¹⁶² For a fuller discussion of this point, see the annotated version of the Bankruptcy (Scotland) Act 1993, (Edinburgh: W. Green, 1993), with annotations by McBryde, WW, pp.6–15.

¹⁶³ The various exclusions from vesting are discussed in Ch.11.

¹⁶⁴ See Bankruptcy (Scotland) Act 1985 s.73(1) as amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007 and Protected Trust Deed (Scotland) Regulations 2008 reg.6(1). Protected trust deeds are discussed further below.

¹⁶⁵ Bankruptcy (Scotland) Act 2016 s.164(2)(b).

by any debtor whose estate may be sequestrated will, however, fall within the definition, and it is specifically provided that a trust deed granted by such a debtor may become protected.¹⁶⁶ The provisions relating to the exclusion of a dwelling-house would not, however, be relevant to debtors other than living individuals.

- 22–51** Trust deeds which do not come within the definition in the Bankruptcy (Scotland) Act 2016 will be governed by the common law and, where applicable, the legislation on trusts and any other relevant legislation.

Provisions of the Bankruptcy (Scotland) Act 2016 relating to trust deeds whether protected or not

- 22–52** This section considers the provisions of the Bankruptcy (Scotland) Act 2016 that apply to all trust deeds falling within the definition discussed in the preceding section, whether protected or not. The provisions of the Bankruptcy (Scotland) Act 2016 which apply only to protected trust deeds are considered in the section on protected trust deeds below.

Apparent insolvency

- 22–53** The granting of a trust deed is one of the events which renders a debtor apparently insolvent.¹⁶⁷
- 22–54** As noted previously, one consequence of apparent insolvency is that certain diligences executed within a specified period before and after apparent insolvency are equalised.¹⁶⁸ Apparent insolvency may also have other effects, for example, where a contract provides for certain effects on a party's apparent insolvency, and in allowing a qualified creditor to petition for sequestration of the debtor's estate.¹⁶⁹

Petition for sequestration by trustee under a trust deed

- 22–55** A trustee under a trust deed is one of the persons who may petition for sequestration of the estate of a living individual, a deceased individual or a partnership, subject to certain conditions being satisfied in the first-mentioned case.¹⁷⁰
- 22–56** Oddly, no provision is made for a trustee under a trust deed granted by any other debtor whose estate may be sequestrated to petition for the debtor's sequestration. The reason for this distinction is not clear.

Family home

- 22–57** The provisions restricting the powers of a trustee in sequestration in relation to the debtor's family home now apply also to a trustee under a trust deed as a result of the reforms introduced by the Home Owner and Debtor Protection (Scotland) Act 2010 discussed above.¹⁷¹

Supplies by utilities

- 22–58** The provisions relating to supplies by utilities apply where a debtor has granted a trust deed.¹⁷²

¹⁶⁶ Bankruptcy (Scotland) Act 2016 s.164(1).

¹⁶⁷ See Bankruptcy (Scotland) Act 2016 s.16(1)(e). Apparent insolvency is discussed in Ch.1.

¹⁶⁸ See Ch.15.

¹⁶⁹ See further Ch.7.

¹⁷⁰ See further Ch.7.

¹⁷¹ See further Ch.12.

¹⁷² See further Ch.12.

*Schedule 4 provisions*¹⁷³

Schedule 4 of the Bankruptcy (Scotland) Act 2016 contains a number of other provisions as follows: **22–59**

- (a) The debtor, the trustee or any creditor may, at any time before the final distribution of the debtor's estate amongst the creditors, insist on the trustee's accounts being audited and their remuneration fixed by Accountant in Bankruptcy (AiB), whether provision for these matters is made in the trust deed or has been agreed between the trustee and the creditors or not.¹⁷⁴
- (b) AiB may audit the trustee's accounts and fix their remuneration at any time *ex proprio motu*.¹⁷⁵ This provision was first introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007.
- (c) The trustee may from time to time record a notice in the prescribed form in the register of inhibitions and adjudications which has the same effect as the recording of letters of inhibition against the debtor.¹⁷⁶ The trustee must record a further notice in the prescribed form recalling any such notice when the debtor's estate has finally been distributed to the creditors or the trust deed has otherwise ceased to be operative.¹⁷⁷
- (d) The submission of a claim to the trustee by a creditor bars the effect of any enactment or rule of law relating to the limitation of actions in any part of the UK.¹⁷⁸ In this context, the reference to the submission of a claim barring the effect of any enactment or rule of law relating to the limitation of actions is to be construed as a reference to the submission of a claim having the same effect as an effective acknowledgement of the creditor's claim¹⁷⁹ and the reference to an enactment does not include an enactment which implements or gives effect to any international agreement or obligation.¹⁸⁰

In addition, it is provided that the submission of such a claim is a relevant claim which interrupts the running of negative prescription in specified cases.¹⁸¹ It is a moot point whether a relevant claim is continuous in nature and subsists until it is disposed of or is an instantaneous event which happens on the day it takes place. However, in the case of *Donnelley v Royal Bank of Scotland Plc*,¹⁸² the sheriff took the view that the submission of a claim to a trustee under a trust deed continuously interrupted the running of prescription for as long as the claim subsisted before the trustee and up to the date of the final, formal adjudication of

¹⁷³ Bankruptcy (Scotland) Act 2016 s.162.

¹⁷⁴ Bankruptcy (Scotland) Act 2016 Sch.4, para.1.

¹⁷⁵ Bankruptcy (Scotland) Act 2016 Sch.4, para.2.

¹⁷⁶ Bankruptcy (Scotland) Act 2016 Sch.4, para.3(1), (2). The prescribed form is Form C in Sch.2 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 S (SSI 2016/213).

¹⁷⁷ Bankruptcy (Scotland) Act 2016 Sch.4, para.3(3). The prescribed form is Form D in Sch.2 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016.

¹⁷⁸ Bankruptcy (Scotland) Act 2016 Sch.4, para.4 and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.6(1)(d).

¹⁷⁹ Bankruptcy (Scotland) Act 2016 s.228(8) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.6(2). The effect of this provision in relation to the provisions relating to the limitation of actions in the Prescription and Limitation (Scotland) Act 1973 is uncertain, because the concept of an effective acknowledgement of a creditor's claim is not referred to in those provisions.

¹⁸⁰ Bankruptcy (Scotland) Act 2016 s.228(10) and Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 art.6(3).

¹⁸¹ See Prescription and Limitation (Scotland) Act 1973 s.9(1)(c). The reference to s.5(2)(c) of the Bankruptcy (Scotland) Act 1985 should now be read as a reference to s.228(1) of the Bankruptcy (Scotland) Act 2016.

¹⁸² *Donnelley v Royal Bank of Scotland Plc*, 2016 S.C. GLA 13.

the claim.¹⁸³ The Scottish Law Commission has recommended that the law should be clarified to make it clear that a relevant claim is continuous in nature and subsists until it is disposed of.¹⁸⁴

- (e) Unless the trust deed otherwise provides, the provisions of Sch.2 of the Bankruptcy (Scotland) Act 2016 relating to the valuation of creditors' claims in sequestration applies subject to specified modifications.¹⁸⁵ Special provisions apply where the debtor's debts include insurance debts of a member or former member of Lloyds.¹⁸⁶

PROTECTED TRUST DEEDS

Background

- 22–60** As noted above, the Bankruptcy (Scotland) Act 1985 originally provided for a trust deed to which it applied to become protected if a defined percentage of the creditors acceded to it within a specified time limit and certain other conditions were satisfied.¹⁸⁷ However, the requirement for positive creditor consent meant that few trust deeds became protected and the Bankruptcy (Scotland) Act 1993 amended the procedure to allow a trust deed to become protected where a defined percentage of the creditors did not object to it within a specified time limit and certain other conditions were satisfied.¹⁸⁸ The Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations*¹⁸⁹ in 2006 revisited the criteria for obtaining protection, and while it did not propose any change to the requirements for creditor consent, it did propose an additional requirement in the form of a requirement that AiB be satisfied that protection was reasonable in all the circumstances.¹⁹⁰ This proposal was not ultimately included in the Protected Trust Deeds (Scotland) Regulations 2008, but the issue of a return to positive creditor consent was revisited in the Scottish

¹⁸³ The sheriff's reasoning on this point was not challenged on appeal.

¹⁸⁴ Scottish Law Commission, *Report on Prescription* (Scot. Law Com. No.247, 2017), paras 7.27–7.30 and recommendation 22.

¹⁸⁵ Bankruptcy (Scotland) Act 2016 Sch.4, para.5. The valuation of claims in sequestration is dealt with in Ch.16.

¹⁸⁶ See Insurers (Reorganisation and Winding Up) (Lloyds) Regulations 2005 (SI 2005/1998) reg.40.

¹⁸⁷ Bankruptcy (Scotland) Act 1985 Sch.5, para.5 as enacted. The defined percentage was a majority in number and not less than two-thirds in value: Sch.5, para.5(c) as enacted.

¹⁸⁸ Bankruptcy (Scotland) Act 1985 Sch.5, para.5 as amended by the Bankruptcy (Scotland) Act 1993. The defined percentage was a majority in number or not less than one-third in value: Sch.5, para.5(d) as substituted by the Bankruptcy (Scotland) Act 1993.

¹⁸⁹ See Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), available at <http://www.scotland.gov.uk/Resource/Doc/89955/0021680.pdf> [Accessed 19 September 2017] and Scottish Executive, *Protected Trust Deeds: Partial Regulatory Impact Assessment* (January 2006), available at <http://www.scotland.gov.uk/Resource/Doc/92494/0022197.pdf> [Accessed 19 September 2017]. For the responses to the consultation, see Scottish Executive, *Protected Trust Deeds—Consultation on Draft Regulations and Partial Regulatory Impact Assessment: Analysis of responses* (June 2006), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0031324.pdf> [Accessed 19 September 2017]. There was also a supplementary consultation on the specific issue of the ranking of debts owed to credit unions in protected trust deeds: see Accountant in Bankruptcy, *Credit Union Debts in Protected Trust Deeds: Supplementary Consultation on Draft Regulations* (March 2007), available at <http://www.gov.scot/Resource/Doc/174118/0048563.pdf> [Accessed 19 September 2017] and, for the responses to that consultation, see consultation responses available at <http://www.gov.scot/Publications/2007/07/23145252/0> [Accessed 19 September 2017] and Accountant in Bankruptcy, *Credit Union Debts in Protected Trust Deeds: Report on Public Consultation*, available at <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000581.pdf> [Accessed 19 September 2017].

¹⁹⁰ Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), para.4.11.

Government's *Consultation on Bankruptcy Law Reform* in 2012.¹⁹¹ The Protected Trust Deed (Scotland) Regulations 2013 did not, however, make any change to the provisions for protection in this respect, with the result that the position with respect to creditor consent remains as it was following the changes made by the Bankruptcy (Scotland) Act 1993.

The Bankruptcy (Scotland) Act 2016 sets out the current conditions which must be satisfied for a trust deed to become protected, the effects of protection and certain administrative provisions applying to a protected trust deed. These apply to any trust deed executed on or after 30 November 2016.¹⁹² The Protected Trust Deed (Scotland) Regulations 2013 apply to protected trust deeds granted on or after 28 November 2013 and before that date,¹⁹³ subject to the proviso that the amendments to those regulations made by the Common Financial Tool etc. (Scotland) Regulations 2014 apply only to protected trust deeds granted on or after 1 April 2015.¹⁹⁴ The Protected Trust Deed (Scotland) Regulations 2008 as amended continue to apply to protected trust deeds granted on or after 1 April 2008 and before 28 November 2013.¹⁹⁵ The provisions of the Bankruptcy (Scotland) Act 1985 applying to protected trust deeds as they stood prior to 1 April 2008 continue to apply to protected trust deeds granted before that date. The provisions which apply to a protected trust deed therefore depend on when it was granted and care is required to ensure that the correct provisions are applied. This section considers only the provisions of the Bankruptcy (Scotland) Act 2016 but refers where appropriate to changes from the provisions under earlier versions of the legislation. **22-61**

As referred to above, the statutory provisions on protected trust deeds overlie the existing law relating to trust deeds generally, which will apply where there is no (contrary) statutory provision relating specifically to protected trust deeds. This important fact is not, however, always clearly appreciated. **22-62**

AiB publishes *Notes for Guidance for Trustees under Protected Trust Deeds*. The current version, published in November 2016, relates to protected trust deeds granted on or after 30 November 2016. Earlier versions are available for protected trust deeds granted under the earlier versions of the legislation. **22-63**

Pre-application moratorium

The debt arrangement scheme introduced the concept of a pre-application moratorium designed to allow a debtor who intended to seek the consent of creditors to a debt payment programme to obtain protection for a specified period from specified actions pending the submission of the application.¹⁹⁶ The Scottish Government in its *Consultation on Bankruptcy Law Reform* in 2012 proposed to introduce similar provisions for sequestration.¹⁹⁷ No specific proposals of this kind were made for protected trusts deeds, but in the summary **22-64**

¹⁹¹ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 10.5.9–10.5.11.

¹⁹² Bankruptcy (Scotland) Act 2016 s.162.

¹⁹³ Protected Trust Deeds (Scotland) Regulations 2013 reg.1.

¹⁹⁴ Common Financial Tool etc. (Scotland) Regulations 2014 regs 1, 11.

¹⁹⁵ Protected Trust Deeds (Scotland) Regulations 2008 reg.26 and Protected Trust Deeds (Scotland) Regulations 2013 reg.31. The Protected Trust Deeds (Scotland) Regulations 2008 were amended by the Protected Trust Deeds (Scotland) Amendment Regulations 2010 (SSI 2010/398), which came into force on 15 November 2010 but did not contain any transitional provisions.

¹⁹⁶ See further Ch.21.

¹⁹⁷ Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), paras 9.7–9.9.

of responses to the consultation, it was noted that there was support for the introduction of such a moratorium in all statutory debt relief products¹⁹⁸ and the Scottish Government response to the consultation indicated an intention to develop provisions for such a moratorium to apply in sequestration, protected trust deeds and the debt arrangement scheme.¹⁹⁹ The relevant provisions were duly included in the Bankruptcy and Debt Advice (Scotland) Act 2014, which amended the Bankruptcy (Scotland) Act 1985 accordingly.

- 22–65** The provisions are now contained in ss.195–198 of the Bankruptcy (Scotland) Act 2016 and are discussed in Ch.5.

Conditions for protection

The debtor

- 22–66** In order to be eligible to obtain protection, the trust deed must be one which is granted by a debtor who is a living individual, a partnership, a limited partnership within the meaning of the Limited Partnership Act 1907, a trust, a corporate body or an unincorporated body of persons.²⁰⁰ A trust deed granted by a debtor whose estate has been sequestrated where the trustee in sequestration remains undischarged cannot become protected,²⁰¹ nor can a trust deed granted by a registered company or any other entity in respect of which an enactment provides expressly or impliedly that sequestration is incompetent.²⁰² The total amount of the debtor's debts, including interest, on the date on which the trust deed is granted must be not less than £5,000.²⁰³ A joint protected trust deed is not competent.²⁰⁴

The trustee

- 22–67** The trustee under the trust deed must be a person who would not be disqualified from acting as replacement trustee in the debtor's sequestration.²⁰⁵

Estate to be conveyed: estate at the date of granting of the trust deed

- 22–68** The trust deed must convey to the trustee all of the debtor's estate (other than such of that estate as would not, under s.88(1) of the Bankruptcy (Scotland) Act 2016 or any other provision of that Act or any other enactment, vest in the trustee were that estate to be sequestrated) *or* that estate with the exception of the whole or part of the debtor's dwelling-house over which a secured creditor holds a security.²⁰⁶

¹⁹⁸ Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 19 September 2017], Executive Summary.

¹⁹⁹ Scottish Government, *Response to: The Consultation on Bankruptcy Law Reform* (November 2012), available at <http://www.gov.scot/Resource/0040/00407799.pdf> [Accessed 19 September 2017].

²⁰⁰ Bankruptcy (Scotland) Act 2016 s.164(1).

²⁰¹ Bankruptcy (Scotland) Act 2016 s.164(2)(a).

²⁰² Bankruptcy (Scotland) Act 2016 s.164(2)(b).

²⁰³ Bankruptcy (Scotland) Act 2016 s.164(3). The introduction of a minimum debt level was first proposed in the Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012): see para.10.5.4. It seems to have been relatively uncontroversial: see Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012), available at <http://www.gov.scot/Resource/0040/00400242.pdf> [Accessed 19 September 2017], paras 5.17–5.18.

²⁰⁴ Bankruptcy (Scotland) Act 2016 s.164(1).

²⁰⁵ Bankruptcy (Scotland) Act 2016 s.165. The replacement trustee in the sequestration is discussed in Ch.10.

²⁰⁶ Bankruptcy (Scotland) Act 2016 s.167(1).

Where it is intended that the whole or part of the debtor's dwelling-house over which a secured creditor holds a security is to be excluded from the estate conveyed to the trustee, and the secured creditor is thus to be excluded from claiming under the trust deed, the appropriate procedure must be followed prior to the granting of the trust deed. The prospective trustee must provide the debtor and the secured creditor with a valuation by a chartered surveyor or other suitably qualified third party of the dwelling-house or part thereof which is to be excluded.²⁰⁷ The debtor must, in the prescribed form, request the creditor's agreement not to claim under the trust deed for any of the debt in respect of which the security is held²⁰⁸ and the agreement (if forthcoming) must be recorded in the prescribed form.²⁰⁹ Where the whole or part of the dwelling-house is excluded from the estate conveyed to the trustee, the trust deed must include details of any secured creditor who has agreed not to claim under the trust deed for any of the secured debt and details of the secured debt.²¹⁰ The provisions for excluding the whole or part of the debtor's dwelling-house are intended to be used where there is no or little equity in the dwelling-house,²¹¹ but it is understood that they have not been used to any great extent in practice.

Acquirenda

The trust deed must convey to the trustee for the benefit of the creditors generally any estate, wherever situated, which is acquired by the debtor during the period of four years beginning with the date on which the trust deed is granted and which would have been conveyed to the trustee if it had been part of the debtor's estate on the date on which the trust deed was granted.²¹²

The requirement to include *acquirenda* in order for the trust deed to become protected was first introduced as a result of the amendments made to the Protected Trust Deeds (Scotland) Regulations 2008 by the Protected Trust Deeds (Scotland) Amendments Regulations 2010. That provision required the trust deed to convey to the trustee *acquirenda* acquired by the debtor during the period between the granting of the trust deed and the debtor's discharge.²¹³ The corresponding provision in the Protected Trust Deed (Scotland) Regulations 2013, however, changed the period to a set period of four years beginning with the date on which the trust deed is granted. This change, which had not been consulted on specifically, was seemingly intended to better align the *acquirenda* period with the expected minimum period of a protected trust deed.²¹⁴ It also foreshadowed a similar change, also not formally consulted on, in the provisions for *acquirenda* in sequestration which was brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014 and which was intended to reinforce the principle of "those who can pay should pay".²¹⁵

²⁰⁷ Bankruptcy (Scotland) Act 2016 s.166(2)(a).

²⁰⁸ Bankruptcy (Scotland) Act 2016 s.166(2)(b). The prescribed form is Pt 1 of Form 1A in the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016: see reg.2(1).

²⁰⁹ Bankruptcy (Scotland) Act 2016 s.166(2)(c). The prescribed form is Pt 2 of Form 1A in the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016: see reg.2(1).

²¹⁰ Bankruptcy (Scotland) Act 2016 s.167(2).

²¹¹ See Accountant in Bankruptcy, *Notes for Guidance for Trustees under Protected Trust Deeds* (2016), para.2.8.3.

²¹² Bankruptcy (Scotland) Act 2016 s.167(1)(b).

²¹³ Protected Trust Deed (Scotland) Regulations 2008 reg.6(1)(b) as added by the Protected Trust Deed (Scotland) Amendment Regulations 2010.

²¹⁴ See policy note for the Protected Trust Deeds (Scotland) Regulations 2013, pp.4–5, available at <http://www.legislation.gov.uk/ssi/2013/318/policy-note/contents> [Accessed 19 September 2017].

²¹⁵ See the policy memorandum that accompanied the Bankruptcy and Debt Advice (Scotland) Bill, paras 132–137, available at [http://www.scottish.parliament.uk/S4/Bills/Bankruptcy%20and%20Debt%20Advice%20\(Scotland\)%20Bill/b34s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4/Bills/Bankruptcy%20and%20Debt%20Advice%20(Scotland)%20Bill/b34s4-introd-pm.pdf) [19 September 2017].

Income

- 22-72** It is not a requirement for protection of the trust deed that the debtor make contributions from income, but where provision is made for such contributions, certain conditions must be satisfied.²¹⁶
- 22-73** The trust deed must provide for contributions to be paid at regular intervals for a specified period, the contributions in the case of a living individual being calculated in accordance with the common financial tool.²¹⁷ The specific period is:
- (i) a period of 48 months beginning with the date of the granting of the trust deed²¹⁸;
 - (ii) any shorter period determined by the trustee.²¹⁹ The trustee may determine a shorter period only where the trustee is of the opinion that the debtor's contributions, from income or otherwise, during the shorter period would allow the debtor's debts (including interest) at the date of the granting of the trust deed to be paid in full²²⁰; and
 - (iii) any longer period *either* determined by the trustee where there has been a period during which the debtor has not paid contributions *or* agreed by the debtor and the trustee.²²¹
- 22-74** Where the trustee makes a determination to shorten or lengthen the payment period, they must notify the debtor accordingly without delay.²²²
- 22-75** Where the debtor is an individual, the total contributions from income over the payment period must not be such as to allow the debtor's debts (including interest) at the date of the granting of the trust deed to be paid in full.²²³ The rationale for this provision is that the debt arrangement scheme is likely to be a more appropriate solution for debtors who are able to repay their debts in this timescale.²²⁴
- 22-76** It is specifically provided that in calculating the debtor's contributions from income, the whole of the debtor's surplus income over expenditure must be applied.²²⁵ It is also provided, however, that while the trustee may take account of any social security benefit paid to the debtor in determining the amount of any contribution from income to be made by the debtor, any contribution must not include an amount derived from social security benefit.²²⁶
- 22-77** It may be noted that the Protected Trust Deed Consultation 2016 sought views on the use of the common financial tool in the case of individuals and the Protected Trust Deed Consultation 2016, *The Report of the Summary of the*

²¹⁶ Bankruptcy (Scotland) Act 2016 s.168.

²¹⁷ Bankruptcy (Scotland) Act 2016 s.168(1). The common financial tool is discussed in Ch.11.

²¹⁸ Bankruptcy (Scotland) Act 2016 s.168(2)(a).

²¹⁹ Bankruptcy (Scotland) Act 2016 s.168(2)(b).

²²⁰ Bankruptcy (Scotland) Act 2016 s.168(3).

²²¹ Bankruptcy (Scotland) Act 2016 s.168(2)(c).

²²² Bankruptcy (Scotland) Act 2016 s.180(1).

²²³ Bankruptcy (Scotland) Act 2016 s.168(4).

²²⁴ See the Scottish Parliament Economy, Energy and Tourism Committee, *Report on the Protected Trust Deeds (Scotland) Regulations 2013 (draft)*, 12th Report 2013 (Session 4), SP Paper 404, p.3, available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/68799.aspx> [Accessed 19 September 2017].

²²⁵ Bankruptcy (Scotland) Act 2016 s.168(5).

²²⁶ Bankruptcy (Scotland) Act 2016 s.181(6).

Responses reported that while the vast majority of consultees considered that the common financial tool was an effective way of ensuring transparency in the calculation of the debtor's contribution, almost half had experienced issues with its application. There is, however, a separate consultation ongoing at the time of writing on the future of the common financial tool generally.²²⁷

Procedure prior to granting of trust deed

Prior to the granting of the trust deed, the prospective trustee must have advised the debtor of certain specified potential consequences of granting the trust deed, namely that the debtor's estate may be sequestrated; that the debtor may be refused credit (whether before or after the debtor's discharge); that the debtor may be required to relinquish property which the debtor owns and that the debtor may not be able to remain in the debtor's current place of residence, subject, in each case, to any exclusion of the whole or part of the debtor's dwelling-house from the trust deed; that the debtor may be required to make contributions from income for the benefit of creditors; that the debtor's business interests and employment prospects may be damaged; and that the granting of the trust deed may become a matter of public knowledge.²²⁸ **22-78**

The trustee is also required to provide the debtor with a copy of the debt advice and information package provided for by s.10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002.²²⁹ **22-79**

The trustee and the debtor must sign a statement to the effect that the trustee has fulfilled these requirements.²³⁰ **22-80**

It may be observed that these provisions are not worded particularly happily: the requirements appear to apply in all cases notwithstanding that they are mainly relevant only to debtors who are living individuals, and the granting of a trust deed which is intended to become protected will, rather than may, become a matter of public knowledge even if it does not ultimately become protected since the first stage of the procedure for obtaining protection is the publication of a notice in the register of insolvencies.²³¹ **22-81**

AiB's *Notes for Guidance of Trustees under Protected Trust Deeds* advise that the debtor should be given adequate time to consider the consequences and alternatives before signing a trust deed as a matter of good practice²³² and Statement of Insolvency Practice 3A contains a similar requirement. There is, however, no statutory provision to this effect. **22-82**

Procedure for obtaining protection

Notice in register of insolvencies

On receipt of the trust deed, the trustee must without delay send a notice in the prescribed form to AiB for publication by registration in the register of insolvencies.²³³ **22-83**

²²⁷ See further Chs 2 and 11.

²²⁸ Bankruptcy (Scotland) Act 2016 s.167(3)(a).

²²⁹ Bankruptcy (Scotland) Act 2016 s.167(3)(b).

²³⁰ Bankruptcy (Scotland) Act 2016 s.167(3)(c).

²³¹ Procedure is discussed further at para.22-83 onwards.

²³² See Accountant in Bankruptcy, *Notes for Guidance for Trustees under Protected Trust Deeds* (2016), para.2.11.

²³³ Bankruptcy (Scotland) Act 2016 s.169. The prescribed form is Form 1 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016; see reg.2(1).

Information to be sent to creditors

22–84 Not later than seven days after such registration, the trustee must send to every creditor known to the trustee, with the exception of any secured creditor who has agreed not to claim under the trust deed in accordance with the provisions for exclusion of the debtor's dwelling-house, the following documents:

- (a) A copy of the trust deed.²³⁴
- (b) A copy of the prescribed form of statement of claim by creditors.²³⁵
- (c) A copy of the notice registered in the register of insolvencies.²³⁶
- (d) A statement of the debtor's affairs.²³⁷ The statement must be prepared by the trustee and contain the following:
 - (i) a list of the debtor's assets and liabilities²³⁸;
 - (ii) a statement of the debtor's income and expenditure as at the date on which the trust deed was granted.²³⁹ In the case of an individual debtor, this must be in the prescribed form²⁴⁰;
 - (iii) a statement as to the extent to which any such assets or income will not vest in the trustee²⁴¹;
 - (iv) a statement as to whether, and if so, on what basis, the EU insolvency proceedings regulation applies to the trust deed and, if it does so apply, whether the trust deed constitutes main or territorial proceedings.²⁴² Where the regulation applies and the trust deed constitutes territorial proceedings, the trust deed will be confined to the debtor's assets in the UK²⁴³;
 - (v) a statement as to whether the creditors are likely to be paid a dividend and, if so, the expected amount of the dividend²⁴⁴;
 - (vi) if all or part of the debtor's dwelling-house is excluded from the trust deed, a statement as to the likely effect of that exclusion on any dividend based on the information then available²⁴⁵;
 - (vii) a statement that the trustee must provide a copy of any third-party valuation of any of the debtor's assets, any statement showing the amount due by the debtor under a security and any document showing the debtor's income on request²⁴⁶;
 - (viii) a copy of any agreement in respect of realisation of the debtor's heritable property made under s.175(1)²⁴⁷;

²³⁴ Bankruptcy (Scotland) Act 2016 s.170(1)(a).

²³⁵ Bankruptcy (Scotland) Act 2016 s.170(1)(b). The prescribed form is Form 2 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

²³⁶ Bankruptcy (Scotland) Act 2016 s.170(1)(c).

²³⁷ Bankruptcy (Scotland) Act 2016 s.170(1)(d).

²³⁸ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(i).

²³⁹ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(ii).

²⁴⁰ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(ii).. The prescribed form is Form 2A in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

²⁴¹ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(iii).

²⁴² Bankruptcy (Scotland) Act 2016 s.170(1)(d)(iv) and (v).

²⁴³ See the discussion of the EU insolvency proceedings regulation in Ch.25.

²⁴⁴ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(vi).

²⁴⁵ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(vii).

²⁴⁶ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(viii).

²⁴⁷ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(ix). Such agreements are discussed further at para.22–112 onwards.

- (ix) a statement explaining the conditions which require to be satisfied before the trust deed will become protected and the consequences of it becoming protected²⁴⁸;
 - (x) details of any previous protected trust deed from which the debtor has either been discharged or has been refused a discharge in the six months preceding the publication of the prescribed notice referred to above in the register of insolvencies²⁴⁹; and
 - (xi) if a secured creditor has agreed not to claim under the trust deed as a consequence of the exclusion of all or part of the debtor's dwelling-house from the trust deed, a statement containing the valuation sent to the debtor and the secured creditor and a statement of the amount owed to the secured creditor under the security.²⁵⁰
- (e) A statement in the prescribed form of the trustee's anticipated realisations from the trust deed.²⁵¹

Accession by creditors

The creditors to whom the trustee has sent the specified documents, referred to as the notified creditors, are required to accede to the trust deed, but are deemed to have done so unless the trustee receives, within a period of five weeks beginning with the date of registration of the notice in the register of insolvencies, notification in writing from a majority in number, or no fewer than a third in value, of these creditors that they object to the trust deed gaining protected status.²⁵² 22–85

Registration

As soon as reasonably practicable after the expiry of the five week period, and no later than four weeks thereafter, the trustee must send to AiB for registration in the register of insolvencies the following documents: 22–86

- (a) A copy of the trust deed.²⁵³
- (b) A copy of every agreement by a secured creditor not to claim under the trust deed as a consequence of the exclusion of all or part of the debtor's dwelling-house from the trust deed *or* a statement by the trustee that no such agreement has been obtained.²⁵⁴
- (c) A statement by the trustee that any objections to the trust deed becoming protected do not constitute a majority in number, or no fewer than a third in value, of the notified creditors.²⁵⁵
- (d) A copy of the statement signed by the trustee and the debtor in relation to the trustee's obligations to advise the debtor and give the debtor a debt and advice package.²⁵⁶

²⁴⁸ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(x). The consequences of a trust deed becoming protected are discussed further at para.22–92 onwards.

²⁴⁹ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(xi).

²⁵⁰ Bankruptcy (Scotland) Act 2016 s.170(1)(d)(xii).

²⁵¹ Bankruptcy (Scotland) Act 2016 s.170(1)(c). The prescribed form is Pt 1 of Form 3 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

²⁵² Bankruptcy (Scotland) Act 2016 s.170(2).

²⁵³ Bankruptcy (Scotland) Act 2016 s.171(1)(a).

²⁵⁴ Bankruptcy (Scotland) Act 2016 s.171(1)(b).

²⁵⁵ Bankruptcy (Scotland) Act 2016 s.171(1)(c).

²⁵⁶ Bankruptcy (Scotland) Act 2016 s.171(1)(d).

- (e) A copy of the statement of the debtor's affairs prepared by the trustee.²⁵⁷
- (f) A copy of any agreement in relation to the realisation of specified heritable property made under s.175(1).²⁵⁸
- (g) A statement in the prescribed form of the trustee's anticipated realisations from the trust deed.²⁵⁹
- (h) Where the debtor is a living individual making a contribution from income, a statement that the amount of the contribution is in accordance with the common financial tool as assessed by the trustee and any evidence or explanation relating to the application of the common financial tool.²⁶⁰
- (i) A statement in the prescribed form setting out the trust deed protection proposal and the trustee's application for protection.²⁶¹

22–87 AiB must register the trust deed in the register of insolvencies where the specified documents have been received, the conditions for protection (described above) are met and AiB is satisfied in accordance with the common financial tool with the amount of the contribution.²⁶²

22–88 If AiB refuses to register the trust deed on the ground that AiB is not satisfied in accordance with the common financial tool with the amount of the contribution, the trustee, the debtor or any creditor may appeal to the sheriff provided, in the case of the debtor or a creditor, that the appellant is able to satisfy the sheriff that the appellant has, or is likely to have, a pecuniary interest in the outcome of the appeal.²⁶³

22–89 There is no formal requirement for AiB to notify the trustee (or any other person) of the registration of the trust deed or a decision to refuse to register it, but AiB's *Notes for Guidance for Trustees under a Protected Trust Deed* state that AiB will notify the trustee of their decision within seven days of receiving all relevant information from the trustee. The trustee is required to notify the debtor and every creditor known to the trustee of the registration of the trust deed or AiB's refusal to register it (as the case may be) no later than seven days after receipt of AiB's notification of same.²⁶⁴

22–90 Where the trust deed is registered, it becomes protected on registration.²⁶⁵ Where registration is refused and the decision to refuse registration is not appealed successfully, the trust deed will not be protected but will remain a valid trust deed at common law and will be governed by the common law, the provisions of the Bankruptcy (Scotland) Act 2016 which apply to unprotected trust deeds, and, where applicable, the legislation on trusts and any other relevant statutory provisions relating to unprotected trust deeds.

²⁵⁷ Bankruptcy (Scotland) Act 2016 s.171(1)(e).

²⁵⁸ Such agreements are discussed further at para.22–112 onwards.

²⁵⁹ Bankruptcy (Scotland) Act 2016 s.171(1)(g). The prescribed form is Pt 1 of Form 3 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

²⁶⁰ Bankruptcy (Scotland) Act 2016 s.171(1)(h).

²⁶¹ Bankruptcy (Scotland) Act 2016 s.171(1)(i). The prescribed form is Form 3 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

²⁶² Bankruptcy (Scotland) Act 2016 s.171(2). The last requirement will apply only in the case of a living individual since the calculation of a contribution using the common financial tool applies only in that case.

²⁶³ Bankruptcy (Scotland) Act 2016 s.188(1), (2). Appeals are discussed further at para.22–145 onwards.

²⁶⁴ Bankruptcy (Scotland) Act 2016 s.171(3), (4).

²⁶⁵ Bankruptcy (Scotland) Act 2016 s.163.

The Protected Trust Deed Consultation 2016 sought views on the grounds on which registration of a trust deed could be refused and the Protected Trust Deed Consultation 2016, *The Report of the Summary of the Responses* reported that more than two thirds of consultees believed that there were additional grounds on which registration should be refused, including where the debtor has acquired a significant amount of credit shortly before granting a trust deed, where there is evidence of fraud and where the trust deeds provides for the trustee to accept payments in return for equity in the debtor's home which do not reflect the true value of the equity. The last point is discussed in greater detail below. 22–91

Effects of protection

Effects on creditors

A creditor who is not a notified creditor, or who objected to the trust deed within the period for doing so, has no higher right to recover their debt than a creditor who has acceded to, or is deemed to have acceded to, the trust deed.²⁶⁶ This is subject, however, to the proviso that any such creditor who is qualified to petition for sequestration of the debtor's estate has the right to present a petition for sequestration within five weeks of the date of registration of the initial notice in the register of insolvencies *or* at any time where the creditor avers that the provision for distribution of the debtor's estate is, or is likely to be, unduly prejudicial to a creditor or class of creditors.²⁶⁷ In the first case, the sheriff may award sequestration if they consider it is in the best interests of the creditors to do so²⁶⁸; in the second case, the sheriff may award sequestration only if they are satisfied that the creditor's averment is true.²⁶⁹ 22–92

A notified creditor ceases to be deemed to have acceded to the trust deed if the trustee refuses a request by the debtor to apply to AiB for the debtor's discharge.²⁷⁰ The effect of this is that the creditor is free to proceed, if so advised, in the same way as a non-acceding creditor. 22–93

Where a secured creditor has agreed not to claim under the trust deed in terms of the provisions for exclusion of the debtor's dwelling-house, the secured creditor may not make a claim under the protected trust deed for any of the secured debt, carry out diligence against any of the assets conveyed to the trustee under the trust deed or petition for sequestration of the debtor's estate during the subsistence of the protected trust deed.²⁷¹ 22–94

Effect on debtor

The debtor may not apply for sequestration during the subsistence of the protected trust deed,²⁷² although as noted above, the trustee under the protected trust deed may do so in certain circumstances. 22–95

The debtor may not apply for a debt payment programme during the subsistence of the protected trust deed.²⁷³ 22–96

²⁶⁶ Bankruptcy (Scotland) Act 2016 s.172(1)(a). Accession is discussed at para.22 85 onwards.

²⁶⁷ Bankruptcy (Scotland) Act 2016 ss.172(1)(a) and 177(1). In the latter case, this is, however, subject to the time limits for presenting a creditor petition for sequestration: see s.177(2). The time limits for presenting a petition for sequestration are discussed in Ch.7.

²⁶⁸ Bankruptcy (Scotland) Act 2016 s.177(3)(a).

²⁶⁹ Bankruptcy (Scotland) Act 2016 s.177(3)(b).

²⁷⁰ Bankruptcy (Scotland) Act 2016 s.172(2).

²⁷¹ Bankruptcy (Scotland) Act 2016 s.172(3).

²⁷² Bankruptcy (Scotland) Act 2016 s.172(1)(b).

²⁷³ Debt Arrangement Scheme (Scotland) Regulations 2011 reg.21(2)(b) and see further Ch.21.

Effect on diligence

- 22–97** Any existing earnings arrestment, current maintenance arrestment or conjoined arrestment order ceases to have effect on the date on which the trust deed becomes protected.²⁷⁴ In the case of a conjoined arrestment order, this is subject to the proviso that any sum paid to the sheriff clerk on a payday prior to the date on which the trust deed becomes protected falls to be disbursed by the sheriff clerk even if the disbursement is after the date of protection.²⁷⁵
- 22–98** It is not competent after the date on which the trust deed becomes protected to make a deduction of earnings order under the Debtor's (Scotland) Act 1987 to secure the payment of any amount due by the debtor under a maintenance calculation within the meaning of that Act in respect of which a claim could be made in the trust deed.²⁷⁶
- 22–99** It is not competent to execute an earnings arrestment or make a conjoined arrestment order after the date on which the trust deed becomes protected to enforce a debt in respect of which the creditor is entitled to claim in the trust deed.²⁷⁷

Effect on essential supplies

- 22–100** The Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017²⁷⁸ introduced new provisions into the Bankruptcy (Scotland) Act 2016 to make provision for the effect of protection on supplies by utilities.²⁷⁹
- 22–101** In terms of these provisions, an insolvency-related term of a contract for the supply of essential goods or services to a debtor ceases to have effect where a trust deed granted by a debtor is granted protected status and the supply is for the purpose of a business which is or has been carried on by or on behalf of the debtor.²⁸⁰ For this purpose, a contract for the supply of essential goods or services is a contract for a supply mentioned in s.222(4) of the Bankruptcy (Scotland) Act 2016²⁸¹ and an insolvency-related term of a contract for the supply of essential goods or services to a debtor is a provision of the contract under which:
- (a) the contract or the supply would terminate, or any other thing would take place, because a trust deed granted by the debtor is granted protected status;
 - (b) the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because a trust deed granted by the debtor is granted protected status; or
 - (c) the supplier would be entitled to terminate the contract or the supply because of an event that occurred before a trust deed granted by the debtor is granted protected status.²⁸²

²⁷⁴ Bankruptcy (Scotland) Act 2016 s.173(1), (2).

²⁷⁵ Bankruptcy (Scotland) Act 2016 s.173(3).

²⁷⁶ Bankruptcy (Scotland) Act 2016 s.173(4).

²⁷⁷ Bankruptcy (Scotland) Act 2016 s.173(5).

²⁷⁸ Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017 (SSI 2017/209).

²⁷⁹ Bankruptcy (Scotland) Act 2016 s.173A as added by the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

²⁸⁰ Bankruptcy (Scotland) Act 2016 s.173A(1).

²⁸¹ Bankruptcy (Scotland) Act 2016 s.173A(9).

²⁸² Bankruptcy (Scotland) Act 2016 s.173A(10).

This is, however, subject to the proviso that such a term does not cease to have effect to the extent that: **22-102**

- (a) it provides for the contract or the supply to terminate, or any other thing to take place, because an individual becomes subject to an insolvency procedure other than a trust deed;
- (b) it entitles a supplier to terminate the contract or the supply, or do any other thing, because the individual becomes subject to an insolvency procedure other than a trust deed; or
- (c) it entitles a supplier to terminate the contract or the supply because of an event that occurs, or may occur, after a trust deed granted by the debtor is granted protected status.²⁸³

Even where an insolvency-related term of a contract ceases to have effect under these provisions, the supplier may still terminate the contract where: **22-103**

- (a) the trustee under the trust deed consents to the termination of the contract²⁸⁴;
- (b) the court grants permission for the termination of the contract on application by the supplier.²⁸⁵ Such an application is to be made to the sheriff who would have had jurisdiction to hear a petition for sequestration of the debtor's estate presented at the date the trust deed was granted.²⁸⁶ The sheriff may grant permission only if satisfied that the continuation of the contract would cause the supplier hardship²⁸⁷; or
- (c) any charges in respect of the supply that are incurred after the date of protection of the trust deed are not paid within the period of 28 days beginning with the day on which payment is due.²⁸⁸

In addition, the supplier may still terminate the supply where the supplier gives written notice to the trustee under the trust deed that the supply will be terminated unless the trustee personally guarantees the payment of any charges in respect of the continuation of the supply after the date of protection of the trust deed and the trustee does not give that guarantee within the period of 14 days beginning with the day the notice is received.²⁸⁹ **22-104**

Where an insolvency-related term of a contract ceases to have effect as a result of these provisions and a subsequent trust deed granted by the debtor is granted protected status, the contract is treated as if, immediately before the subsequent trust deed granted by the debtor is granted protected status, it included an insolvency-related term identical to the original term.²⁹⁰ **22-105**

These provisions, *inter alia*, were introduced in order to promote the on-going operation and rescue of viable businesses subject to insolvency proceedings, in this case, protected trust deeds.²⁹¹ The provisions are not, however, entirely happily worded: while they refer in most places to the debtor, in certain places **22-106**

²⁸³ Bankruptcy (Scotland) Act 2016 s.173A(2).

²⁸⁴ Bankruptcy (Scotland) Act 2016 s.173A(3)(a) and (4)(a).

²⁸⁵ Bankruptcy (Scotland) Act 2016 s.173A(3)(a) and (4)(b).

²⁸⁶ Bankruptcy (Scotland) Act 2016 s.173A(5).

²⁸⁷ Bankruptcy (Scotland) Act 2016 s.173A(6).

²⁸⁸ Bankruptcy (Scotland) Act 2016 s.173A(3)(a) and (4)(c).

²⁸⁹ Bankruptcy (Scotland) Act 2016 s.173A(3)(b) and (7).

²⁹⁰ Bankruptcy (Scotland) Act 2016 s.173A(8).

²⁹¹ See Explanatory Note to the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

they refer to an individual. Since these provisions are most likely to be relevant where a protected trust deed is granted by an entity rather than an individual, this seems somewhat odd.

- 22–107** The provisions do not have effect in relation to any contract entered into before 1st August 2017.²⁹²

Administration of the trust deed

General

- 22–108** The trustee will proceed to realise the debtor's assets and ingather any income contributions during the period for which they fall to be paid. Particular aspects of this process are examined further below.
- 22–109** Where the protected trust deed is one to which the EU insolvency proceedings regulation applies and the protected trust deed is main proceedings under the regulation, the trustee may wish to give an undertaking under art.36 of the regulation in order to prevent the opening of secondary proceedings in another Member State. In such a case s.14A of the Bankruptcy (Scotland) Act 2016 sets out a number of requirements with which the trustee must comply. These are discussed further in Ch.25.
- 22–110** As noted above, the supervisory functions of AiB extend to the supervision of trustees under protected trust deeds.²⁹³

Contributions from income

- 22–111** Where the trust deed provides for the payment of a contribution from income, some or all of which is to be paid from the debtor's earnings from employment, and the debtor has failed to make the required payments from earnings on two consecutive occasions, the trustee may request the debtor to give the employer an instruction in the prescribed form to make the relevant deductions from the debtor's earnings and remit them to the trustee.²⁹⁴ If the debtor fails to do so, the trustee may give the employer an instruction in the prescribed form.²⁹⁵ The employer must comply with the instruction (and any subsequent variation).²⁹⁶ If the employer fails to do so without good cause, the employer is liable to pay the sum which should have been paid to the trustee on demand and is not entitled to recover from the debtor any amount paid to the debtor in breach of the instruction.²⁹⁷ The employer is entitled to charge a fee equivalent to that chargeable in the case of diligence against earnings and to deduct this from the balance due to the debtor.²⁹⁸ Where the instruction has been given by the debtor and the debtor and the trustee have agreed, the instruction may be varied by the debtor giving the employer a further instruction in the prescribed form.²⁹⁹ Curiously, there is no corresponding provision for variation where the

²⁹² Bankruptcy (Scotland) Act 2016 s.173A(11).

²⁹³ See Bankruptcy (Scotland) Act 2016 s.200(1)(a). The supervisory functions of AiB are discussed further in Ch.4.

²⁹⁴ Bankruptcy (Scotland) Act 2016 s.174(1), (2). The prescribed form is Form 4A in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

²⁹⁵ Bankruptcy (Scotland) Act 2016 s.174(3). The prescribed form is Form 4B in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

²⁹⁶ Bankruptcy (Scotland) Act 2016 s.174(5), (6).

²⁹⁷ Bankruptcy (Scotland) Act 2016 s.174(7).

²⁹⁸ Bankruptcy (Scotland) Act 2016 s.174(8).

²⁹⁹ Bankruptcy (Scotland) Act 2016 s.174(4). The prescribed form is Form 4C in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

instruction is given by the trustee. The trustee must without delay notify the employer in writing that any instruction, whether given by the debtor or the trustee, is recalled following the debtor's discharge.³⁰⁰

Realisation of heritable property

Specific provision is made for the trustee to enter into an agreement with the debtor in relation to the realisation of any specified heritable property of the debtor (other than a dwelling-house or part thereof excluded from the estate conveyed to the trustee under the provisions discussed above).³⁰¹ Such an agreement is designed to allow the amount of equity in the property to be fixed at the time the trust deed is entered into and realised for the benefit of the creditors without the sale of the property, which is ultimately returned to the debtor. 22-112

In terms of these provisions, the trustee may agree not to realise any specified heritable property which has been conveyed to them, to relinquish their interest in the specified heritable property and to recall any notice of inhibition recorded by them so far as it relates to the specified heritable property, in return for which the debtor must make payment to the trustee and otherwise co-operate with the trustee.³⁰² The payment to the trustee may take the form of *either* a lump sum determined by the trustee which is payable by a specified date *or* a number of monthly payments determined by the trustee which are payable for a specified period determined by the trustee after the period for the making of any income contributions has come to an end.³⁰³ In the former case, the payment of the lump sum will require to be made from funds which would not otherwise form part of the estate under the trust deed: possible sources of such funds might include funds from family members or other third parties, funds available under schemes such as the current Scottish Government mortgage to rent scheme or a conventional remortgage. In the latter case, the requirement that the monthly payments fall to be made after the period for which any income contributions are being paid is designed to ensure that the payments are not being made from funds which would otherwise fall to be paid to the trustee in any event. The total amount to be paid by the debtor under either formulation must be determined in accordance with a valuation by a chartered surveyor or other suitably qualified third party.³⁰⁴ Once the amount is determined, provided the agreement is implemented in accordance with its terms, it is not affected by any subsequent change in the value of the property. 22-113

Any agreement under these provisions must be embodied in the prescribed form at the date on which the trust deed is granted³⁰⁵ and the valuation on which the debtor's payment(s) fall to be based must be made as at that date.³⁰⁶ Where such an agreement is entered into, the trustee must, as soon as practicable, send a copy of the agreement in the prescribed form to AiB and every creditor known to the trustee, with the exception of any secured creditor who has agreed not to claim under the trust deed in accordance with the provisions for exclusion of the debtor's dwelling-house.³⁰⁷ If the debtor fails to make the 22-114

³⁰⁰ Bankruptcy (Scotland) Act 2016 s.174(9).

³⁰¹ Bankruptcy (Scotland) Act 2016 s.175(1), (6).

³⁰² Bankruptcy (Scotland) Act 2016 s.175(1), (2).

³⁰³ Bankruptcy (Scotland) Act 2016 s.175(2).

³⁰⁴ Bankruptcy (Scotland) Act 2016 s.175(3).

³⁰⁵ Bankruptcy (Scotland) Act 2016 s.175(1). The prescribed form is Form 1B in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

³⁰⁶ Bankruptcy (Scotland) Act 2016 s.175(3).

³⁰⁷ Bankruptcy (Scotland) Act 2016 s.175(5).

agreed payment(s) or co-operate with the trustee, the trustee may withdraw from the agreement.³⁰⁸ The trustee would then be free to realise the property in the normal way, and the net proceeds of sale would form part of the trust estate irrespective of whether these amounted to more or less than the amount of the payment(s) originally agreed.

- 22–115** These provisions have proved controversial. The Protected Trust Deed Consultation 2016 sought views on their use and the Protected Trust Deed Consultation 2016, *The Report of the Summary of the Responses* reported that more than half of the respondents thought that the provisions did not adequately address the issue of equity in heritable property as the process is open to abuse. There is anecdotal evidence that despite the requirement that the amount to be paid must be determined by a valuation, in some cases the full amount of the equity in property is not being reflected in the amount to be paid by the debtor, the debtor being required to make additional monthly payments for a period of, for example, 12 months, despite the fact that total payments made as a result do not amount to the full value of the equity. Such an agreement is not only contrary to the statutory provisions, but it is suggested that it would be in breach of the trustee's duties to the creditors: as noted above, the trustee is required to act in the interests of, and is accountable to, the creditors, not the debtor.³⁰⁹
- 22–116** Where no agreement is entered into under these provisions, the trustee will be free to sell or otherwise realise the property. AiB's *Notes for Guidance for Trustees under Protected Trust Deeds* encourages the trustee to agree with the debtor as early as possible how the equity in the property will be realised. Ultimately, however, the matter is one for the trustee. As noted above, the provisions restricting the powers of a trustee in sequestration in relation to the debtor's family home now apply also to a trustee under a trust deed. In practice, where the property is the debtor's family home, the trustee will generally explore the possibility of a sale to a co-proprietor (if any) or family member before considering the possibility of a sale on the open market. Where there is equity in the property, it should be realised where this would be for the benefit of creditors. There is anecdotal evidence to the effect that in some cases, trustees are not realising equity for the benefit of creditors, even where the realisation of equity in some cases would result in payment of the debtor's debts in full. It is suggested that this would be in breach of the trustee's duties to the creditors for the same reasons as noted in the preceding paragraph.

Challenge of prior transactions

- 22–117** A trustee under a protected trust deed is given the same powers as a trustee in sequestration to challenge gratuitous alienations, orders on divorce and unfair preferences, but not excessive pension contributions or extortionate credit transactions.³¹⁰

Distribution of the estate

- 22–118** Provision is made for payment of dividends to creditors within dividend periods. The first dividend period is 24 months beginning with the date on which the trust deed was granted³¹¹ and subsequent dividend periods are six months beginning with the end of the previous period.³¹²

³⁰⁸ Bankruptcy (Scotland) Act 2016 s.175(4).

³⁰⁹ See para.22–16.

³¹⁰ See Ch.14.

³¹¹ Bankruptcy (Scotland) Act 2016 s.176(1)(a).

³¹² Bankruptcy (Scotland) Act 2016 s.176(1)(b).

The trustee is required to pay a dividend to creditors no later than six weeks after the end of the first and any subsequent dividend period if the funds in the estate are sufficient.³¹³ For this purpose, the funds in the estate are defined as sufficient where there are funds to pay a dividend of at least 5p in the £1 after deduction of the trustee's fees and outlays and an allowance is made for contingencies.³¹⁴ Somewhat curiously, the calculation of whether there is a dividend of at least 5p in the £1 is based on the debts at the date on which the trust deed becomes protected,³¹⁵ which makes no allowance for any revaluation of any debt. **22-119**

Directions as to administration of estate

AiB may give the trustee directions as to how the trustee should conduct the administration of the trust.³¹⁶ A direction may be issued *ex proprio motu* or on the request of the trustee, the debtor or any creditor.³¹⁷ Provision is made for the intimation of any direction issued to the trustee to the debtor and all known creditors, but it is not specified by whom the intimation must be made or within what timescale.³¹⁸ **22-120**

The trustee, the debtor or any creditor may appeal to the sheriff against any direction provided, in the case of the debtor or a creditor, that the appellant is able to satisfy the sheriff that the appellant has, or is likely to have, a pecuniary interest in the outcome of the appeal.³¹⁹ There is no provision for appeal against a decision of AiB to refuse to issue a direction at the request of the trustee, the debtor or any creditor, although such a decision might be subject to judicial review. The trustee is required to comply with any direction within 30 days unless they appeal to the sheriff.³²⁰ Somewhat oddly, it would appear that the trustee still has to comply with the direction within that period notwithstanding an appeal by any other person. If the trustee appeals to the sheriff and the appeal is dismissed or subsequently withdrawn by the trustee, the trustee is then required to comply with the direction within 30 days of the date of dismissal or withdrawal as the case may be.³²¹ If it appears to AiB that the trustee has failed without reasonable cause to comply with a direction, AiB may report the matter to the sheriff who may, after hearing the trustee, censure the trustee or make such other order as the circumstances require.³²² **22-121**

Requirement to supply information to AiB

A trustee, whether or not they are still acting as such, is required to supply AiB with such information relating to the trust deed as the latter considers necessary to enable them to discharge their statutory functions.³²³ If AiB considers that the trustee has failed without reasonable excuse to supply them with information that they have requested under this provision, AiB may report the matter to the sheriff who may, after hearing the trustee, censure the trustee or make such order as the circumstances require.³²⁴ **22-122**

³¹³ Bankruptcy (Scotland) Act 2016 s.176(1).

³¹⁴ Bankruptcy (Scotland) Act 2016 s.176(2).

³¹⁵ Bankruptcy (Scotland) Act 2016 s.176(2).

³¹⁶ Bankruptcy (Scotland) Act 2016 s.179(1).

³¹⁷ Bankruptcy (Scotland) Act 2016 s.179(3).

³¹⁸ Bankruptcy (Scotland) Act 2016 s.179(2).

³¹⁹ Bankruptcy (Scotland) Act 2016 s.188(1)(c) and (2). Appeals are discussed further at para.22-145 onwards.

³²⁰ Bankruptcy (Scotland) Act 2016 s.179(4).

³²¹ Bankruptcy (Scotland) Act 2016 s.179(5).

³²² Bankruptcy (Scotland) Act 2016 s.179(6).

³²³ Bankruptcy (Scotland) Act 2016 s.180(2).

³²⁴ Bankruptcy (Scotland) Act 2016 s.180(3).

- 22–123** Where the trustee under the trust deed is replaced with a new trustee, the new trustee must notify AiB without delay.³²⁵

Accounts and reports

- 22–124** The trustee is required to send accounts and reports on the administration of the trust deed to the debtor, creditors and AiB at regular intervals.
- 22–125** At intervals of no more than 12 months, the first such interval commencing on the date on which the trust deed was granted, the trustee must send their accounts of their intromissions with the debtor's estate to the debtor, each creditor and AiB (unless are sent to AiB in connection with the trustee's application for discharge under s.186).³²⁶ At the same intervals, the trustee must send to the debtor, each creditor and AiB a report in the prescribed form on the management of the trust.³²⁷ The accounts and report must be sent no later than six weeks after the end of each interval.³²⁸
- 22–126** The report on the management of the trust requires, inter alia, disclosure of any change in the expected final dividend payable to creditors and the reasons for this, and where the expected final dividend is less than 80 per cent of the final dividend shown in the trustee's original statement of anticipated realisations, the report must set out the options the trustee has identified for completing the trust deed in the circumstances and their recommended course of action.³²⁹ Creditors are invited to approve the trustee's recommended course of action, but it will be assumed that they have done so unless the trustee receives within 21 days of the date of the report notification in writing from a majority in number or not less than a third in value of the creditors that they object to the recommended course of action.³³⁰ If the trustee does receive such notification, they must apply to AiB for a direction as to how the trust is to be administered thereafter.³³¹

- 22–127** Within 14 days of receiving the trustee's accounts, the debtor or any creditor may require AiB to exercise AiB's statutory function of supervision of trustees under protected trust deeds by carrying out an examination of the administration of the trust by the trustee.³³²

Trustee's remuneration

- 22–128** It is specifically provided that the trustee is entitled to remuneration for the work done in administering the trust,³³³ but there are now certain restrictions on the amount of that remuneration. Concerns regarding the remuneration of trustees in trust deeds for creditors are long-standing and indeed pre-date the introduction of protected trust deeds as such. As noted above, the audit of the trustee's accounts and the fixing of their remuneration was considered by the Cullen Committee, whose only recommendation for legislation in relation to trust deeds for creditors was for the introduction of a statutory provision for

³²⁵ Bankruptcy (Scotland) Act 2016 s.180(4).

³²⁶ Bankruptcy (Scotland) Act 2016 s.181(1).

³²⁷ Bankruptcy (Scotland) Act 2016 s.181(2). The prescribed form is Form 4 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

³²⁸ Bankruptcy (Scotland) Act 2016 s.181(1).

³²⁹ See Form 4.

³³⁰ See Form 4.

³³¹ Bankruptcy (Scotland) Act 2016 s.181(3), (4). Directions are discussed at para.22–120 onwards.

³³² Bankruptcy (Scotland) Act 2016 s.181(5).

³³³ Bankruptcy (Scotland) Act 2016 s.183(1).

the auditing of the trustee's accounts and the fixing of their remuneration where either no provision was made for this in the trust deed or such provision was not acted upon, such provision subsequently being introduced in the Bankruptcy (Scotland) Act 1913.³³⁴ As also noted, the Scottish Law Commission subsequently recommended the strengthening of that provision, to allow the auditing of the trustee's accounts and the fixing of their remuneration whether or not the trust deed contained provisions or the trustee and creditors had agreed a method for this, such provision duly being made in the Bankruptcy (Scotland) Act 1985.³³⁵ Concerns continued to exist, however, and the consultation on the draft of the regulations which eventually became the Protected Trust Deeds (Scotland) Regulations 2008, having looked specifically at the issue of fees, recommended that a trustee in a protected trust deed should be required to quote or estimate a fixed fee for the work involved in the administration of the estate and to notify the debtor, creditors and AiB of any anticipated increase in the estimated fees or outlays beyond a specified level as well as seeking views on the introduction of a cap on the percentage of the estate which could be applied to fees and outlays.³³⁶ The majority of respondents were against the introduction of such a cap³³⁷ and this was not implemented, but the Protected Trust Deeds (Scotland) Regulations 2008 effectively required a trustee to provide an estimate of fees and outlays and information about any change in the level of that estimate as a consequence of the requirement to provide creditors with a statement of any estimated dividend at the time of seeking protection of the trust deed and to produce annual reports including information on any variation in that expected dividend and the reasons therefore, which would include any change in the projected level of fees and/or outlays.³³⁸ Fees continued to be a concern, however, and the Scottish Government consultation paper *Protected Trust Deeds—Improving the Process* in October 2011 contained proposals to introduce, through the mechanism of guidance to be issued by AiB, a revised structure for trustee fees based on an initial fixed administration fee to cover the cost of setting up the trust deed followed by regular monthly fees based on an agreed percentage of contributions and/or asset realisation.³³⁹ Following the report on the consultation,³⁴⁰ which set out an intention to proceed with these changes, new provisions on trustee remuneration in broadly those terms were duly introduced, but in the Protected Trust Deed (Scotland) Regulations 2013 rather than through guidance. The intention was that the trustee's remuneration must be in the form set out in these provisions,³⁴¹ but the original wording of the provisions used the word “may”,

³³⁴ See para.22–04.

³³⁵ See para.22–05.

³³⁶ See Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), available at <http://www.scotland.gov.uk/Resource/Doc/89955/0021680.pdf> [Accessed 19 September 2017], paras 4.28–4.34 and paras 5.4–5.6.

³³⁷ See Scottish Executive, *Protected Trust Deeds—Consultation on Draft Regulations and Partial Regulatory Impact Assessment: Analysis of responses* (June 2006), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0031324.pdf> [Accessed 19 September 2017], paras 15–17.

³³⁸ Protected Trust Deed (Scotland) Regulations 2008 regs 8(c) and 17 and Form 4.

³³⁹ Scottish Government, *Protected Trust Deeds—Improving the Process* (October 2011), available at <http://www.gov.scot/Resource/Doc/360299/0121805.pdf> [Accessed 19 September 2017], Appendix 1, Pt 12.

³⁴⁰ Accountant in Bankruptcy, *Report on Public Consultation: Protected Trust Deeds—Improving the Process* (May 2012), available at <http://www.gov.scot/Resource/0039/00393396.pdf> [Accessed 19 September 2017].

³⁴¹ See the Scottish Parliament Economy, Energy and Tourism Committee, *Report on the Protected Trust Deeds (Scotland) Regulations 2013 (draft)*, 12th Report 2013 (Session 4), SP Paper 404, p.3, available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/68799.aspx> [Accessed 19 September 2017]; policy note on the Protected Trust Deed (Scotland) Regulations 2013, para.13 and commentary on reg.23 in the Annex.

which gave rise to doubts as to whether the provisions could in fact be regarded as mandatory.³⁴² Accordingly, the provisions were amended to make clear that the trustee was entitled to remuneration only on the basis set out in the regulations.³⁴³

22–129 The current provisions therefore provide that the trustee is entitled only to remuneration in the form of:

- (a) a fixed fee, which must be set out in the trustee's original statement of anticipated realisations.³⁴⁴ The trustee is entitled to include in the fixed fee any work done with a view to the exclusion of the debtor's dwelling-house or part thereof from the trust deed irrespective of whether the dwelling-house or part thereof is ultimately excluded.³⁴⁵ The fixed fee may be increased in the event of unforeseen circumstances with the approval of:
 - (i) a majority in value of the notified creditors³⁴⁶; or
 - (ii) AiB.³⁴⁷ In this case, the notified creditors must first have been asked to approve the increase.³⁴⁸ AiB is to approve an increase if satisfied that a majority in value of the notified creditors has not actively refused to approve the increase and that the increase is required for work to be carried out for the benefit of creditors generally which was not foreseen when the trustee's original statement of anticipated realisations was submitted.³⁴⁹ Where an increase is approved in this way, AiB may determine the amount of the increase.³⁵⁰
- (b) an additional fee based on a percentage of the total assets and contributions realised by the trustee, which must be set out in the trustee's original statement of anticipated realisations³⁵¹; and
- (c) outlays incurred *either* after the date on which the trust deed was granted *or* before that date in the case of a single valuation of any item of the debtor's heritable estate.³⁵² As originally enacted, this provision referred only to outlays incurred after the date on which the trust deed was granted. This was intended to ensure that trustees could not include outlays, in particular fees paid to third parties for pre-trust deed work which it was feared were in fact introduction fees rather than legitimate payments for work done, as outlays of the trust deed.³⁵³ This approach caused difficulty, however, since it also excluded legitimate outlays such as pre-trust deed valuations of the

³⁴² Protected Trust Deed (Scotland) Regulations 2013 reg.23(1) as originally enacted.

³⁴³ Protected Trust Deed (Scotland) Regulations 2013 reg.23(1) as amended by the Common Financial Tool etc. (Scotland) Regulations 2014.

³⁴⁴ Bankruptcy (Scotland) Act 2016 s.183(1)(a).

³⁴⁵ Bankruptcy (Scotland) Act 2016 s.183(5).

³⁴⁶ Bankruptcy (Scotland) Act 2016 s.183(2)(a).

³⁴⁷ Bankruptcy (Scotland) Act 2016 s.183(2)(b).

³⁴⁸ Bankruptcy (Scotland) Act 2016 s.183(2)(b).

³⁴⁹ Bankruptcy (Scotland) Act 2016 s.183(3).

³⁵⁰ Bankruptcy (Scotland) Act 2016 s.183(4).

³⁵¹ Bankruptcy (Scotland) Act 2016 s.183(1)(b).

³⁵² Bankruptcy (Scotland) Act 2016 s.183(1)(c).

³⁵³ See the Scottish Parliament Economy, Energy and Tourism Committee, *Report on the Protected Trust Deeds (Scotland) Regulations 2013 (draft)*, 12th Report 2013 (Session 4), SP Paper 404, p.3, available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/68799.aspx> [Accessed 19 September 2017]; see also policy note on the Protected Trust Deed (Scotland) Regulations 2013, para.13.

debtor's property, in particular heritable property, obtained before the granting of the trust deed for purposes such as entering into an agreement in respect of heritable property under what is now s.175(1) and calculating accurately the expected dividend under the trust deed. The provision was therefore amended to allow a single valuation of any item of the debtor's heritable estate, which partly but not entirely meets the difficulties outlined. It is also specifically provided that any debt due to a third party for work done before the granting of the trust deed does not rank higher than any other claim.³⁵⁴ The trustee is entitled *seperatim* to any outlays incurred with a view to the exclusion of the debtor's dwelling-house or part thereof from the trust deed irrespective of whether the dwelling-house or part thereof is ultimately excluded.³⁵⁵ The outlays will include the various statutory fees which are payable to AiB in relation to protected trust deeds.³⁵⁶ Where there are insufficient funds in the estate to meet the statutory fees, however, the trustee is personally liable for them.³⁵⁷

As noted above, Sch.4 of the Bankruptcy (Scotland) Act 2016 contains two separate provisions for the audit of the trustee's accounts and the fixing of their remuneration by AiB, and it is provided that any fee for an audit carried out by AiB as a result of these provisions is recoverable from the trust estate.³⁵⁸ There is also a specific provision that AiB may audit the trustee's accounts and fix the outlays at any time.³⁵⁹ **22-130**

The trustee, the debtor or any creditor may appeal to the sheriff against any determination of AiB fixing the trustee's remuneration provided, in the case of the debtor or a creditor, that the appellant is able to satisfy the sheriff that the appellant has, or is likely to have, a pecuniary interest in the outcome of the appeal.³⁶⁰ **22-131**

Discharge of the debtor

Provision is made for the discharge of the debtor. No such provision was made when protected trust deeds were first introduced, and it was held that the debtor's discharge under a protected trust deed did not include the debts of non-acceding creditors, but the provision that a non-acceding creditor had no higher right to recover their debt than an acceding creditor meant that such a creditor would not be able to do diligence for their debt after the debtor's discharge with the result that the debtor was, in effect, discharged.³⁶¹ The continuing subsistence of the debt might have been important, however, for other purposes.³⁶² The Protected Trust Deed (Scotland) Regulations 2008, however, introduced specific provisions relating to the debtor's discharge and the Protected Trust Deed (Scotland) Regulations 2013 expanded these provisions further. The provisions are now contained in s.184 of the Bankruptcy (Scotland) Act 2016. **22-132**

³⁵⁴ Bankruptcy (Scotland) Act 2016 s.183(6).

³⁵⁵ Bankruptcy (Scotland) Act 2016 s.183(5).

³⁵⁶ At the time of writing, the current fees can be found in the Bankruptcy Fees (Scotland) Regulations 2014 (SSI 2014/227).

³⁵⁷ Bankruptcy Fees (Scotland) Regulations 2014 reg.10. See also *Accountant in Bankruptcy v Patullo* unreported 23 October 2012 Glasgow Sheriff Court.

³⁵⁸ Bankruptcy (Scotland) Act 2016 s.183(7).

³⁵⁹ Bankruptcy (Scotland) Act 2016 s.183(8).

³⁶⁰ Bankruptcy (Scotland) Act 2016 s.188(1)(b) and (2). Appeals are discussed further at para.22-145 onwards.

³⁶¹ *Junespear Ltd v Dear*, 2008 S.L.T. (Sh Ct) 69.

³⁶² *Junespear Ltd v Dear*, 2008 S.L.T. (Sh Ct) 69, in that case for the purposes of a claim under the Third Parties (Rights Against Insurers) Act 1930.

Procedure

22–133 The provisions for the debtor's discharge are somewhat cumbersome. It is provided that where certain conditions are met, the trustee must send an application for discharge of the debtor in the prescribed form to AiB and a copy to the debtor.³⁶³ The conditions are that:

- (a) the trustee is able to make a statement in the application to the effect that, to the best of their knowledge, the debtor has met the debtor's obligations under the trust deed and has co-operated in the administration of the trust.³⁶⁴ It is specifically provided that for this purpose, it is not a failure to meet the debtor's obligations for the debtor to refuse: (i) to consent to the sale of the debtor's dwelling-house or part thereof where this has been excluded from the trust deed under the provisions for exclusion of the debtor's dwelling-house³⁶⁵; or (ii) to give relevant consent in terms of the provisions restricting realisation of the debtor's family home in s.113 of the Bankruptcy (Scotland) Act 2016.³⁶⁶ These provisions are, of course, relevant to a living individual only; and
- (b) any notice of inhibition has expired or been recalled.³⁶⁷

22–134 On receipt of the application, AiB must register it in the register of insolvencies unless they are not satisfied that the debtor has met the debtor's obligations under the trust deed or co-operated with the administration of the trust.³⁶⁸ Where AiB registers the application, the date of registration is the date of the debtor's discharge³⁶⁹ and AiB must notify the trustee of the registration and the date of discharge.³⁷⁰ The trustee must in turn notify the debtor and every creditor known to the trustee of the registration and the date of discharge within seven days of receipt of the notification.³⁷¹

22–135 Where AiB refuses to register the application because they are not satisfied that the debtor has met the debtor's obligations under the trust deed or co-operated with the administration of the trust, they must notify the trustee and the debtor in writing of the refusal and the reasons for it.³⁷² The trustee must in turn send a copy of the notification to every creditor known to them within seven days of its receipt.³⁷³ The trustee, the debtor or any creditor may appeal to the sheriff against AiB's refusal to register the application provided, in the case of the debtor or a creditor, that the appellant is able to satisfy the sheriff that the appellant has, or is likely to have, a pecuniary interest in the outcome of the appeal.³⁷⁴

³⁶³ Bankruptcy (Scotland) Act 2016 s.184(1)(b). The prescribed form is Form 5 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

³⁶⁴ Bankruptcy (Scotland) Act 2016 s.184(2)(a).

³⁶⁵ Bankruptcy (Scotland) Act 2016 s.184(7)(a). The provisions for exclusion of the debtor's dwelling-house are discussed at para.22–69.

³⁶⁶ Bankruptcy (Scotland) Act 2016 s.184(7)(b). The provisions restricting the realisation of the family home in s.113 of the Bankruptcy (Scotland) Act 2016 are discussed above and in Ch.12.

³⁶⁷ Bankruptcy (Scotland) Act 2016 s.184(2)(b).

³⁶⁸ Bankruptcy (Scotland) Act 2016 s.184(3), (9).

³⁶⁹ Bankruptcy (Scotland) Act 2016 s.184(3).

³⁷⁰ Bankruptcy (Scotland) Act 2016 s.184(4).

³⁷¹ Bankruptcy (Scotland) Act 2016 s.184(5).

³⁷² Bankruptcy (Scotland) Act 2016 s.184(10).

³⁷³ Bankruptcy (Scotland) Act 2016 s.184(11).

³⁷⁴ Bankruptcy (Scotland) Act 2016 s.188(1)(d) and (2). Appeals are discussed further at para.22–145 onwards.

Where the trustee, either on a request by the debtor to apply for the debtor's discharge or as soon as reasonably practicable after the end of the period for which payments are required under trust deed, decides not to apply for the discharge of the debtor, they must inform the debtor in writing of: (i) their decision and the reasons for it; (ii) the fact that the debtor is not discharged; and (iii) the debtor's right to apply to the sheriff for a direction in relation to the administration of the trust.³⁷⁵ They must also send a copy of the notification to the AiB within 21 days.³⁷⁶ The debtor may appeal to the sheriff against the trustee's refusal to apply for the debtor's discharge.³⁷⁷ **22-136**

Effect of discharge

On discharge, the debtor is discharged from all debts and obligations in terms of the trust deed or for which the debtor was liable at the date the trust deed was granted, subject to a number of specified exceptions.³⁷⁸ The specified exceptions are: **22-137**

- (a) Any liability arising after the date on which the trust deed was granted.³⁷⁹ This provision seems superfluous given that it is already provided that the debtor is discharged (only) from all debts and obligations for which the debtor was liable at the date the trust deed was granted.
- (b) Any liability or obligation from which the debtor would not be discharged on sequestration as a result of s.145(3) of the Bankruptcy (Scotland) Act 2016.³⁸⁰
- (c) Any liability for a debt in respect of which the creditor holds a security where the creditor has agreed not to claim in the trust deed under the provisions for exclusion of the debtor's dwelling-house.³⁸¹

It is specifically provided that the discharge does not affect the rights of a secured creditor³⁸² or the right to recover any debt arising from a student loan.³⁸³ For this purpose, a student loan is defined as a loan made by virtue of s.73(f) of the Education (Scotland) Act 1980 s.1 of the Education (Student Loans) Act 1990 s.22 of the Teaching and Higher Education Act 1998 or art.3 of the Education (Student Support) (Northern Ireland) Order 1998.³⁸⁴ **22-138**

Discharge of trustee

Procedure

When the trustee has completed the final distribution of the estate, they are required to apply for their discharge to those creditors who have acceded or are deemed to have acceded to the trust deed.³⁸⁵ The application must be made in **22-139**

³⁷⁵ Bankruptcy (Scotland) Act 2016 s.184(8)(a). The provisions for an application to the sheriff for directions in relation to the administration of the trust are discussed at para.22-150 onwards.

³⁷⁶ Bankruptcy (Scotland) Act 2016 s.184(8)(b).

³⁷⁷ Bankruptcy (Scotland) Act 2016 s.188(4). Appeals are discussed further at para.22-145 onwards.

³⁷⁸ Bankruptcy (Scotland) Act 2016 s.184(1)(a), (6).

³⁷⁹ Bankruptcy (Scotland) Act 2016 s.184(6)(a)(i).

³⁸⁰ Bankruptcy (Scotland) Act 2016 s.184(6)(a)(ii). The liabilities and obligations from which the debtor is not discharged on sequestration are discussed in Ch.17.

³⁸¹ Bankruptcy (Scotland) Act 2016 s.184(6)(a)(iii). The provisions on exclusion of a debtor's dwelling-house are discussed at para.22-69.

³⁸² Bankruptcy (Scotland) Act 2016 s.184(6)(b).

³⁸³ Bankruptcy (Scotland) Act 2016 s.185(1).

³⁸⁴ Bankruptcy (Scotland) Act 2016 s.185(2).

³⁸⁵ Bankruptcy (Scotland) Act 2016 s.186(1), (2).

the prescribed form within 28 days of the date of the final distribution.³⁸⁶ For this purpose, the date of final distribution is defined as the date on which all of the estate distributed has been placed beyond the control of the trustee.³⁸⁷ Prior to applying for discharge, the trustee must send AiB a copy of the application and their accounts of their intromissions with the estate for the final period for which such accounts are required.³⁸⁸

22–140 If a majority in value of the creditors consent to the application, the trustee is discharged.³⁸⁹ A creditor who does not respond to the application within 14 days of it being made is deemed to consent to the discharge.³⁹⁰ If the creditors refuse to grant the trustee's discharge, the trustee may appeal to the sheriff.³⁹¹

22–141 Where the trustee is discharged, they must within 28 days of the discharge inform AiB, send AiB a statement of realisation and distribution in the prescribed form for registration in the register of insolvencies and, if the accounts submitted in connection with the application required revision, a copy of the revised accounts.³⁹² A discharge granted under these provisions also discharges any previous trustee under the trust deed unless an order to the contrary has been obtained under the provisions for any person with an interest to apply to the sheriff for a direction in relation to the administration of the trust deed.³⁹³

Effect of discharge

22–142 There is no specific provision as to the effect of the trustee's discharge. The effect of the discharge will therefore be the effect at common law discussed above.

22–143 A creditor who was not sent a copy of the initial notice registered in the register of insolvencies under s.169 or who notified the trustee of their objection to the trust deed becoming protected within the period for such objections may apply to the sheriff for an order that the creditor should not be bound by the trustee's discharge.³⁹⁴ Such an application must be made within 28 days of the registration of the trustee's statement of realisation and distribution of estate in the register of insolvencies.³⁹⁵ The sheriff may make such an order where they are satisfied that the trustee's intromissions with the estate have been so unduly prejudicial to the creditor's claim that the creditor should not be bound by the trustee's discharge, provided that they are so satisfied on a ground other than

³⁸⁶ Bankruptcy (Scotland) Act 2016 s.186(2), (3). The prescribed form is Form 6 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

³⁸⁷ Bankruptcy (Scotland) Act 2016 s.186(5).

³⁸⁸ Bankruptcy (Scotland) Act 2016 s.186(4). The periods for which accounts are required are discussed at para.22–124 onwards.

³⁸⁹ Bankruptcy (Scotland) Act 2016 s.186(7).

³⁹⁰ Bankruptcy (Scotland) Act 2016 s.186(6).

³⁹¹ Bankruptcy (Scotland) Act 2016 s.188(3). Appeals are discussed further at para.22–145 onwards.

³⁹² Bankruptcy (Scotland) Act 2016 s.186(8), (9). The prescribed form of statement of realisation and distribution is Form 7 in the Schedule to the Protected Trust Deed (Scotland) Regulations 2016: see reg.2(1).

³⁹³ Bankruptcy (Scotland) Act 2016 s.186(10). The provisions for any person with an interest to apply to the sheriff for a direction in relation to the administration of the trust deed are discussed further at para.22–150 onwards.

³⁹⁴ Bankruptcy (Scotland) Act 2016 s.178(1). The sheriff to whom such an application is made is the sheriff before whom a petition for sequestration of the debtor's estates would be presented: Bankruptcy (Scotland) Act 2016 s.178(5).

³⁹⁵ Bankruptcy (Scotland) Act 2016 s.178(4).

one of the grounds on which the creditor did or could have petitioned for the sequestration of the debtor's estates.³⁹⁶ Where such an order is made, the sheriff clerk is required to send a copy of the order to the trustee and to AiB for registration in the register of insolvencies.³⁹⁷

Retention of documents by trustee

The trustee is required to retain the following documents or copies of them for **22-144** at least 12 months after the date of their discharge³⁹⁸:

- (a) the trust deed;
- (b) the statement signed by the trustee and the debtor in relation to the trustee's obligations to advise the debtor and give the debtor a debt and advice package;
- (c) the notice initially registered in the register of insolvencies;
- (d) the statement of the debtor's affairs prepared by the trustee;
- (e) all statements of objection or accession received from creditors;
- (f) the trustee's original statement of anticipated realisations;
- (g) any agreement made in relation to the realisation of specified heritable property;
- (h) all the regular reports sent to the debtor, creditors and AiB;
- (i) any adjudication on a creditor's claim;
- (j) any scheme of division;
- (k) any circular sent to creditors with accounts;
- (l) the debtor's discharge from the trust deed;
- (m) the application to creditors for the trustee's discharge;
- (n) the statement of realisation and distribution submitted to AiB following the trustee's discharge;
- (o) any decree, interlocutory decree, direction or order relating to the administration of the trust deed issued by a court; and
- (p) any other document relating to the administration of the trust deed which AiB has identified to the trustee prior to the trustee's discharge as one that the trustee should retain.

Appeals

Provision is made for an appeal to the sheriff in specified cases.

22-145

As noted above, the trustee, the debtor or any creditor may appeal to the sheriff **22-146** against the decision of AiB in the following cases provided, in the case of the debtor or a creditor, that the appellant is able to satisfy the sheriff that the appellant has, or is likely to have, a pecuniary interest in the outcome of the appeal³⁹⁹:

- (a) where AiB has refused to register a trust deed on the ground that they are not satisfied that the expenditure allowed or a contribution from income is appropriate⁴⁰⁰;
- (b) where AiB has fixed the remuneration payable to the trustee⁴⁰¹;

³⁹⁶ Bankruptcy (Scotland) Act 2016 s.178(2). The grounds on which the creditor could have petitioned for the sequestration of the debtor's estates are discussed at para.22-92.

³⁹⁷ Bankruptcy (Scotland) Act 2016 s.178(3).

³⁹⁸ Bankruptcy (Scotland) Act 2016 s.182.

³⁹⁹ Bankruptcy (Scotland) Act 2016 s.188(1), (2).

⁴⁰⁰ Bankruptcy (Scotland) Act 2016 s.188(1)(a).

⁴⁰¹ Bankruptcy (Scotland) Act 2016 s.188(1)(b).

- (c) where AiB has issued a direction to the trustee⁴⁰²; and
- (d) where AiB has refused to register an application for the debtor's discharge in the register of insolvencies.⁴⁰³

22-147 Any such appeal must be made within 21 days of the relevant decision.⁴⁰⁴

22-148 Provision is also made for an appeal by the trustee against a refusal by the creditors to grant the trustee's discharge⁴⁰⁵ and an appeal by the debtor against a refusal by the trustee to apply for the debtor's discharge.⁴⁰⁶ No time limit is specified for such appeals.

22-149 In all cases, the sheriff to whom an appeal is to be made is the sheriff who would have had jurisdiction to hear a petition for sequestration of the debtor's estates on the date on which the trust deed was granted.⁴⁰⁷ The decision of the sheriff is final.⁴⁰⁸

Applications to the sheriff

22-150 Any person with an interest may apply to the sheriff at any time for a direction in relation to the administration of the trust deed.⁴⁰⁹ Such a direction may include any order which the sheriff thinks fit in the interests of justice or an order to cure any defect in procedure.⁴¹⁰ As in relation to appeals, the sheriff to whom an application is to be made is the sheriff who would have had jurisdiction to hear a petition for sequestration of the debtor's estates on the date on which the trust deed was granted.⁴¹¹

22-151 The scope of this provision may be a matter of debate. It was noted above that in the case of *Pattullo v Massey*,⁴¹² Sheriff Holligan granted an undefended application for declarator that a compensation payment received by the debtor formed part of the debtor's estate and for the re-appointment of the trustee under the trust deed who had been discharged. That application was made under the provisions of reg.24 of the Protected Trust Deeds (Scotland) Regulations 2008, a predecessor of the current provision, and it is understood that there have been a number of other cases in which such an application has been made and granted under the provisions of what is now s.189. In *Pattullo v Massey*,⁴¹³ Sheriff Holligan expressed some reservations as to what he referred to as the amplitude of the provision in question: he said that one might construe the principal purpose of the provision as being to deal with matters arising in the course of a trust which has a trustee in office and extending it to cover circumstances in which the trust has, for all practical purposes, come to an end may be seen to be stretching a point too far. As noted, however, he did

⁴⁰² Bankruptcy (Scotland) Act 2016 s.188(1)(c).

⁴⁰³ Bankruptcy (Scotland) Act 2016 s.188(1)(d).

⁴⁰⁴ Bankruptcy (Scotland) Act 2016 s.188(5). The appeal must be made in Form 9.1 in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see reg.9.1.

⁴⁰⁵ Bankruptcy (Scotland) Act 2016 s.188(3). The appeal must be made in Form 9.1 in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see reg.9.1.

⁴⁰⁶ Bankruptcy (Scotland) Act 2016 s.188(4). The appeal must be made in Form 9.1 in Sch.1 to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016: see reg.9.1.

⁴⁰⁷ Bankruptcy (Scotland) Act 2016 s.188(6).

⁴⁰⁸ Bankruptcy (Scotland) Act 2016 s.188(7).

⁴⁰⁹ Bankruptcy (Scotland) Act 2016 s.189(1).

⁴¹⁰ Bankruptcy (Scotland) Act 2016 s.189(2).

⁴¹¹ Bankruptcy (Scotland) Act 2016 s.189(3).

⁴¹² *Pattullo v Massey* unreported 6 May 2016 Edinburgh Sheriff Court.

⁴¹³ *Pattullo v Massey* unreported 6 May 2016 Edinburgh Sheriff Court.

grant the application because, despite his reservations, he did not consider that he could properly conclude that the application was incompetent. It is suggested, however, that the sheriff's reservations were, in fact, well-founded. In any event, any such application would need to be considered in the light of what has been said above about the effect of the debtor's discharge and the end of the trust.

Electronic delivery of notices, etc.

It is specifically provided that any notice or document authorised or required under the provisions relating to protected trust deeds may be given, delivered or sent by electronic means, provided that the intended recipient has consented to electronic delivery (either generally or in the specific case) and has provided an electronic address for delivery.⁴¹⁴ **22-152**

There is a rebuttable presumption that a notice or document has been delivered where the notice has been sent to the electronic address provided and the sender can produce a copy of the electronic message which contains the notice or other document or to which it was attached and which shows the date and time the message was sent.⁴¹⁵ **22-153**

These provisions do not apply where some other form of delivery is required by rules of court or by order of the court.⁴¹⁶ **22-154**

Conversion of protected trust deed to sequestration

Provision is made for the conversion of a protected trust deed into sequestration under art.51 of the EU insolvency proceedings regulation (conversion of secondary insolvency proceedings).⁴¹⁷ **22-155**

Where the insolvency practitioner in the main proceedings seeks the conversion of a protected trust deed into sequestration under that article, they must submit to AiB an application supported by an affidavit.⁴¹⁸ The affidavit must state that main proceedings have been opened in relation to the debtor in a Member State other than the UK⁴¹⁹ and that the insolvency practitioner believes that the conversion of the trust deed into sequestration would be most appropriate as regards the interests of the local creditors and coherence between the main and secondary proceedings⁴²⁰ and it must contain such other information as the insolvency practitioner considers will assist AiB in making a decision on the application and any consequential provisions which may be necessary or desirable⁴²¹ and any other prescribed information.⁴²² The affidavit must be sworn by or on behalf of the insolvency practitioner.⁴²³ **22-156**

⁴¹⁴ Bankruptcy (Scotland) Act 2016 s.187(1).

⁴¹⁵ Bankruptcy (Scotland) Act 2016 s.187(2).

⁴¹⁶ Bankruptcy (Scotland) Act 2016 s.187(3).

⁴¹⁷ Bankruptcy (Scotland) Act 2016 ss.190-192. The EU insolvency proceedings regulation is discussed in Ch.25.

⁴¹⁸ Bankruptcy (Scotland) Act 2016 s.190(2). The application must be in writing in Form 6 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see reg.17(1).

⁴¹⁹ Bankruptcy (Scotland) Act 2016 s.191(1)(a).

⁴²⁰ Bankruptcy (Scotland) Act 2016 s.191(1)(b) as substituted by the Insolvency Amendment (EU 2015/848) Regulations 2017.

⁴²¹ Bankruptcy (Scotland) Act 2016 s.191(1)(c).

⁴²² Bankruptcy (Scotland) Act 2016 s.191(1)(d). At the time of writing, no additional information has been prescribed.

⁴²³ Bankruptcy (Scotland) Act 2016 s.191(2).

- 22-157** The application and the affidavit must be served on the debtor, the trustee and such other persons as may be prescribed.⁴²⁴
- 22-158** On consideration of such an application, it is provided that AiB may make such an order as they think fit,⁴²⁵ and where they make an order for conversion, it may contain such consequential provisions as they consider necessary or desirable.⁴²⁶ AiB must notify the Member State insolvency practitioner, the debtor, the trustee and any other person who has been served with a copy of the application and affidavit of their decision.⁴²⁷
- 22-159** An order for conversion is treated as if it were a determination of a debtor application in which the Member State insolvency practitioner was a concurring creditor.⁴²⁸ On conversion, any expenses properly incurred in the administration of the trust deed form a first charge on the debtor's estate.⁴²⁹

Modification of provisions relating to protected trust deeds

- 22-160** The Scottish Ministers may make regulations modifying or adding to the statutory provisions relating to protected trust deeds within certain limits.⁴³⁰

⁴²⁴ Bankruptcy (Scotland) Act 2016 s.190(3). At the time of writing, no other persons have been prescribed.

⁴²⁵ Bankruptcy (Scotland) Act 2016 s.192(1).

⁴²⁶ Bankruptcy (Scotland) Act 2016 s.192(2). The order must be made in writing in Form 7 in the Schedule to the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016: see reg.17(2).

⁴²⁷ Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 reg.17(3).

⁴²⁸ Bankruptcy (Scotland) Act 2016 s.192(3).

⁴²⁹ Bankruptcy (Scotland) Act 2016 s.192(4).

⁴³⁰ Bankruptcy (Scotland) Act 2016 s.194.

CHAPTER 23

JUDICIAL FACTORS

INTRODUCTION

Insolvency may sometimes result in the appointment of a judicial factor. A **23-01** judicial factor is an officer appointed by the court to administer the property of another and may be appointed under specific statutory provisions or at common law. A judicial factor is an officer of the court and is supervised in the carrying out of his functions by the Accountant of Court.

This chapter outlines the circumstances in which a judicial factor may be **23-02** appointed, the procedure for obtaining the appointment of a judicial factor, the most important features of judicial factories, the relationship between a judicial factory and sequestration under the bankruptcy legislation or the granting of a trust deed for creditors and current proposals for reform of judicial factories.

CIRCUMSTANCES IN WHICH JUDICIAL FACTOR MAY BE APPOINTED

Judicial factors may be appointed in a wide variety of circumstances, many **23-03** of which have nothing to do with insolvency. This section considers the most common circumstances linked to insolvency where a judicial factor may be appointed.

Appointment under s.41 of the Solicitors (Scotland) Act 1980

The Council of the Law Society of Scotland may apply for the appointment of **23-04** a judicial factor where, in the exercise of any power conferred on it by the Solicitors' Accounts Rules,¹ it has caused an investigation of the books, accounts and documents of any solicitor to be carried out and is consequently satisfied that: (i) the solicitor has failed to comply with the provisions of the Solicitors' Accounts Rules; and (ii) in connection with the solicitor's practice as such, any one of a number of specified conditions applies.² The specified conditions are:

- (i) the solicitor's liabilities exceed the assets in the business³;
 - (ii) it is not reasonably practicable to ascertain from the solicitor's books and accounts whether their liabilities exceed their assets⁴;
- and

¹ That is, the rules made under s.35 of the Solicitors (Scotland) Act 1980.

² Solicitors (Scotland) Act 1980 s.41.

³ Solicitors (Scotland) Act 1980 s.41(b)(i).

⁴ Solicitors (Scotland) Act 1980 s.41(b)(ii).

- (iii) there is reasonable ground for apprehending that a claim on the guarantee fund⁵ may arise.⁶

Appointment on partnership estate

- 23-05** A judicial factor may be appointed to the estate of a partnership which has already been dissolved or when the court orders dissolution of the partnership on an application under s.35 of the Partnership Act 1890. The appointment may be applied for by a creditor.⁷
- 23-06** A partnership is dissolved in the circumstances specified in the partnership agreement, if there is one, or in the circumstances set out in the Partnership Act 1890. The latter include, subject to any contrary agreement between the partners, the bankruptcy of any partner,⁸ although of course this does not necessarily mean that the partnership itself is insolvent; the other partners also have the option to dissolve the partnership if any partner suffers their share of the partnership property to be charged for their separate debt.⁹ The primary responsibility for winding up the affairs of a dissolved partnership rests with the partners, for which purpose their authority continues,¹⁰ but any partner or their representative may, on the termination of the partnership, apply to the court to wind up the affairs and business of the firm for the purpose of ensuring the proper application of the partnership property.¹¹ The court will only appoint a judicial factor under these provisions if it considers it necessary or expedient, and it has been said that the court will be slow to appoint a judicial factor on a dissolved partnership and will not do so if the partners or remaining partners are in a position to, and can, conduct the winding up.¹² It is suggested, however, that the insolvency or suspected insolvency of the partnership may be a reason for making such an appointment.
- 23-07** An application for dissolution of a partnership may be made to the court on any of the grounds set out in s.35 of the 1890 Act, which include that the partnership can only be carried on at a loss¹³ and that it is just and equitable to wind up the partnership.¹⁴

Appointment under s.11A of the Judicial Factors (Scotland) Act 1889

- 23-08** A judicial factor may be appointed to the estate of a deceased person where that person has *either* left no settlement appointing trustees or other persons having power to manage their estate or part of it *or* the trustees or other persons do not accept appointment or act.¹⁵ An appointment will not be made under these

⁵ That is, the Scottish Solicitors Guarantee Fund established under s.43 of the Solicitors (Scotland) Act 1980. Its operating name as used by the Law Society of Scotland is the Client Protection Fund: see <https://www.lawscot.org.uk/for-the-public/client-protection/client-protection-fund/> [Accessed 2 November 2017].

⁶ Solicitors (Scotland) Act 1980 s.41(b)(iii).

⁷ *Rosserlane Consultants Ltd, Petitioner* [2008] CSOH 120.

⁸ Partnership Act 1890 s.33(1).

⁹ Partnership Act 1890 s.33(2).

¹⁰ Partnership Act 1890 s.38. This is subject to the proviso that the firm is not bound by the acts of a partner who has become bankrupt, although the proviso does not affect the liability of any person who has, after the bankruptcy, represented themselves or knowingly suffered themselves to be represented as a partner of the bankrupt.

¹¹ Partnership Act 1890 s.39.

¹² See *Carabine v Carabine*, 1949 S.C. 521.

¹³ Partnership Act 1890 s.35(e).

¹⁴ Partnership Act 1890 s.35(f).

¹⁵ Judicial Factors (Scotland) Act 1889 s.11A(1).

provisions, however, where the trustees or other persons have not acted at the time the application was made but have done so by the time it is heard¹⁶ or where there is no estate for the judicial factor to administer and no likelihood of there ever being any.¹⁷

There is no requirement for the estate to be insolvent, but the insolvency or doubtful solvency of the estate may be one reason for seeking the appointment of a judicial factor, and where the estate is absolutely insolvent within the meaning of s.228(5) of the Bankruptcy (Scotland) Act 2016, certain provisions of that Act will apply.¹⁸ **23-09**

Appointment subsequent to judicial composition on sequestration

It has already been noted that historically, a sequestration could be brought to an end where there was a judicial composition which re-invested the debtor in their estate, and that although judicial composition has now been abolished, a sequestration brought to an end by judicial composition may be revived in certain circumstances, which may in turn lead to the appointment of a judicial factor.¹⁹ **23-10**

In addition, where a sequestration has been brought to an end by a judicial composition, the Court of Session on the application of any creditor may reduce the order of the sheriff discharging the debtor where it is satisfied that a payment or preference was given or promised for the purpose of facilitating the debtor obtaining their discharge.²⁰ Where the order is reduced and the trustee has been discharged, the court may appoint a judicial factor to administer the debtor's estate.²¹ **23-11**

Other appointments

A judicial factor may be appointed at common law on a trust estate where the trustees are insolvent and mismanaging the trust estate.²² **23-12**

An executor may apply for the appointment of a judicial factor to the deceased's estate at common law where the estate is insolvent as an alternative to applying for sequestration of the estate. It should be noted that after the period of 12 months following the day on which the executor knew or ought to have known that the estate was absolutely insolvent and likely to remain so, any intromission with the estate by that executor is deemed to be an intromission without title unless the executor has made a debtor application for sequestration or petitioned for the appointment of a judicial factor within the 12 month period.²³ **23-13**

It has been said that a judicial factor may be appointed at common law to the estate of a chartered accountant in circumstances similar to those which would ground an application for the appointment of a judicial factor to the estate of a solicitor under s.41 of the Solicitors' (Scotland) Act 1980 notwithstanding the **23-14**

¹⁶ *London and Brazilian Bank Ltd v Lumsden's Trustees*, 1913 1 S.L.T. 262, which concerned the predecessor of the current provisions.

¹⁷ *Dunn v Britannic Assurance Co Ltd*, 1932 S.L.T. 244, which also concerned the predecessor of the current provisions.

¹⁸ Judicial Factors (Scotland) Act 1889 s.11A(2) and see further below. Absolute insolvency is discussed in Ch.1

¹⁹ See Ch.18.

²⁰ Bankruptcy (Scotland) Act 1985 Sch.4, para.18(1).

²¹ Bankruptcy (Scotland) Act 1985 Sch.4, para.18(3).

²² See Walker, N, *Judicial Factors*, 4th edn (Edinburgh: W. Green), p.36.

²³ Bankruptcy (Scotland) Act 2016 s.14(3), (4).

absence of specific statutory provisions to the same effect as s.41 of the Solicitors' (Scotland) Act 1980.²⁴

PROCEDURE FOR OBTAINING APPOINTMENT OF JUDICIAL FACTOR

- 23-15** In the case of an application for the appointment of a judicial factor under s.41 of the Solicitors (Scotland) Act 1980, the application is made by petition to the Inner House of the Court of Session.²⁵ The petition is always presented by the Council of the Law Society of Scotland.²⁶
- 23-16** In any other case, the application is made by petition to the Outer House of the Court of Session or by summary application in the appropriate sheriff court, the relevant procedure being set out in the Court of Session Rules and the Act of Sederunt (Judicial Factors) Rules 1992 respectively.²⁷ Applications for the appointment of a judicial factor under s.11A of the Judicial Factors (Scotland) Act 1889 may be made by one or more creditors of the deceased or by any person with an interest in the succession.²⁸ There is no definitive list of those who may apply in other cases, but it seems clear that anyone who has a direct interest in the estate may apply for the appointment of a judicial factor.²⁹
- 23-17** The court may appoint a judicial factor *ad interim* in appropriate cases.³⁰

IMPORTANT FEATURES OF JUDICIAL FACTORIES

Sequestration of the estate

- 23-18** The term sequestration is now most familiar in the context of bankruptcy as the process whereby the estate of a debtor is placed in the hands of a trustee under the bankruptcy legislation, but it is not confined to bankruptcy: it is a general term meaning the taking possession of the property of a person by the court and the placing of that property in the hands of a person appointed by the court to manage it³¹ and it is in this sense that it is used in the context of judicial factory.

²⁴ Addison, D, *Judicial Factors* (Edinburgh: W. Green, 1995), para.21.3. But see *The Institute of Chartered Accountants of Scotland v Kay*, 2001 S.L.T. 1449, where it was held that the appointment of a judicial factor was not appropriate in the circumstances of the case.

²⁵ Court of Session Rules r.14.3(b).

²⁶ Solicitors (Scotland) Act 1980 s.41.

²⁷ For applications in the Court of Session, see Court of Session Rules r.14.2 and Ch.61. For applications in the sheriff court, see Judicial Factors (Scotland) Act 1880 s.4 as amended (which gives the sheriff the same powers to appoint judicial factors as the Court of Session) s.4(1) (which prescribes the form of application) and s.4(1A) (which defines the appropriate sheriff court) and the Act of Sederunt (Judicial Factors) Rules 1992 (SI 1992/272). Although s.4(1) of the Judicial Factors (Scotland) Act 1880 states that an application shall be by petition, the Act of Sederunt (Judicial Factors) Rules 1992 r.4 provides that applications shall be made by summary application, while s.11A of the Judicial Factors (Scotland) Act 1889 as amended also provides for an application under that provision to be made by summary application.

²⁸ Judicial Factors (Scotland) Act 1889 s.11A(1).

²⁹ Addison, D, *Judicial Factors* (Edinburgh: W. Green, 1995), para.22.1.

³⁰ See, for example, *McCulloch v McCulloch*, 1953 S.C. 189. It was held in that case that an appeal against the making of such an appointment does not have the effect of suspending the appointment pending a decision on the appeal.

³¹ See Bell, *Commentaries*, ii, 244, para.263; *Smith v Smith* (1892) 20 R. 27 per Lord Young at 28; *Council of the Law Society of Scotland v McKinnie (No.2)*, 1995 S.C. 94 per Lord Penrose at 110.

The appointment of a judicial factor may, but will not necessarily, be preceded by the sequestration of the estate which they are appointed to manage.³² The Scottish Law Commission has noted that **23-19**

“it is difficult to identify any clear principle from the practice of the Court in relation to sequestration as an incident to the appointment of a judicial factor”.³³

In practice, it would appear that sequestration is generally regarded as necessary in the case of a partnership or trust in order to avoid the risk of a conflict of powers, but not in other cases such as in the case of an individual.³⁴ **23-20**

The Scottish Law Commission has also raised the issue of whether sequestration remains a live issue since the powers of a judicial factor as described in case law appear to apply whether or not there is formal sequestration of the estate, or alternatively whether sequestration should be an incident of the appointment of all judicial factors if it is in fact relevant to the definition of the judicial factor's powers.³⁵ It also noted that the effect of sequestration on title to property was unclear.³⁶ The Scottish Law Commission's recommendations are discussed further below, but these issues remain unresolved at the time of writing. **23-21**

Functions, duties and powers of judicial factor

The functions, duties and powers of a judicial factor depend largely on the purpose for which they are appointed, although all judicial factors have certain general duties irrespective of the purpose of the appointment.³⁷ **23-22**

The function of a judicial factor was traditionally perceived as the conservation of property,³⁸ and in some cases this remains their function. In other cases, however, a judicial factor will be appointed specifically for the purpose of realising and distributing the estate in respect of which they are appointed, and this is likely to be the case in judicial factories involving insolvency. In particular, this is the case for judicial factors appointed on partnership estates and judicial factors appointed under s.41 of the Solicitors (Scotland) Act 1980 and s.11A of the Judicial Factors Act 1889. **23-23**

A judicial factor's powers can be divided into usual and special powers, the former being those which can be seen as ordinary acts of management for the type of factory involved and the latter being those required for anything over and above such ordinary acts of management.³⁹ Where appropriate, a judicial **23-24**

³² See Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010) at para.2.5 and references there cited.

³³ Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), para.3.21.

³⁴ See *Council of the Law Society of Scotland v McKinnie* (No.2), 1995 S.C. 94 per Lord Penrose at 110.

³⁵ Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), para.3.24.

³⁶ Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), para.3.24 and Pt 4.

³⁷ See Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), Pts 5 and 6 and references there cited.

³⁸ See Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), para.2.25 onwards and references there cited.

³⁹ See Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), para.6.2.

factor may apply to the court for special powers under s.5 of the Trusts (Scotland) Act 1921 or s.7 of the Judicial Factors Act 1849 or by application to the *nobile officium* and the application may be made in the application for appointment itself or subsequently by note in the proceedings⁴⁰; in some circumstances, an application may be made to the Accountant of Court instead.⁴¹ In general terms, a judicial factor will have the power and duty to ingather the property comprised in the factory estate and administer it and, where they are appointed to realise and distribute the estate, the powers necessary to carry out these functions, including the power of sale.⁴² It is understood that in the case of a judicial factor appointed under s.41 of the Solicitors (Scotland) Act 1980, it is usual to ask for the judicial factor to be given the powers of a receiver as set out in paras 1–16 of Sch.2 of the Insolvency Act 1986.⁴³ The realisation of the estate will, however, be subject to any specific rules affecting the realisation of the particular type of property⁴⁴ and there may in fact be circumstances where it is not appropriate for all the items in the estate to be sold but for the judicial factor to distribute the estate by transferring items in the estate to those entitled to them.⁴⁵ In the case of a judicial factor appointed subsequent to a judicial composition on sequestration, it is specifically provided that the court may give the judicial factor such order as it thinks fit as to the administration of the debtor's estate.⁴⁶ It has been said in relation to a judicial factor appointed under the statutory predecessor to s.41 of the Solicitors (Scotland) Act 1980 that a judicial factor appointed under these provisions is not a trustee in sequestration and does not have the powers and duties of such and that the effects and procedures relating to sequestration do not follow upon such an appointment.⁴⁷ In the case of a judicial factor appointed under s.11A of the Judicial Factors (Scotland) Act 1889, however, certain provisions of the bankruptcy legislation do apply in certain circumstances.⁴⁸

23–25 Broadly speaking, at least absent sequestration of the estate, the appointment of a judicial factor does not affect title to the estate, although there are specific statutory provisions which allow a judicial factor who considers it appropriate to complete title to the estate in specified circumstances.⁴⁹ The estate remains

⁴⁰ Court of Session Rules r.61.15(2); Act of Sederunt (Judicial Factors) Rules 1992 r.5, 17.

⁴¹ See Trusts (Scotland) Act 1961 s.2(3). For the procedure in such cases, see Court of Session Rules r.61.14(3); Act of Sederunt (Judicial Factors) Rules 1992 r.16(3).

⁴² See, for example, *Francis Cooper & Son's Judicial Factor*, 1931 S.L.T. 26; *Murray's Judicial Factor v Thomas Murray & Sons (Ice Merchants) Ltd*, 1992 S.C. 435. For a detailed discussion of the powers and duties of judicial factors, reference should be made to specialised texts such as Addison, D, *Judicial Factors* (Edinburgh: W. Green, 1995); Walker, NML, *Judicial Factors* (Edinburgh: W. Green, 1974); Stair Memorial Encyclopaedia, Vol.24. See also Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), Pts 5 and 6.

⁴³ Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), para.6.14.

⁴⁴ See, for example, *Murray's Judicial Factor v Thomas Murray & Sons (Ice Merchants) Ltd*, 1992 S.C. 435, where it was said that where part of the estate consisted of shares in a private company, the judicial factor's duty to realise the estate must be read as subject to the provisions of the company's articles of association.

⁴⁵ *Murray's Judicial Factor v Thomas Murray & Sons (Ice Merchants) Ltd*, 1992 S.C. 435. It was said that whether or not there is a duty to realise an item forming part of the estate must depend upon the nature of the item and the extent to which it is marketable.

⁴⁶ Bankruptcy (Scotland) Act 1985 Sch.4, paras 17(3) and 18(3).

⁴⁷ *Ross v Gordon's Judicial Factor*, 1973 S.L.T. (Notes) 91; *Council of the Law Society of Scotland v McKinnie (No.2)*, 1995 S.L.T. 880.

⁴⁸ See further paras 23–26 and 23–28.

⁴⁹ For a good summary of the current law, see Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), Pt 4 and references cited therein. As noted above, the effect of sequestration on title is uncertain. See also *Council of the Law Society of Scotland v McKinnie (No.2)*, 1995 S.L.T. 880, discussed further below.

subject to the burdens and rights of third parties constituted prior to the appointment of the judicial factor and the judicial factor does not have any higher rights to the estate than that of the ward.⁵⁰ It has already been noted in the context of sequestration that certain provisions which prevent vesting of estate or effect a transfer of rights on sequestration also apply where a judicial factor has been appointed.

Where a judicial factor is appointed to the estate of a deceased debtor under s.11A of the Judicial Factors Act 1889 within 12 months of the death and the estate was absolutely insolvent at the date of death, the provisions of s.24 of the Bankruptcy (Scotland) Act 2016, which set out the effect of sequestration on diligence generally, apply with appropriate modifications.⁵¹ A judicial factor appointed to the estate of a deceased debtor under s.11A of the Judicial Factors Act 1889 also has the power to challenge gratuitous alienations and unfair preferences and to apply for the recall of certain orders made on divorce or the dissolution of a civil partnership if they were appointed within 12 months of the debtor's death and, in the case of gratuitous alienations and unfair preferences, the estate was absolutely insolvent at the date of death.⁵² **23–26**

Distribution of the estate

In broad terms, where a judicial factor is appointed to realise and distribute the estate, they must distribute the estate to those who have a right to it, for example, in the case of a partnership to the creditors and partners.⁵³ **23–27**

In the case of a judicial factor appointed under s.11A of the Judicial Factors Act 1889, where the estate is absolutely insolvent, the scheme of distribution applicable on sequestration applies in the judicial factor's appointment with claims being calculated to the date of the judicial factor's appointment.⁵⁴ **23–28**

Remuneration and expenses of judicial factor

A judicial factor is entitled to have recourse to the funds in their hands for their remuneration and reimbursement of the expenses properly incurred in their administration, including in the case of a judicial factor appointed under s.41 of the Solicitors (Scotland) Act 1980 recourse to both the interest earned on any client funds and the client funds themselves so far as their remuneration and expenses relate to the administration of those funds.⁵⁵ The judicial factor's remuneration and expenses will require to be approved by the Accountant of Court. **23–29**

Effect of appointment

Certain disqualifications from continuing to hold or obtaining certain offices and from undertaking certain activities apply where a judicial factor has been appointed, either under specified statutory provisions or otherwise, in the same **23–30**

⁵⁰ See *Armstrong, Petitioner*, 1988 S.L.T. 255 at 257.

⁵¹ Bankruptcy (Scotland) Act 2016 s.25(1), (2). The provisions on the effect of sequestration on diligence are discussed in Ch.15.

⁵² See Bankruptcy (Scotland) Act 2016 ss.98 (gratuitous alienations), 99 (unfair preferences) and 100 (recall of orders on divorce or dissolution of civil partnership). The challenge can be made under the appropriate statutory provisions or, where applicable, at common law. For a discussion of the relevant provisions, see Ch.14.

⁵³ *Armstrong, Petitioner*, 1988 S.L.T. 255 at 258.

⁵⁴ Judicial Factors Act 1889 s.11A(2). The scheme of distribution applicable on sequestration is discussed in Ch.14.

⁵⁵ See *Council of the Law Society of Scotland v Andrew*, 1995 S.L.T. 877; *Council of the Law Society of Scotland v McKinnie (No.2)*, 1995 S.L.T. 880.

way as on sequestration or similar events.⁵⁶ For example, where a judicial factor is appointed to the estate of a solicitor under s.41 of the Solicitors (Scotland) Act 1980, their practicing certificate ceases to have effect and they are suspended from practice as a solicitor.⁵⁷ The relevant disqualification provisions must be checked in each case to ascertain whether they apply on the appointment of a judicial factor.

JUDICIAL FACTORY AND SEQUESTRATION UNDER THE BANKRUPTCY LEGISLATION OR THE GRANTING OF A TRUST DEED FOR CREDITORS

23–31 The appointment of a judicial factor does not preclude a subsequent sequestration of the debtor's estate under the bankruptcy legislation.⁵⁸ In terms of the provisions of the Bankruptcy (Scotland) Act 2016 relating to concurrent proceedings, a petitioner in a sequestration petition, the debtor or any creditor concurring in a debtor application for sequestration who is or becomes aware, inter alia, of the fact that an application for the appointment of a judicial factor to the debtor's estate is before a court or that such a judicial factor has been appointed must notify the sheriff (in the case of a petition for sequestration) or the AiB (in the case of a debtor application) of that fact as soon as may be.⁵⁹ In the case of a petition for sequestration, the sheriff may then allow the petition to proceed or sist or dismiss it⁶⁰ and, without prejudice to that provision, the Court of Session may direct the sheriff before whom the petition for sequestration or the application for the appointment of a judicial factor is pending to sist or dismiss the petition or application (as the case may be) or to hear the sequestration petition and the application for the appointment of a judicial factor together.⁶¹ In the case of a debtor application, it is provided that the AiB may dismiss the debtor application.⁶² In deciding how best to proceed, the sheriff or AiB (as the case may be) will have to take into account factors such as the stage the respective proceedings have reached, the nature of the judicial factory in question and the possible advantages and disadvantages of the respective proceedings. So, for example, if a judicial factor with the function of realising and distributing the estate has already been in post for some time and their administration is well advanced, it may be more appropriate to allow that administration to continue to a conclusion rather than embark on a sequestration under the bankruptcy legislation. On the other hand, if, for example, there are prior transactions of the debtor which may be subject to challenge, it may be more appropriate to allow a sequestration under the bankruptcy legislation to proceed in preference to a judicial factory since a judicial factor would not be able to challenge such transactions unless they were appointed under s.11A of the Judicial Factors Act 1889 within 12 months of the debtor's death and the estate was absolutely insolvent.

23–32 Where sequestration under the bankruptcy legislation is awarded, there is authority to the effect that this brings an existing judicial factory to an end.⁶³ The effect of such a sequestration is not, however, without difficulty. The issue

⁵⁶ See Ch.17, where some examples of the disqualifications which apply on sequestration are discussed.

⁵⁷ Solicitors (Scotland) Act 1980 s.18(1)(e).

⁵⁸ See, for example, *Ross v Gordon's Judicial Factor*, 1973 S.L.T. (Notes) 91; *Council of the Law Society of Scotland v McKinnie*, 1993 S.L.T. 238.

⁵⁹ Bankruptcy (Scotland) Act 2016 s.17(1), (2) and (3).

⁶⁰ Bankruptcy (Scotland) Act 2016 s.18(1).

⁶¹ Bankruptcy (Scotland) Act 2016 s.18(2).

⁶² Bankruptcy (Scotland) Act 2016 s.18(8).

⁶³ *Mitchell v Scott* (1881) 8 R. 875.

has most recently been considered in two decisions relating to a judicial factory involving a judicial factor appointed on the estate of a solicitor under s.41 of the Solicitors (Scotland) Act 1980. In the first decision, it was held that client funds in the hands of the judicial factor did not vest in the solicitor's trustee in sequestration since they were held by the solicitor in a fiduciary capacity and so did not form part of their estate for the purposes of sequestration.⁶⁴ This seems unexceptionable. In the second decision, the court took as its starting point the fact that not all judicial factories are *in pari casu*, that the nature and extent of a judicial factor's duties and the scope of their powers in relation to the funds committed to their management depend on the circumstances giving rise to their appointment and that it was necessary to examine with care the circumstances of the particular appointment to determine the extent to which the property of the ward vests in the judicial factor.⁶⁵ Again, this seems unexceptionable. It went on to hold that since the judicial factor in the instant case was not merely a conservator, but had the power and duty to distribute the solicitor's estate, what vested in the trustee in sequestration was the solicitor's right to an accounting from the judicial factor rather than the assets of the solicitor in the hands of the judicial factor. It was said that it made little sense to refer to the solicitor having continuing rights of property in assets which were totally at the disposal of the judicial factor during their period of administration and that there was, and could be, no sense in which the debtor was at the moment of sequestration reinvested with a direct right of property in any such asset and the judicial factor divested of the title to and possession of the asset independently of their obligation to account.⁶⁶ It is thought, however, that this aspect of the decision may be more questionable, for a variety of reasons: as already noted, the effect of the appointment of a judicial factor on property and title, with or without sequestration of the estate, cannot necessarily be regarded as entirely clear; the decision does not seem to consider whether, even if the estate is vested in the judicial factor, this necessarily precludes it from being part of the debtor's estate for the purposes of sequestration under the bankruptcy legislation; in the analogous case of a trust deed for creditors which is followed by a sequestration, the trustee under the trust deed is required to denude in favour of the trustee in sequestration; and the decision does not seem to consider the effect of the fact that the judicial factory is said to come to an end as a result of the subsequent sequestration.⁶⁷ As already noted, the decision concerned a judicial factory where a judicial factor had been appointed on the estate of a solicitor under s.41 of the Solicitors (Scotland) Act 1980 and the court accepted that the position in each case would depend on the nature of the appointment. By analogy, however, the same result would seem to apply to any judicial factory where the factor was appointed to realise and distribute the estate rather than simply to conserve it.

The appointment of a judicial factor does not appear to preclude the subsequent granting of a trust deed for creditors by the debtor.⁶⁸ 23-33

⁶⁴ *Council of the Law Society of Scotland v McKinnie*, 1993 S.L.T. 238.

⁶⁵ *Council of the Law Society of Scotland v McKinnie (No.2)*, 1995 S.C. 94 at 108-109 per Lord Penrose.

⁶⁶ *Council of the Law Society of Scotland v McKinnie (No.2)*, 1995 S.C. 94 at 110-112 per Lord Penrose.

⁶⁷ For a full discussion of the arguments, see McKenzie, "Council of the Law Society of Scotland v McKinnie (No.2)", 1996 SLPQ 252. The situation where a trust deed is followed by a sequestration, which is itself not entirely free from difficulty, is discussed further in Ch. 22.

⁶⁸ See *Council of the Law Society of Scotland v McKinnie*, 1993 S.L.T. 238, where the court clearly contemplated the possibility of the grant of a trust deed for creditors following the appointment of a judicial factor under s.41 of the Solicitors (Scotland) Act 1980.

PROPOSALS FOR REFORM OF JUDICIAL FACTORIES

23–34 As noted above, the Scottish Law Commission has recently reviewed the law relating to judicial factors and recommended a number of reforms.⁶⁹ In particular, it recommends that the existing legislation on judicial factors should be replaced with new legislation in the form of a new Judicial Factors (Scotland) Act and a draft Bill is appended to its report. The appointment of a judicial factor under the proposed new legislation would be without prejudice to the appointment of a judicial factor under other legislation, such as s.41 of the Solicitors (Scotland) Act 1980,⁷⁰ but the new legislation would relate to any judicial factor so-called appointed under the new legislation or any other enactment or rule of law.⁷¹

23–35 The main recommendations of most relevance to the issues discussed above include:

- (i) Petitions for appointment of a judicial factor under s.41 of the Solicitors (Scotland) Act 1980 should no longer be presented in the Inner House but in the Outer House.⁷² It was noted that this recommendation did not require primary legislation but could be achieved by a change to the rules of court, but at the time of writing this has not yet been done.
- (ii) It should continue to be competent to make interim appointments.⁷³
- (iii) The grounds for the appointment of judicial factor should be that there is property which requires to be managed properly and *either* it appears to the court that it is not possible, or not practicable, or not sensible, for those responsible to manage it *or* there would otherwise be benefit in having it managed by a judicial factor.⁷⁴ The existing specific ground for appointment under s.11A of the Judicial Factors (Scotland) Act 1889 would therefore cease to exist as such.
- (iv) That the property subject to the judicial factor should vest in the judicial factor qua judicial factor.⁷⁵ This would clarify the current confusion regarding the relationship of the judicial factor with the property subject to the judicial factory as discussed above.
- (v) That without prejudice to ss.41 and 42 of the Solicitors (Scotland) Act 1980, a judicial factor appointed on the estate of a solicitor under s.41 of that Act should be vested in all the property held by the solicitor including, unless the court determines otherwise, all such property held by the solicitor in a fiduciary capacity.⁷⁶

⁶⁹ Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010) and *Report on Judicial Factors* (Scot. Law Com. No.233, 2013).

⁷⁰ See Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), paras 3.8—3.9 and recommendation 5.

⁷¹ Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), para.3.10 and recommendation 6.

⁷² Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), para.3.11 and recommendation 7.

⁷³ Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), para.3.15 onwards and recommendation 9.

⁷⁴ Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), para.3.37 onwards and recommendation 19.

⁷⁵ Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), para.3.51 onwards and recommendation 20.

⁷⁶ Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), para.3.75 onwards and recommendation 25.

- (vi) That the legislation should set out a new general duty and certain specific duties.⁷⁷
- (vii) That the legislation should provide for a judicial factor to have all the powers of a natural person beneficially entitled to the estate, including: (i) the specific powers mentioned in the Schedule to the draft Bill; and (ii) those conferred on the judicial factor by any other enactment; that the court should have the power to vary these powers in any particular case; and that the judicial factor should have the power to apply to the court for additional powers if appropriate.⁷⁸ It may be noted that the Discussion Paper included in its proposed list of powers of judicial factors a section setting out proposed powers where a judicial factor was appointed to a sequestrated estate within 12 months of a person's death which included powers to challenge gratuitous alienations and unfair preferences and to apply for the recall of certain orders on divorce or dissolution of a civil partnership where the estate was absolutely insolvent at the date of death.⁷⁹ This reflected the existing powers which are currently set out in bankruptcy legislation. This provision has not, however, been included in the draft Bill. The provisions would therefore remain in the bankruptcy legislation, but would need to be amended to substitute the existing reference to judicial factor appointed under s.11A of the Judicial Factors (Scotland) Act 1889 with a reference to a judicial factor appointed under new legislation if and when enacted.
- (viii) That the bankruptcy legislation should be amended to make it explicit that property held by a person as judicial factor does not vest in their trustee in sequestration.⁸⁰
- (ix) That the bankruptcy legislation should be amended to reflect the fact that where a judicial factor is appointed under the new legislation on the estate of deceased person and the estate is absolutely insolvent, the scheme of distribution which applies on sequestration will apply.⁸¹ This provision would replace the existing provision in s.11A of the Judicial Factors (Scotland) Act 1889 which would be repealed by the new legislation.

The recommendations are as yet unimplemented. The initial Scottish Government response to the Scottish Law Commission indicated that detailed work on the report would begin towards the end of 2015 and highlighted a number of specific issues for further consideration.⁸² There has been no further indication of when legislation might result, however, and there is no proposed legislation on this topic in the current legislative programme at the time of writing.

⁷⁷ Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), Pt 4.

⁷⁸ Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), Pt 5.

⁷⁹ Scottish Law Commission, *Discussion Paper on Judicial Factors* (Discussion Paper No.146, 2010), para.6.27 onwards and Appendix C, paras 24–26.

⁸⁰ Scottish Law Commission, *Report on Judicial Factors* (Scot. Law Com. No.233, 2013), para.2.43 and recommendation 2. The proposed amendment refers to an amendment to s.33 of the Bankruptcy (Scotland) Act 1985; this would now be an amendment to s.88 of the Bankruptcy (Scotland) Act 2016.

⁸¹ Draft Bill s.57 and Sch.2, para.3(3). The draft Bill refers to inserting a new s.51A of the Bankruptcy (Scotland) 1985 Act; this would now be the insertion of a new s.129A of the Bankruptcy (Scotland) 2016 Act.

⁸² The initial response is available on the Scottish Law Commission's website at https://www.scotlawcom.gov.uk/files/8614/3326/0213/Judicial_factors_report_by_the_Scottish_law_commission_initial_response_by_the_SG.pdf [Accessed 19 September 2017].

CHAPTER 24

CROSS-BORDER INSOLVENCY: INTRODUCTION AND OVERVIEW

INTRODUCTION

Cross-border insolvencies, that is to say insolvencies where the law of more than one jurisdiction comes into play, cause special problems. This is not just a matter of academic interest for those concerned with bankruptcy law in Scotland: an increasing number of cases may have cross-border aspects and it has already been seen that where the EU insolvency proceedings regulation applies, this may impact on cases even where there are no other cross-border elements.¹ In fact, cross-border insolvency has a particular importance in Scots law because both England and Wales and Northern Ireland are foreign jurisdictions for this purpose. 24-01

Where a case in Scotland has cross-border elements, these will be dealt with by the application of the rules of Scots law including its rules of private international law. These rules are discussed in Ch.25. This chapter attempts to provide some context for these rules by considering the elements which may make a cross-border case, the issues which can typically arise in cross-border cases, the need for special rules in cross-border cases, the theoretical approaches to dealing with cross-border cases and national and international initiatives aimed at dealing with cross-border cases.² 24-02

THE ELEMENTS OF A CROSS-BORDER CASE

Cases giving rise to cross-border issues are not confined to cases involving multi-national businesses, although that may be the typical example which springs to mind. Cross-border trade is, however, one of the elements which may make a case a cross-border one. Individuals and entities which are subject to sequestration may carry on business in the other jurisdictions in the UK, or increasingly commonly, even for small businesses, in jurisdictions outwith the UK, particularly within the EU. However, even consumer cases may involve cross-border elements, for example, a contract for the purchase of goods or services from a party outwith Scotland. Other examples of elements which might make a case a cross-border case include ownership of, or an interest in, property 24-03

¹ The cases in which the EU insolvency proceedings applies are discussed in Ch.25.

² For texts dealing with these issues generally, see in particular Wessels, B, *Current Topics of International Insolvency Law* (Netherlands: Kluwer, 2004); Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005) and *Supplement to Second Edition* (Oxford: OUP, 2007); Wood, PR, *Principles of International Insolvency*, 2nd edn (London: Sweet & Maxwell, 2007); Wessels, B, *Cross-border insolvency law: international instruments and commentary* (Netherlands: Kluwer Law International, 2007); Omar, P (ed), *International insolvency law: themes and perspectives* (Aldershot: Ashgate, 2008); Omar, P (ed), *International insolvency law: reforms and challenges* (Aldershot: Ashgate, 2012); Santen, BPA, van Offren, DH and Wessels, B, *Perspectives on international insolvency law: a tribute to Bob Wessels* (Netherlands: Kluwer, 2014); Bork, R, *Principles of Cross-Border Insolvency Law* (Cambridge: Intersentia, 2017).

outside Scotland; liabilities incurred outwith Scotland or owed to parties outwith Scotland; and contracts to be performed outside Scotland or governed by foreign law. Cross-border issues may also arise where there are bankruptcy proceedings outwith Scotland, whether or not there are also such proceedings in Scotland.

THE ISSUES TO WHICH CROSS-BORDER CASES GIVE RISE

24-04 Cross-border cases give rise to difficult issues because “despite numerous general resemblances, national insolvency laws and procedures differ from one another almost infinitely in ways both great and small”.³

24-05 The application of different bankruptcy laws in any given case may therefore give quite different, and unexpected, results.

24-06 The difficulties are exacerbated because of the nature of bankruptcy law. As previously noted,⁴ bankruptcy law has been described as “meta-law”⁵ because it impacts on virtually every other area of law, including property law, contract law, delict, commercial law, employment law, environmental law and so on. It has also been pointed out that

“there is a profound and intimate correlation between insolvency—whether individual or corporate—and the very wellsprings of policy and social order from which national law ultimately draws its inspiration”.⁶

24-07 It may readily be seen, therefore, that cases involving cross-border elements are peculiarly difficult.

24-08 Cross-border cases are traditionally regarded as giving rise to three main issues: jurisdiction (choice of forum); applicable law (choice of law); and the recognition and effect of insolvency proceedings.

Jurisdiction

24-09 Where a debtor has connections with more than one jurisdiction, the question may arise of the jurisdiction in which bankruptcy proceedings may be opened. Different jurisdictions have different rules as to the connecting factors which will allow such proceedings to be opened. Examples of such connecting factors might be the debtor’s domicile, nationality, residence, place of business, and so on.⁷ Different jurisdictions also have different rules as to the scope of bankruptcy law. This means that it may be possible for proceedings to be opened in more than one jurisdiction, or none.⁸

Choice of law

24-10 The issue of choice of law is distinct from that of choice of forum, although in many cases the choice of forum will, in practice, determine the choice of law.

³ Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.1.03.

⁴ See Preface.

⁵ Tung, F, “Is International Bankruptcy Possible?” 23 *Michigan Journal of International Law* 31 (2001–2002).

⁶ Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.1.03.

⁷ The Scottish rules on jurisdiction in sequestration and the debt arrangement scheme are discussed in Chs 7 and 21 respectively.

⁸ The rules on concurrent proceedings, including foreign proceedings, in sequestration are also discussed in Ch.7.

In Scots law, there is a rebuttable presumption that foreign law is the same as Scots law, and Scots law will therefore apply unless one of the parties avers that a foreign law applies and avers and proves what that law is.⁹ In addition, the Scottish courts will always apply their own rules of procedure and evidence.¹⁰ Where choice of law issues do arise, the court will apply its own law, including its rules of private international law, to determine the law to be applied. The relevant rules of Scots law in this respect are discussed further in Ch.25.

Recognition and effect

Where bankruptcy proceedings have been opened in one jurisdiction, the issue arises of the extent to which those proceedings will be recognised and given effect to in other jurisdictions. Different jurisdictions have different rules as to whether and to what extent foreign proceedings will be recognised and given effect to and on what conditions. **24-11**

There are two aspects to this issue: the recognition and effect of Scottish proceedings outwith Scotland and the recognition and effect of foreign proceedings in Scotland. With regard to the first aspect, it has already been seen that the Bankruptcy (Scotland) Act 2016 provides that on an award of sequestration, the estate which vests in the trustee includes estate *wherever situated*.¹¹ As a matter of Scots law, therefore, a Scottish sequestration claims to affect estate situated outwith Scotland. As a matter of practice, however, whether and to what extent that claim is recognised, and whether and to what extent the trustee will receive assistance from the foreign jurisdiction in enforcing it, will depend on the law of the jurisdiction concerned. Similarly, a trust deed for creditors may convey to the trustee estate outwith Scotland, but whether and to what extent the trustee's claim will be recognised and assistance will be forthcoming from the foreign jurisdiction will depend on the law of the jurisdiction concerned. With regard to the second aspect, the rules of Scots law on the recognition and effect of foreign proceedings are discussed in Ch.25. **24-12**

THE NEED FOR SPECIAL RULES IN CROSS-BORDER CASES

The issues identified above may give rise to significant problems in practice. For example, will a trustee in sequestration or a trustee under a trust deed be able to recover and realise property outwith Scotland for the benefit of the creditors? Will they be able to insist on delivery of goods under a contract entered into by the debtor with a party in another jurisdiction? How and to what extent can a Scottish creditor claim in foreign proceedings? How will that creditor find out about the foreign proceedings and how will their claim be treated once submitted? How is the trustee to deal with claims by foreign creditors? What happens where there are multiple proceedings in different jurisdictions? **24-13**

It has been argued that states have an obligation to resolve these problems,¹² **24-14**

“in a world where States allow their citizens—including companies formed under their laws—the freedom to have dealings and relationships

⁹ See Anton, AE, *Private International Law*, 3rd edn (Edinburgh, W. Green, 2011), para.27.171 onwards. See also *Assignees of Stein, Smith, Stein, Stein and Smith v Brown* (1831) 6 E.R. 692.

¹⁰ Anton, AE, *Private International Law*, 3rd edn (Edinburgh, W. Green, 2011), para.5.18.

¹¹ See Ch.11.

¹² Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.1.16.

which transcend national frontiers, to acquire and own foreign assets, and to transfer property between jurisdictions with relative ease, it becomes incumbent upon all States to play a responsible part in constructing rules of private international law that are in harmony with the realities of such cross-border activity”.

- 24–15** It is difficult to disagree. One of the difficulties in putting this into practice, however, is the fact that the principles which should underlie these rules remain a matter of debate.

THE THEORETICAL DEBATE

- 24–16** Traditionally, the focus of the debate has been on two opposing principles: universalism and territorialism.¹³ There has been fierce debate on their relative advantages and disadvantages and scholars have devised modified versions of both, including modified universalism, co-operative territoriality and an internationalist approach, in an attempt to find a workable alternative.¹⁴

Universalism

- 24–17** Universalism in its pure form envisages one proceeding encompassing all of the debtor’s assets wherever situated which is under the control of one court and with one applicable law. It has two elements: unity (one proceeding) and universality (the proceeding has universal effect).

- 24–18** This approach is conceptually attractive: Fletcher notes that it

“seems initially to be in fullest harmony with the principle of collectivity and the equal treatment of all creditors on a global basis”.¹⁵

¹³ See, for example, Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.1.12; Omar, P, “The Landscape of International Insolvency Law” (2002) 11 I.I.R. 173; Mason R, “Cross-Border Insolvency Law: Where Private International Law and Insolvency Meet” in Omar, P (ed), *International Insolvency Law: Themes and Perspectives* (Oxford: Routledge, 2008).

¹⁴ There is an extensive literature on the subject: see, for example, LoPucki, LM, “Cooperation in International Bankruptcy: A Post-Universalist Approach” (1999) 84 Cornell Law Review 696; Guzman, AT, “International Bankruptcy: In Defence of Universalism” (2000) 98 Michigan Law Review 2177; LoPucki, LM, “The Case for Cooperative Territoriality in International Bankruptcy” (2000) 98 Michigan Law Review 2216; Westbrook, JL, “A Global Solution to Multinational Default” (2000) 98 Michigan Law Review 2276; Perkins, L, “A Defense of Pure Universalism in Cross-Border Insolvencies” (2000) 32 Journal of International Law and Politics 787; Tung, F, “Skepticism about Universalism: International Bankruptcy and International Relations” UC Berkeley Law and Economics Working Paper Series, Working Paper 2001–2007, available at https://papers.ssrn.com/sol13/paper.cfm?abstract_id=267437 [Accessed 19 September 2017]; Tung, F, “Fear of Commitment in International Bankruptcy” (2001) 33 George Washington Journal of International Law & Economics 555; Tung, F, “Is International Bankruptcy Possible?” (2001–2002) 23 Michigan Journal of International Law 31; Westbrook, JL, “Universalism and Choice of Law” (2005) 23 Penn State International Law Review 625; LoPucki, LM, “Global and Out of Control?” (2005) 79 American Bankruptcy Law Journal 79; Bufford, SL, “Global Venue Controls Are Coming: A Reply to Professor LoPucki” (2005) 79 American Bankruptcy Law Journal 105; LoPucki, LM, “Universalism Unravels” (2005) 79 American Bankruptcy Law Journal 143; Westbrook, JL, “Multinational Financial Distress: The Last Hurrah of Territorialism” (2006) 41 Texas International Law Journal 321; Kipnis, AM, “Beyond UNCITRAL: Alternatives to Universality in International Bankruptcy” (2006), available at <http://ssrn.com/abstract=913844> (3 July 2006) [Accessed 19 September 2017]; Pottow, JAE, “The Myth (And Realities) of Forum Shopping in Transnational Insolvency” (2007) 32 Brook. J. Int’l Law 785; Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.1.16 onwards; Mason R, “Cross-Border Insolvency Law: Where Private International Law and Insolvency Meet” in Omar, P (ed), *International Insolvency Law: Themes and Perspectives* (Oxford: Routledge, 2008).

¹⁵ Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.1.12.

It may also appear to be simpler, less costly and more efficient because there is only one set of proceedings. It is not, however, without difficulties. There may be legitimate differences of view as to the appropriate connecting factor to establish jurisdiction for such proceedings. The legitimate expectations of creditors may be defeated where the result is the application of a different law to that which was anticipated, and in any event there are likely to be practical difficulties in enforcing their claims in foreign proceedings. There are also likely to be practical difficulties in giving effect to one set of proceedings in every other jurisdiction, which may in fact increase costs and decrease efficiency. States may also be reluctant to allow the operation of foreign law within their borders, and it may be this, more than anything, which has militated against the widespread acceptance of universalism in its pure form. 24-19

Territorialism

Territorialism in its pure form envisages multiple proceedings, in every state in which the debtor has assets, with each confined to the assets located there. It also has two elements: plurality (multiple proceedings) and territoriality (each proceeding has effect in the state where it is opened only). 24-20

The advantages and disadvantages of this approach may be regarded as the mirror images of the advantages and disadvantages of universalism. The primary advantage of territoriality is that it is much more likely that creditors' legitimate expectations will be met and the practical difficulties of enforcing creditors' claims and giving effect to proceedings in other jurisdictions does not arise. It also preserves state sovereignty. The costs of administering a number of separate proceedings may, however, be greater, and absent some degree of co-operation between territorial proceedings, less efficient. Furthermore, since the location of assets and creditors may be entirely fortuitous, the failure to pool assets and allow all creditors to claim in respect of that pool may result in substantial injustice. It also militates against rescue or re-organisation of a debtor's business where relevant. 24-21

Modified versions of universalism and territorialism

Modified versions of universalism and territorialism attempt to provide alternatives which are more pragmatic and more attractive to states. Co-operative territoriality, of which LoPucki is the principal proponent,¹⁶ seeks to ameliorate some of the disadvantages of pure territorialism by allowing co-operation between the different sets of territorial proceedings. This does not, however, address the fundamental issue of the substantial injustice which may result from the fortuitous location of assets and creditors. Modified universalism may take a variety of forms.¹⁷ Crucially, it accepts the possibility of more than one set of proceedings, but requires the proceedings to be co-ordinated in such a way as to achieve de facto universalism. The EU insolvency proceedings regulation and the UNCITRAL Model Law on Cross-Border Insolvency, discussed further below and in Ch.25, both embody the principle of modified universalism, which is given effect to through the concept of main and secondary proceedings: the main proceedings have universal effect, but there may be secondary proceedings which have only territorial effect but protect the interests of local creditors, with provision for co-ordination and co-operation between all proceedings. As 24-22

¹⁶ See literature cited above.

¹⁷ For a detailed analysis, see in particular, Mason, R, "Cross-Border Insolvency Law: Where Private International Law and Insolvency Meet" in Omar, P (ed), *International Insolvency Law: Themes and Perspectives* (Oxford: Routledge, 2008).

will be seen in the analysis of the EU insolvency proceedings regulation and the UNCITRAL Model Law on Cross-Border Insolvency which follows, even this approach is not entirely free from difficulties, but it has the merit of having been translated into a workable model in practice.

NATIONAL AND INTERNATIONAL INITIATIVES ON CROSS-BORDER INSOLVENCY

- 24-23** It has been said that there are four levels at which action can be taken to address the issues which arise in cross-border cases: multi-lateral treaties, bi-lateral treaties, facilitative provisions in domestic legislation and the use of protocols in individual cases.¹⁸
- 24-24** There are a number of bi-lateral and localised multi-lateral treaties throughout the world.¹⁹ The EU insolvency proceedings regulation may be included in this category as the equivalent of a multi-national treaty, although it is not a treaty but a piece of supra-national legislation which flows from the unique position of the EU.
- 24-25** A number of countries have also incorporated facilitative provisions in domestic legislation.²⁰ This includes the UK, which in fact has two different sets of facilitative provision in the form of s.426 of the Insolvency Act 1986 and the Cross-Border Insolvency Regulations 2006, which enact a modified version of the UNCITRAL Model Law on Cross-Border Insolvency discussed below.
- 24-26** There are also examples of protocols being used in individual cases, the most famous being that of the *Maxwell* case, where proceedings in the US and the UK were co-ordinated by means of a protocol drawn up by the examiner appointed by the US court and approved by the US and UK courts.²¹

International initiatives

- 24-27** There have been a variety of international initiatives on cross-border insolvency, some of which have been more successful than others. An outline of what is considered to be the most important is given here.
- 24-28** The Council of Europe opened a Convention on Certain Aspects of Bankruptcy for signature on 5 June 1990. However, few member countries have signed it and none have ratified it.²² The Convention has not therefore come into force.

¹⁸ Bruce Leonard at the first Vienna Colloquium on International Insolvency, the edited proceedings of which are contained in the special conference issue of 1995 4 *International Insolvency Review*.

¹⁹ See Wood, PR, *Principles of International Insolvency*, 2nd edn (London: Sweet & Maxwell, 2007), Ch.17.

²⁰ The longest standing of these was s.304 of the United States Bankruptcy Code, which came into force in 1978. It has now been replaced by Ch.15 of the United States Bankruptcy Code which enacts a version of the UNCITRAL Model Law on Cross-Border Insolvency, discussed further below.

²¹ For a detailed description of that case, which was never reported, see Mason, R, "Cross-Border Insolvency Law: Where Private International Law and Insolvency Meet" in Omar, P (ed), *International Insolvency Law: Themes and Perspectives* (Oxford: Routledge, 2008). Protocols have also been used in cases involving the US and Canada: see, for example, the case of *Everfresh Beverages Inc*, discussed in Leonard, "Committee J's Initiatives in Cross-Border Insolvencies and Reorganisations: The Experience of the *Everfresh* Case", 1997 6 I.I.R. 127.

²² A minimum of three ratifications would be necessary to bring it into force between ratifying states.

The European Union opened a Convention on Insolvency Proceedings for signature on 23 November 1995. It remained open for signature until 23 May 1996 and was signed by all the then Member States with the exception of the UK. Since the legal basis for the Convention was art.220 of the Treaty of Rome, it required all Member States to sign it before it could come into force, and since the UK did not sign it, it never came into force. However, the substance of the convention formed the basis for the EC insolvency proceedings regulation which came into force in 2002 and which, as previously noted, has recently been recast in the form of the EU insolvency proceedings regulation. The EU insolvency proceedings regulation is discussed in Ch.25. **24-29**

The International Bar Association produced a Cross-Border Insolvency Concordat in 1995 which provides a statement of principles to be followed in drawing up protocols for use in individual cases.²³ It also produced a Model International Insolvency Co-operation Act containing model legislation for adoption by countries into their own domestic legislation. This was never adopted by any country, however, and for practical purposes has effectively been superseded by the UNCITRAL Model Law on Cross-Border Insolvency. It was nonetheless an important development in so far as it sought to provide model provisions for states to adopt. **24-30**

The UNCITRAL Model Law on Cross-Border Insolvency was developed under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) and adopted in 1997. Like the International Bar Association's Model International Insolvency Co-operation Act, it provides model legislation which can be adopted into each country's domestic legislation. It has been adopted, at the time of writing, in 45 jurisdictions including, as noted, the US and the UK, and is discussed in Ch.25 in the context of the UK's enactment. UNCITRAL, through its Working Group V (Insolvency Law), has also undertaken a number of other initiatives in the field of cross-border insolvency, including the publication of the UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation in 2011; the publication of its UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective in 2011 and an updated version in 2014; and the publication of a new Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency in January 2014 to replace the original Guide to Enactment which accompanied the Model Law on Cross-Border Insolvency in 1997. It is currently working, inter alia, on a draft Model Law on recognition and enforcement of insolvency-related judgments and the development of a UN insolvency convention. **24-31**

European Communication and Co-operation Guidelines for Cross-Border Insolvency developed under the aegis of the Academic Wing of INSOL Europe and designed to enable courts and insolvency practitioners to operate efficiently and effectively in cross-border insolvency proceedings within the context of the EC insolvency proceedings regulation (and beyond) were published in 2007. **24-32**

The American Law Institute and the International Insolvency Institute produced a report entitled *Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases* in March 2012 which was presented to the **24-33**

²³ The concordat is available on the International Bar Association website. The principles contained therein were utilised in drawing up the protocol in the *Everfresh Beverages* case.

Annual Meeting of the American Law Institute on 23 May 2012 and unanimously adopted by the International Insolvency Institute at its Annual Conference on 22 June 2012. The report provides a non-binding statement of principles intended to facilitate the co-ordination of the administration of international insolvency cases involving the same debtor, including where appropriate the use of a protocol.

- 24–34 The Judicial Insolvency Network produced Guidelines for Communication and Co-operation Between Courts in Cross-Border Insolvency Matters in 2016.
- 24–35 INSOL International published a Protocol for International Recognition of Insolvency Proceedings Affecting Natural Persons in 2017.

HARMONISATION

- 24–36 Since the root of the difficulties in cross-border cases lies in the differences in national laws, it might be thought that the ultimate answer to these difficulties lies in the harmonisation of those national laws. Standing the nature of bankruptcy law and its close link with policy as discussed above, however, it is extremely doubtful that complete harmonisation could ever be achieved in practice. There may, however, be scope for harmonisation of at least some areas.
- 24–37 In this context, it may be observed that, as noted in Ch.3, a number of publications have been produced by international bodies seeking to set out general principles and recommendations for the enactment or reform of insolvency law.²⁴ As different countries enact insolvency laws or reform their existing insolvency laws, therefore, this may result in some convergence of insolvency laws over time.²⁵
- 24–38 Furthermore, the issue of harmonisation has recently received attention at the European level.
- 24–39 In 2011, the European Parliament published a report with recommendations to the Commission on insolvency proceedings in the context of EU company law which included, inter alia, recommendations for the harmonisation of certain aspects of national insolvency law.²⁶ This drew on, inter alia, a 2010 study commissioned by the European Parliament's Committee on Legal Affairs and carried out by INSOL Europe entitled *Harmonisation of Insolvency Law at EU*

²⁴ See European Bank for Reconstruction and Development, *Core Principles for an Insolvency Law Regime*, available at <http://www.ebrd.com/what-we-do/sectors/legal-reform/debt-restructuring-and-bankruptcy.html> [Accessed 19 September 2017]; International Monetary Fund, *Orderly and Effective Insolvency Procedures* (1999), available at <http://www.imf.org/external/pubs/ft/orderly> [Accessed 19 September 2017]; UNICTRAL, *Legislative Guide on Insolvency Law*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html [Accessed 19 September 2017]; World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (2001) and revised draft (2005), available at <http://www.worldbank.org/> [Accessed 19 September 2017]; INSOL International, *Consumer Debt Report* (2001) and (2011); and World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013), available at <http://www.worldbank.org/> [Accessed 19 September 2017].

²⁵ See Mears, PE and Pandya, S, "Convergence in National and International Insolvency Laws Since 2002" (2013) 7 *Insolvency & Restructuring International* 12.

²⁶ European Parliament Committee on Legal Affairs, *Report with recommendations to the Commission on insolvency proceedings in the context of EU company law* (2011/2006(INI)).

Level²⁷ which was followed in 2011 by a further study entitled *Harmonisation of Insolvency Law at EU Level with respect to opening of proceedings, claims filing and verification and reorganisation plans*.²⁸ Although the context was company law, some of the areas proposed for harmonisation were also relevant in the context of bankruptcy law. In December 2012, at the same time as publishing its proposals for reform of the EC insolvency proceedings regulation,²⁹ the European Commission issued a communication entitled *A new European approach to business failure and insolvency* which highlighted areas where the Commission considered that the differences between domestic insolvency laws had the greatest potential to hamper the establishment of an efficient insolvency legal framework in the internal market.³⁰ This was followed in July 2013 by a public consultation.³¹ In due course, as previously noted,³² the Commission issued its recommendation of 12.3.2014 on a new approach to business failure and insolvency,³³ which was mainly concerned with restructuring frameworks but also included recommendations relating to the discharge of entrepreneurs following bankruptcy. These recommendation did not extend to consumer bankruptcy, but Member States were invited to explore the possibility of applying the recommendations to consumers. The UK Insolvency Service issued a call for evidence on the recommendation in February 2015,³⁴ the responses to which informed the UK's response to the European Commission's review of the recommendation.³⁵ Following an evaluation of the implementation of the recommendation,³⁶ a further public consultation on an effective insolvency framework within the EU was launched on 23 March 2016 and, as previously noted,³⁷ in November 2016 the European Commission issued a proposal for a Directive on preventative restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU.³⁸ The need to implement any changes which may be necessary to comply with the resulting Directive will, of course, depend on the terms, and the timing, of "Brexit". What is clear, however, is that harmonisation of at least certain areas of insolvency law in the quest to address the problems arising from the diversity of national insolvency laws is seen as both desirable and achievable.

²⁷ European Parliament, *Harmonisation of Insolvency Law at EU Level* (2010) PE 419.633.

²⁸ European Parliament, *Harmonisation of Insolvency Law at EU Level with respect to opening of proceedings, claims filing and verification and reorganisation plans* (2011) PE 432.766.

²⁹ See further Ch.25.

³⁰ European Commission, *Communication on A new European approach to business failure and insolvency* 12.12.2012 COM (2012) 742 final.

³¹ European Commission *Consultation on A new European approach to business failure and insolvency* (5 July 2013).

³² See Ch.2.

³³ European Commission Recommendation of 12.3.2014 on a new European approach to business failure and insolvency (2014) 1500 final.

³⁴ Insolvency Service, *Call for Evidence: European Commission Recommendation on a new approach to business failure and insolvency* (February 2015).

³⁵ See Insolvency Service, *UK Response to Commission Questionnaire on Recommendation on a new approach to business failure and insolvency* (undated), available on the Insolvency Service website.

³⁶ European Commission, *Evaluation of the Implementation of the Commission Recommendation on a new approach to business failure and insolvency* (30 September 2015).

³⁷ See Ch.2.

³⁸ European Commission, *Proposal for a Directive on preventative restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU*, 22.11.2016 COM (2016) 723 final.

CROSS-BORDER INSOLVENCY: SCOTS LAW

INTRODUCTION

As noted in Ch.24, cross-border insolvency has a particular importance in Scots law because both England and Wales and Northern Ireland are foreign jurisdictions for this purpose. **25-01**

The law in Scotland is found partly in statute and partly in case law. Certain provisions of the Bankruptcy (Scotland) Act 2016 are of particular relevance in cross-border cases: the provisions on jurisdiction, discussed in Ch.7; the provisions on oaths by creditors, also discussed in Ch.7; the provisions on concurrent insolvency proceedings, discussed in Ch.8; the provisions on recall, discussed in Ch.9; the effect claimed for Scottish bankruptcy proceedings, discussed in Ch.11 and Ch.24; the provisions on creditors' claims, discussed in Ch.16; and the provisions on discharge of the debtor, discussed in Ch.17. In addition, as in the rest of the UK, there are currently four sets of provisions specifically regulating cross-border cases: s.426 of the Insolvency Act 1986; the EU insolvency proceedings regulation; the Cross-Border Insolvency Regulations 2006; and the common law. **25-02**

Traditionally, cross-border cases were regulated by the common law, but this has been superseded in a number of respects by the statutory provisions referred to. It remains important, however, where the statutory provisions do not apply, and in some cases may be used to supplement them. Section 426 of the Insolvency Act 1986 now regulates the enforcement of orders made by UK courts under insolvency law within the UK and provides for assistance in insolvency matters both within the UK and between the UK and specified countries and territories. The EU insolvency proceedings regulation currently regulates recognition and enforcement in insolvency matters between the Member States of the EU with the exception of Denmark. It does not, however, affect the position within the UK except to the extent that it provides mandatory rules of international jurisdiction and choice of law in cases to which it applies. The Cross-Border Insolvency Regulations 2006 provide for assistance in insolvency matters between the UK and any other country, but do not apply within the UK itself. **25-03**

The existence of these different sets of provisions results in a complex matrix of partially overlapping provisions, and it may be questioned whether this is ideal. The decision to retain the Insolvency Act 1986 s.426 in its existing form and the common law after the enactment of the Cross-Border Insolvency Regulations 2006 was deliberate: the Government specifically stated that it wished to afford applicants a choice of the different procedures available to them, be that what is now the EU insolvency proceedings regulation, the Model Law as enacted in the Cross-Border Insolvency Regulations 2006, the Insolvency Act 1986 s.426 or case law.¹ This view was also taken by others, such as Fletcher, **25-04**

¹ See Insolvency Service, *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain: Summary of Responses and Government Reply*, Executive Summary, para.6.

who argued strongly for the retention of the Insolvency Act 1986 s.426 after the enactment of the UNCITRAL Model Law in the UK as an additional source of assistance for those jurisdictions to which it applies: he considered that the special arrangements it provides were not inconsistent or incompatible with the assistance to be provided under the Cross-Border Insolvency Regulations 2006, and that it might serve as an incentive to other states to explore the development of more advanced levels of assistance to be agreed on a “balanced and fully reciprocal basis”.² He subsequently observed that³:

“The decision to allow both the common law principles and the statutory procedure under section 426 to continue to co-exist alongside the Model Law (and also the EC Regulation) has ensured that the positive qualities of those two bodies of law are available to provide solutions in certain situations where neither the Model Law or the Regulation could do so.”

25–05 On the other hand, there are areas of potential conflict between the different provisions⁴ and it can be argued that the complexity of the system is less than user-friendly. Fletcher argues that it is nonetheless preferable to preserve the benefits of the arrangements which have previously evolved: he takes the view that insolvency practitioners and their legal advisers will simply need to be aware of the different forms of assistance and their characteristics, and by identifying the appropriate avenue of approach, will be able to maximise the effectiveness of the assistance to be gained from a British court.⁵ While this may be true, it might also be observed that the requirement to take advice about the options available may add both time and expense to proceedings. There is no uniform approach to this issue in other states which have enacted the UNCITRAL Model Law: for example, the US simply replaced its existing provisions (although it incorporated some aspects of these in the replacement), while Australia retained its existing provisions on multi-state liquidations alongside its version of the UNCITRAL Model Law. A different type of approach can be seen in Germany, which has not enacted the UNCITRAL Model Law, but instead enacted a modified version of the EC insolvency proceedings regulation to apply to all cases to which that regulation did not apply, thus creating as uniform an approach as possible. It is suggested that this type of uniformity of approach may have attractions, and once the outcome of “Brexit” and the fate of the EU insolvency proceedings regulation is known, it might be useful to review how the various provisions might operate in future.

25–06 This chapter considers first s.426 of the Insolvency Act 1986, as the provision regulating cross-border insolvency within the UK as well between the UK and certain countries and territories; then the EU insolvency proceedings regulation, as the measure regulating cross-border insolvency between the Member States of the EU (with the exception of Denmark); then the Cross-Border Insolvency Regulations 2006 as the measure regulating cross-border insolvency between the UK and the rest of the world; and finally the common law, which remains available where these other measures do not apply.

² Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.4.26.

³ Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), Supplement, para.8.87.

⁴ See, for example, Omar, PJ, “Cross-Border Insolvency Law in the UK: An Embarrassment of Riches” [2006] *Insolvency Law & Practice* 132.

⁵ Fletcher, IF, “Better Late Than Never: The UNCITRAL Model Law Enters Into force in Great Britain” 2006 *Insolvency Intelligence*, 19(6), 86.

SECTION 426 OF THE INSOLVENCY ACT 1986

Introduction

As referred to above s.426 of the Insolvency Act 1986 contains provisions relating to the enforcement within the UK of orders made by a court in any part of the UK in the exercise of its jurisdiction in relation to insolvency law and provisions for co-operation between the courts having such jurisdiction in the UK and between the courts having such jurisdiction in the UK and the courts having such jurisdiction in any relevant country or territory. 25-07

There is very little Scottish case law on s.426, particularly on the provisions for co-operation between courts, but there are a moderate number of English cases to which reference may be made. Much of the case law relates to corporate insolvency law rather than bankruptcy and is therefore of less relevance in terms of providing examples of co-operation, but some of the principles applied are equally relevant in the context of bankruptcy and are referred to accordingly. 25-08

Meaning of insolvency law

For the purpose of these provisions, “insolvency law” means: 25-09

- (a) in relation to England and Wales, provision extending to England and Wales and made by or under the Insolvency Act 1986 or specified provisions of the Company Directors Disqualification Act 1986⁶;
- (b) in relation to Scotland, provision extending to Scotland made by or under the Insolvency Act 1986, specified provisions of the Company Directors Disqualification Act 1986, Pt XVIII of the Companies Act 1985 or the Bankruptcy (Scotland) Act 2016⁷;
- (c) in relation to Northern Ireland, provision made by or under the Insolvency (Northern Ireland) Order 1989 or the Company Directors (Northern Ireland) Order 2002⁸; and
- (d) in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to the provisions of UK law as so defined.⁹ A “relevant country or territory” means any of the Channel Islands or the Isle of Man or any country or territory designated for the purpose by the Secretary of State.¹⁰

⁶ Insolvency Act 1986 s.426(10)(a).

⁷ Insolvency Act 1986 s.426(10)(b). It may be noted that Pt XVIII of the Companies Act 1985 is prospectively repealed by, and replaced with Pt 2 of, the Bankruptcy and Diligence etc. (Scotland) Act 2007.

⁸ Insolvency Act 1986 s.426(10)(c).

⁹ Insolvency Act 1986 s.426(10)(d).

¹⁰ Insolvency Act 1986 s.426(11). The countries and territories which have been so designated to date are: Anguilla; Australia; the Bahamas; Bermuda; Botswana; Brunei Darussalam; Canada; Cayman Islands; Falkland Islands; Gibraltar; Hong Kong; Republic of Ireland; Malaysia; Montserrat; New Zealand; St Helena; Republic of South Africa; Turks and Caicos Islands; Tuvalu and the Virgin Islands: see the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123); the Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996 (SI 1996/253); and the Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1998 (SI 1998/2766). The provisions of the Insolvency Act 1986 s.426 relating to co-operation between courts were extended, in modified form, to Guernsey, with the result that there are now reciprocal arrangements for co-operation between the courts of Guernsey and the courts of the UK, Jersey and the Isle of Man: Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989/2409). Corresponding provisions for judicial assistance have also been enacted in Jersey and the Isle of Man.

- 25-10** It is specifically provided that for this purpose, any reference to an enactment includes, in relation to any time before the coming into force of that enactment, the corresponding enactment in force at that time.¹¹
- 25-11** In addition, certain provisions of the Banking Act 2009 are insolvency law for the purposes of the section,¹² and the provisions of Pt VII of the Companies Act 1989 (financial markets and insolvency) and so much of the law of a relevant country or territory as corresponds to those provisions are also insolvency law for the purposes of the section.¹³
- 25-12** It may be noted that insolvency law is defined exclusively by reference to statute law and does not therefore include those aspects of the law which are derived solely from the common law.

Enforcement within the UK

- 25-13** An order made by a court in any part of the UK in the exercise of its jurisdiction in relation to insolvency law must be enforced in any other part of the UK as if it were made by a court exercising the corresponding jurisdiction in that other part.¹⁴ This does not, however, require a court in any part of the UK to enforce, in relation to property situated in that part, any order of a court in another part of the UK.¹⁵ Provision may be made by order for securing that a “trustee or assignee” under the insolvency law of any part of the UK has, subject to any modifications specified in the order, the same rights in relation to property situated in any other part of the UK as they would have if they were a “trustee or assignee” under the insolvency law of that part,¹⁶ but no such order has ever been made.

Co-operation between courts

Procedure

- 25-14** The courts having jurisdiction in relation to insolvency law in any part of the UK “shall assist” the courts having the corresponding jurisdiction in any other part of the UK or any relevant country or territory.¹⁷ Assistance is requested by means of letters of request issued by the court seeking assistance to the court from which assistance is sought.¹⁸ So if, for example, a Scottish trustee in sequestration wishes to obtain assistance in another part of the UK or a relevant country or territory, they will require to make an application to the court for the necessary letters of request to be issued. Although this procedure may seem cumbersome, it allows the trustee to present their case in their own jurisdiction and the court being asked to make the request to act as a filter. It has been held that it is not necessary for there to be ongoing insolvency proceedings in the jurisdiction from which the request emanates: it is enough that the requesting court has jurisdiction in relation to insolvency law.¹⁹ In *Hynd’s*

¹¹ Insolvency Act 1986 s.426(10).

¹² See Insolvency Act 1986 s.426(13) and (14) as added by the Banking Act 2009.

¹³ Companies Act 1989 s.183(1).

¹⁴ Insolvency Act 1986 s.426(1) and see *Hynd’s Trustee, Petitioner* [2009] CSOH 76, where an English bankruptcy order was enforced under this provision. It was held that the Court of Session had jurisdiction to make the necessary order under this subsection.

¹⁵ Insolvency Act 1986 s.426(2).

¹⁶ Insolvency Act 1986 s.426(3).

¹⁷ Insolvency Act 1986 s.426(4).

¹⁸ See *Morris, Noter* [2007] CSOH 165.

¹⁹ *HSBC Bank Plc v Tambrook Jersey Ltd* [2013] EWCA Civ 576.

Trustee, Petitioner,²⁰ an issue arose as to the Scottish court having jurisdiction to receive requests for assistance made under these provisions. Lord Glennie noted that until 1 April 2008, when the changes made by the Bankruptcy and Diligence etc. (Scotland) Act 2007 came into force, there was no difficulty: the relevant court in Scotland was the Court of Session. However, the effect of the changes made by the Bankruptcy and Diligence etc. (Scotland) Act 2007 was to give the sheriff court exclusive jurisdiction over petitions for sequestration of a debtor's estate, although the Court of Session retained concurrent jurisdiction with the sheriff court in relation to corporate insolvency. This raised the issue of whether the Court of Session could be said to continue to have jurisdiction to receive requests under s.426(4) in relation to bankruptcy as opposed to corporate insolvency. Lord Glennie identified a number of difficulties which might arise if it did not, but ultimately did not have to decide the question. It is thought, however, that it can be argued that the Court of Session does continue to have jurisdiction to deal with requests under s.426(4) in relation to bankruptcy on the basis that the Court of Session still has jurisdiction in relation to certain matters relating to sequestration, including the power to make certain orders under the provisions relating to concurrent proceedings²¹ and the reduction of an award of sequestration.²² It is also the court to which applications under the Cross-Border Insolvency Regulations 2006 are made.²³

Nature of assistance

Despite the apparently mandatory nature of the requirement to assist the requesting court suggested by the words "shall assist", the courts in England have refused requests for assistance on a number of occasions.²⁴ It has been said, however, that the court will proceed on the basis that the assistance sought should be given unless there is some good reason not to do so.²⁵ A request may be rejected if it is not sufficiently specific.²⁶ The fact that the requesting court does not have jurisdiction over a person in respect of whom a request is made does not affect the court's jurisdiction to give assistance, although it may be

²⁰ *Hynd's Trustee, Petitioner* [2009] CSOH 76.

²¹ See Ch.8.

²² See Ch.9.

²³ See para.25–188.

²⁴ See *Re Focus Insurance Co Ltd* [1996] B.C.C. 659 (where the court refused a request for examination on the basis that it would be oppressive in the light of the liquidators' instigation of bankruptcy proceedings in relation to person sought to be examined in which that person was also liable to be examined); *Hughes v Hannover Ruckversicherungs-Atkingesellschaft* [1997] 1 B.C.L.C. 497 (in which the court refused a request for a worldwide anti-suit injunction on the basis that there was no connection with the jurisdiction); and *Purves v England* [1999] B.C.C. 197 (in which the court again refused a request for examination, although the reasoning in that case has subsequently been disapproved: see *Re Southern Equities Corp Ltd* [2000] B.C.C. 123).

²⁵ *Hughes v Hannover Ruckversicherungs-Atkingesellschaft* [1997] 1 B.C.L.C. 497. For cases in which assistance has been granted by the English courts, not all of which are relevant in the context of bankruptcy as opposed to corporate insolvency law, see *Re Dallhold Estates (UK) Pty Ltd* [1992] B.C.C. 394 (making of administration order in relation to a foreign company); *Re Business City Express Ltd* [1997] B.C.C. 826 (order binding creditors to a scheme of arrangement); *Re Southern Equities Corporation Ltd* [2000] B.C.C. 123 (order for examination); *Re Duke Group Ltd* [2001] B.C.C. 144 (order for examination); *Re Television Trade Rentals Ltd* [2002] B.C.C. 807 (application of provisions for company voluntary arrangement under Pt 1 of the Insolvency Act 1986 to a foreign company); *Fourie v Le Roux* [2005] BPIR 779 (application of anti-avoidance provisions); *Morris, Noter* [2007] CSOH 165 (appointment of liquidator in ancillary liquidation); *McGrath v Riddell* [2008] UKHL 21 (remittal of funds to foreign main liquidation); *HSBC Bank Plc v Tambrook Jersey Ltd* [2013] EWCA Civ 576 (making of administration order in relation to foreign company).

²⁶ See *Fourie v Le Roux* [2005] BPIR 723. The request was subsequently resubmitted and granted: see *Fourie v Le Roux* [2005] BPIR 779.

relevant to the exercise of its discretion as to whether and/or what assistance to give.²⁷ It has been said, obiter, that these provisions cannot be used to obtain the enforcement of foreign judgments.²⁸ It has been held that in giving assistance, the court has available to it its own general jurisdiction and powers as well as the insolvency law applicable by either court.²⁹

Applicable law

25–16 The court to which a request for assistance is made may, in relation to any matters specified in the request, apply the insolvency law applicable by either court but is required, in exercising its discretion as to which insolvency law to apply, to have regard in particular to the rules of private international law.³⁰ It is not entirely clear what the requirement to have regard in particular to the rules of private international law entails. Fletcher described it as “somewhat oblique and enigmatic”,³¹ while in the case of *Re Television Trade Rentals Ltd*³² it was described in somewhat more trenchant terms as “obscure and ill-thought out”. Fletcher considered there to be two possible interpretations of this requirement: a narrow interpretation, in terms of which the court is simply being reminded to observe the normal private international law conventions, such as that the court will always apply its own procedural rules and not foreign procedural rules, and a wide interpretation, considered to be preferable, in terms of which the court will deploy its full repertoire of choice of law rules and techniques to determine which of the two laws should apply.³³ In *Re Television Trade Rentals Ltd*, however, it was ultimately held that it simply means that the court must take into account the foreign elements of the case in deciding which law to apply, such as the connections of the parties with the court’s own jurisdiction and the foreign jurisdiction. The cases demonstrate that the court may choose to apply UK insolvency law even though it would not otherwise have applied³⁴ and even though the foreign insolvency law has no comparable procedure or provisions³⁵ and it may choose to apply the foreign insolvency law to do something which could not have been done under UK law.³⁶

25–17 It is specifically provided that where a person who is a “trustee or assignee” under the insolvency law of any part of the UK claims property situated in any other part of the UK, the submission of that claim to the court in the part where the property is situated shall be treated in the same manner as a request for assistance under s.426(4), with the result that the court has the option of applying the insolvency law applicable by either court.³⁷ In *McKinnon v Graham*,³⁸ an application was made under s.426 seeking orders in favour of the debtor’s trustee in sequestration for the possession and sale of a house in England belonging to the debtor. The debtor argued that the house had re-vested in him. The issue turned

²⁷ *Fourie v Le Roux* [2005] BPIR 779. See also *Re Television Trade Rentals Ltd* [2002] B.C.C. 807.

²⁸ *New Cap Reinsurance Corporation (In Liquidation) v Grant* [2012] UKSC 46.

²⁹ *Hughes v Hannover Ruckversicherungs-Atkingsgesellschaft* [1997] 1 B.C.L.C. 497.

³⁰ Insolvency Act 1986 s.426(5).

³¹ Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.4.13.

³² *Re Television Trade Rentals Ltd* [2002] B.C.C. 807.

³³ Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.4.13.

³⁴ See *Re Dallhold Estates (UK) Pty Ltd* [1992] B.C.C. 394; *Re Television Trade Rentals Ltd* [2002] B.C.C. 807.

³⁵ See *Re Dallhold Estates (UK) Pty Ltd* [1992] B.C.C. 394; *Re Television Trade Rentals Ltd* [2002] B.C.C. 807; *Re B.C.C.I (No.9)* [1994] 2 B.C.L.C. 636.

³⁶ *Re Business City Express Ltd* [1997] B.C.C. 826; *Re Southern Equities Corporation Ltd* [2000] B.C.C. 123; *Re Duke Group Ltd* [2001] B.C.C. 144.

³⁷ Insolvency Act 1986 s.426(6).

³⁸ *McKinnon v Graham* [2013] EWHC 2870 (Ch).

on whether Scots or English law applied: the differences between the re-vesting provisions in the two jurisdictions meant that if Scots law applied, no re-vesting was possible, whereas if English law applied, re-vesting was possible. At first instance, the deputy judge held that Scots law applied and granted the orders sought. On appeal, it was held that the deputy judge had discretion as to whether to apply Scots or English law and there was no basis for challenging the deputy judge's exercise of that discretion in favour of applying Scots law. The deputy judge had analysed the relevant law with considerable care and had correctly concluded that the application of the principle of modified universalism required him to apply Scots law unless the case fell within one of the recognised exceptions to that principle. These are *either* something that is manifestly unfair or offends against insolvency proceedings already taking place in England or against the general principle underlying insolvency law of fair distribution of assets amongst creditors *or* is something that is otherwise against public policy. The principle of modified universalism applied equally to personal insolvencies as to commercial insolvencies and the deputy judge had been right to conclude that the differences between the provisions in the two jurisdictions did not offend a fundamental principle of English insolvency law or any public policy or give rise to manifest unfairness. Since none of the exceptions applied, therefore, the deputy judge's decision to apply Scots law on the basis of modified universalism was not open to criticism. It is thought that despite the subsequent developments in the case law discussed below in relation to the application of the principle of modified universalism at common law, the decision remains good law.

Warrants for arrest

Section 426(7) of the Insolvency Act 1986 provides that s.38 of the Criminal Law Act 1977 (execution of warrant of arrest throughout the UK) applies to a warrant for the arrest of any person issued in the exercise of any jurisdiction in relation to insolvency law in any part of the UK. However, that section was repealed and replaced by a new provision in the Criminal Justice and Public Order Act 1994¹⁷ without any consequential amendment being made to s.426(7). 25-18

EU INSOLVENCY PROCEEDINGS REGULATION

Introduction

As noted in Ch.24, the European Union opened a Convention on Insolvency Proceedings for signature on 23 November 1995 but it never came into force.³⁹ It did, however, form the basis for the EC insolvency proceedings regulation⁴⁰ which came into force on 31 May 2002⁴¹ and applied to all Member States except Denmark⁴²; the UK and Ireland had the option to opt out of the regulation, but decided to opt in.⁴³ Since the substance of the regulation was based 25-19

³⁹ Convention on Insolvency Proceedings, OJ No.L00000.

⁴⁰ Council Regulation (EC) No.1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1.

⁴¹ EC insolvency proceedings regulation art.47.

⁴² See EC insolvency proceedings regulation, recital 33, which explains that Denmark, in accordance with arts 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, was not participating in the adoption of the regulation and was not therefore bound by it or subject to its application.

⁴³ See EC insolvency proceedings regulation, recital 32, which explains that the UK and Ireland, in accordance with art.3 of the Protocol on the position of the UK and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, had given notice of their wish to take part in the adoption and application of the regulation.

almost verbatim on the lapsed convention, the *Report on the Convention on Insolvency Proceedings* by Miguel Virgos and Etienne Schmit (the Virgos-Schmit Report) remained relevant as an aid to interpretation of the EC insolvency proceedings regulation and has been referred to by courts for that purpose.

- 25–20** The EC insolvency proceedings regulation embodied the principle of modified universalism which was given effect to through the concept of main and secondary proceedings. It provided mandatory rules of international jurisdiction, uniform rules on applicable law and provisions for co-operation and co-ordination of proceedings within the EU. As a regulation, it was directly effective in UK law, but a number of consequential amendments were made to UK legislation with the aim of ensuring that there was no conflict between it and domestic law and generally providing for it. It applied to insolvency proceedings opened after its entry into force.⁴⁴
- 25–21** Perhaps inevitably, its implementation revealed a number of problems in practice and there were soon calls for reform.⁴⁵ Many of the problems identified were of more relevance in the context of corporate insolvency, but some applied equally or even more so in the context of bankruptcy.⁴⁶ The EC insolvency proceedings regulation did have, however, an in-built provision for review: art.46 provided that no later than 1 June 2012, and every five years thereafter, the European Commission was to present a report on the application of the regulation to the European Parliament, the Council and the Economic and Social Committee accompanied, if need be, by a proposal for its adaptation. In 2011, as referred to Ch.24, the European Parliament published a report with recommendations to the Commission on insolvency proceedings in the context of EU company law which included, inter alia, recommendations regarding the revision of the EC insolvency proceedings regulation.⁴⁷ In 2012, the European Commission established a group of experts to assist it with the review of the EC insolvency proceedings regulation, commissioned a comparative legal study on the evaluation of the EC insolvency proceedings regulation in the 26 Member States and a study for an impact assessment of an amended regulation and carried out a public consultation.⁴⁸ In December 2012, it published its report, proposal for an amending regulation and impact assessment.⁴⁹ It concluded that⁵⁰

“the Regulation is generally regarded as a successful instrument for the co-ordination of cross-border insolvency proceedings in the Union. Its

⁴⁴ EC insolvency proceedings regulation art.43.

⁴⁵ See, in particular, Moss, G and Paulus, C, “The European Insolvency Regulation—The Case for Urgent Reform” 2006 *Insolvency Intelligence*, 19(1), 1–5; Wessels, B, *International Insolvency Law* (Deventer, Kluwer, 2006), Ch.IV.

⁴⁶ See, for example, the discussion of the phenomenon which has become known as bankruptcy tourism in the context of the discussion of the debtor’s centre of main interest.

⁴⁷ European Parliament Committee on Legal Affairs, *Report with recommendations to the Commission on insolvency proceedings in the context of EU company law* (2011/2006(INI)).

⁴⁸ Details of these can be found in the European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No.1346/2000 of 29 May 2000 on insolvency proceedings* COM (2012) 743 final, hereafter “Eurovision Commission Report”.

⁴⁹ See European Commission Report and European Commission, *Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No.1346/2000 on insolvency proceedings*, COM (2012) 744 final and *Impact Assessment* SWD (2012) 416 final.

⁵⁰ European Commission Report, para.1.2.

fundamental choices and underlying policies are largely supported by stakeholders”.

However, it went on to say,⁵¹

25–22

“a number of shortcomings of the Regulation have been identified by the evaluation study and the public consultation. Therefore, the Commission considers that there is a need to bring forward necessary adaptations to meet the need for a modern and business-friendly environment. Essentially, problems have been identified in relation to the scope of the Regulation, the rules on jurisdiction, the relation between main and secondary proceedings, the publicity of insolvency-related decisions and the lodging of claims. In addition, the absence of specific rules for the insolvency of members of a group of companies has been criticised”.

The European Commission’s proposals for amending the EC insolvency proceedings regulation were generally well-received but not entirely uncontroversial.⁵² Changes were proposed by the European Parliament and the Council,⁵³ but ultimately agreement was achieved.⁵⁴ The regulation was recast and became the EU insolvency proceedings regulation.⁵⁵ The changes which have been made are discussed, where relevant, in the context of the discussion of the current provisions. 25–23

Like the EC insolvency proceedings regulation, the EU insolvency proceedings regulation applies to all Member States except Denmark: the UK and Ireland had the option to opt out of the recast, but decided to opt in.⁵⁶ It is directly effective in UK law, but further amendments have been made to UK legislation with the aim of ensuring that there is no conflict between it and domestic law and generally providing for it. It applies to insolvency proceedings opened from 26 June 2017.⁵⁷ The EC insolvency proceedings regulation continues to apply to insolvency proceedings opened before that date.⁵⁸ 25–24

Like the EC insolvency proceedings regulation, the EU insolvency proceedings regulation replaces specified Conventions between Member States. It is specifically provided, however, that it will not apply in any Member State to 25–25

⁵¹ European Commission Report, para.1.2.

⁵² See, for example, Moss, G, “A very decent proposal: the European Commission’s proposals for reforming the EC Regulation on insolvency proceedings 1346/2000”, 2013 *Insolv. Int.* 55; cf McCormack, G, “Reforming the European Insolvency Regulation: a legal and policy perspective” 2014 *J. Priv. Int. L.* 41. For an alternative set of proposals for revision of the EC insolvency proceedings regulation, see INSOL Europe’s *Revision of the European Insolvency Regulation: Proposals by INSOL Europe* (2012).

⁵³ See European Parliament Committee on Legal Affairs, *Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No.1346/2000 on insolvency proceedings* (2013) and European Council, *Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No.1346/2000 on insolvency proceedings—General Approach* (10284/14) (June 2014) and *Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No.1346/2000 on insolvency proceedings—General Approach on Recitals and Annexes* (13276/14) (September 2014).

⁵⁴ European Council, *Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No.1346/2000 on insolvency proceedings—Political agreement* (November 2014).

⁵⁵ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

⁵⁶ See EU insolvency proceedings regulation, recitals 87 and 88.

⁵⁷ EU insolvency proceedings regulation art.84.1.

⁵⁸ EU insolvency proceedings regulation art.84.2.

the extent that it is irreconcilable with the obligations arising from a prior convention relating to bankruptcy concluded by that state with one or more third countries and that it will not apply in the UK to the extent that is irreconcilable with existing obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth. This is a reference to s.426 of the Insolvency Act 1986, which therefore takes precedence over the EU insolvency proceedings regulation if there is a conflict.

25–26 Like the EC insolvency proceedings regulation, the EU insolvency proceedings regulation has in-built provision for review. It provides, *inter alia*, that no later than 27 June 2027, and every five years thereafter, the European Commission will present a report on the application of the EU insolvency proceedings regulation to the European Parliament, the Council and the Economic and Social Committee accompanied, if need be, by a proposal for its adaptation.⁵⁹ There will, therefore, be an opportunity to review the changes brought about by the recast.

25–27 Finally, it may be noted that, like the EC insolvency proceedings regulation, the EU insolvency proceedings regulation applies only to insolvency proceedings taking place within the EU—it does not apply to any insolvency proceedings which may also be taking place outwith the EU. The European Commission concluded that the lack of harmonised provisions for the recognition of non-EU insolvency proceedings or the co-ordination between proceedings inside and outside the EU had not caused any significant problems in practice.⁶⁰ Be that as it may, it is suggested that the possibility of providing for such situations would be something worthy of further exploration in future.

Structure of EU insolvency proceedings regulation

25–28 The EU insolvency proceedings regulation retains the same basic structure as the EC insolvency proceedings regulation but with the addition of two new chapters.⁶¹ Chapter I contains general provisions, including provisions on the scope of the regulation, definitions, rules of international jurisdiction, and provisions on the applicable law and the exceptions thereto; Ch.II contains provisions on recognition of insolvency proceedings; Ch.III contains provisions on secondary insolvency proceedings; Ch.IV contains provisions on the provision of information for creditors and the lodging of their claims; Ch.V contains provisions on insolvency proceedings of members of a group of companies; Ch.VI contains provisions on data protection; and Ch.VII contains final and transitional provisions. Chapter V is not considered here since it relates purely to corporate insolvency rather than bankruptcy.

Scope of EU insolvency proceedings regulation

25–29 As noted above, one of the areas identified by the European Commission as being in need of reform was the scope of the EC insolvency proceedings regulation: it was noted that it no longer covered a wide range of national proceedings aimed at resolving the indebtedness of companies and individuals and excluded pre-insolvency and hybrid procedures.⁶² The Commission was

⁵⁹ EU insolvency proceedings regulation art.90.1. The other provisions for review which are contained in art.90 are discussed in context where relevant.

⁶⁰ European Commission Report, para.2.3.

⁶¹ A correlation table is provided at Annex D of the EU insolvency proceedings regulation.

⁶² European Commission Report, para.2.1.1.

particularly concerned that despite the fact that the regulation is meant to apply to natural and legal persons, traders and individuals, a considerable number of personal insolvency procedures were outwith its scope.⁶³

The scope of the EU insolvency proceedings regulation has therefore been extended considerably,⁶⁴ and it now applies to,⁶⁵ **25–30**

“public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

- (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
- (b) the assets and affairs of a debtor are subject to control or supervision by a court; or
- (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b)”.

If the proceedings may be commenced where there is only a likelihood of insolvency, their purpose must be to avoid the debtor’s insolvency or the cessation of the debtor’s business activities.⁶⁶ **25–31**

As a result of these changes, a number of new and amended definitions have been introduced, including a new definition of “collective proceedings”, an amended definition of “insolvency practitioner” (to replace the former definition of “liquidator”) and an amended definition of “court”.⁶⁷ These definitions are referred to further below where appropriate. **25–32**

The proceedings to which the EU insolvency proceedings regulation applies are definitely listed in Annex A.⁶⁸ In the case of the UK, so far as relevant to Scotland, the relevant bankruptcy proceedings are sequestration and protected trust deeds for creditors, the latter being included by virtue of being “voluntary arrangements under insolvency legislation”. **25–33**

An insolvency practitioner, formerly a liquidator, is now defined as any person or body whose function, including on an interim basis, is to: **25–34**

- (a) verify and admit claims submitted in insolvency proceedings;
- (b) represent the collective interest of the creditors;
- (c) administer, either in full or in part, assets of which the debtor has been divested;
- (d) liquidate the assets referred to in point (iii); or
- (e) supervise the administration of the debtor’s affairs.⁶⁹

⁶³ European Commission Report, para.2.1.2.

⁶⁴ See EU insolvency proceedings regulation, recitals 10–17.

⁶⁵ EU insolvency proceedings regulation art.1.1.

⁶⁶ EU insolvency proceedings regulation art.1.1.

⁶⁷ See EU insolvency proceedings regulation art.2.

⁶⁸ EU insolvency proceedings regulation, recital 9, art.2(4) and Annex A.

⁶⁹ EU insolvency proceedings regulation art.2(5).

- 25–35** The relevant persons and bodies are listed in Annex B.⁷⁰ In the case of the UK, so far as relevant to Scotland, the relevant insolvency practitioners are a trustee and a judicial factor. It is thought that “trustee” is wide enough to include both a trustee and an interim trustee in sequestration as well as a trustee under a protected trust deed.
- 25–36** Prior to the reforms, some provisions of the EC insolvency proceedings regulation applied only to “winding up proceedings”, which were listed in Annex B.
- 25–37** However, the EU insolvency proceedings regulation no longer makes provision for winding up proceedings.
- 25–38** The EU insolvency proceedings regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties or collective investment undertakings,⁷¹ because such debtors are subject to other arrangements.⁷²
- 25–39** The EU insolvency proceedings regulation applies only where the debtor’s centre of main interests, hereafter referred to as COMI, is in a Member State.⁷³ As Denmark is not participating in the EU insolvency proceedings regulation, for this purpose, Denmark is not a Member State.

The scheme of the EU insolvency proceedings regulation

- 25–40** Recital 23 to the EU insolvency proceedings regulation describes the scheme of the EU insolvency proceedings regulation. It explains that the EU insolvency proceedings regulation enables main insolvency proceedings to be opened in the Member State where the debtor’s COMI is situated. Main proceedings have universal scope and aim to encompass all the debtor’s assets. In order to protect the diversity of interests, secondary proceedings may be opened to run in parallel with the main proceedings in a Member State in which the debtor has an establishment. Secondary proceedings are limited to the assets located in that state (that is, they are territorial proceedings), and there are mandatory rules of co-ordination with the main proceedings in order to satisfy the need for unity in the Union. Recital 37 goes on to explain that territorial proceedings may be opened in a Member State in which the debtor has an establishment prior to the opening of main proceedings, but only in limited circumstances. Such proceedings are here referred to as “independent territorial proceedings”. If main insolvency proceedings are subsequently opened, independent territorial proceedings become secondary proceedings.

International jurisdiction

- 25–41** The EU insolvency proceedings regulation imposes mandatory rules of jurisdiction in those cases to which it applies.⁷⁴ It should be noted, however, that these rules establish only international jurisdiction, that is, they identify the Member State whose courts have jurisdiction to open insolvency proceedings:

⁷⁰ EU insolvency proceedings regulation art.2(5).

⁷¹ EU insolvency proceedings regulation art.1.2. There is a new definition of “collective investment undertakings”: see art.2(2).

⁷² EU insolvency proceedings regulation, recital 19.

⁷³ EU insolvency proceedings regulation, recital 25.

⁷⁴ EU insolvency proceedings regulation art.3.

the allocation of jurisdiction within a Member State remains a matter for the law of the Member State.⁷⁵

Main proceedings

The courts of the Member State in which the debtor's COMI is situated shall have jurisdiction to open insolvency proceedings.⁷⁶ The meaning of the debtor's COMI is discussed in detail below. As noted above, insolvency proceedings opened in the Member State in which the debtor's COMI is situated are main proceedings and encompass all the debtor's assets. 25-42

Territorial proceedings

Where the debtor's COMI is situated in a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if they possess an establishment in that Member State.⁷⁷ The meaning of establishment is discussed further below. The effects of insolvency proceedings opened in a Member State where the debtor has an establishment are restricted to the assets of the debtor situated in that Member State.⁷⁸ 25-43

Where main insolvency proceedings have already been opened in relation to the debtor, any territorial insolvency proceedings subsequently opened in a Member State where the debtor has an establishment are secondary proceedings.⁷⁹ Prior to the reforms, such proceedings were required to be winding-up proceedings, but as referred to at para.25-36, this restriction no longer applies. 25-44

Independent territorial proceedings may be opened prior to the opening of main proceedings only where: 25-45

- (a) main proceedings cannot be opened because of the conditions laid down by the law of the Member State in which the debtor's COMI is situated; or
- (b) the opening of such proceedings is requested by *either* a creditor whose claim arises from or is in connection with the operation of an establishment in the Member State in which the opening of proceedings is requested *or* by a public authority which has the right to request the opening of insolvency proceedings under the law of the Member State where the establishment is situated.⁸⁰

Where main proceedings are opened after the opening of independent territorial proceedings, the independent territorial proceedings effectively become secondary proceedings and the provisions relating to secondary proceedings then apply to them so far as their progress permits.⁸¹ In addition, the insolvency 25-46

⁷⁵ EU insolvency proceedings regulation, recital 26. Jurisdiction within Scotland is discussed in Ch.7.

⁷⁶ EU insolvency proceedings regulation art.3.1.

⁷⁷ EU insolvency proceedings regulation art.3.2.

⁷⁸ EU insolvency proceedings regulation art.3.2. For the determination of which of the debtor's assets fall within the scope of secondary proceedings, see *Comité d'entreprise de Nortel networks SA v Cosme Rogeau*; *Cosme Rogeau v Bloom* [2015] EUECJ C-649/13.

⁷⁹ EU insolvency proceedings regulation art.3.3.

⁸⁰ EU insolvency proceedings regulation art.3.4. Prior to the reforms, it was held that a public authority was not a creditor for the purpose of applying for the opening of independent territorial proceedings: *Procureur-generaal bij het hof van beroep te Antwerpen v Zara Retail* Case C-112/10 (ECJ). This has now been specifically provided for.

⁸¹ EU insolvency proceedings regulation art.50.

practitioner in the main proceedings may request that such proceedings be converted into another type of proceedings in Annex A, provided that the conditions for opening that type of proceedings in the national law are fulfilled and that that type of proceedings is the most appropriate in the interests of the local creditors and of coherence between the main and secondary insolvency proceedings.⁸² For this purpose, local creditors means creditors whose claims arose from or in connection with the operation of an establishment in a Member State other than that in which the centre of the debtor's main interests is located.⁸³ When considering a request for conversion, the court to which the request is made may seek information from the insolvency practitioners involved in both proceedings.⁸⁴

Examination of jurisdiction

25–47 Prior to the reforms, there was no specific provision relating to the examination of jurisdiction by a court asked to open insolvency proceedings. The European Commission noted that it did not seem to be clear for all courts that they were under an obligation to examine their jurisdiction *ex officio* and to expressly note the jurisdictional basis for their decision to open proceedings.⁸⁵ This was problematic because of the principle of mutual trust, discussed further below, which requires the recognition of decisions opening proceedings in other Member States without scrutiny.⁸⁶ The Commission also noted that there had been some criticism to the effect that foreign creditors did not always have a right to challenge the decision opening insolvency proceedings in the state in which that decision was made, and that even if they did, they were not informed of the decision in sufficient time to allow an effective challenge.⁸⁷

25–48 It is thought that these were not serious issues in the UK since, as noted above, amendments had been made to UK legislation, including the rules of court, with the aim of providing for the regulation. However, the EU insolvency proceedings regulation does now make specific provision in relation to these matters. Thus, it is now provided that a court seised of a request to open insolvency proceedings must *ex proprio motu* examine whether it has jurisdiction, and a judgment opening insolvency proceedings must specify the grounds on which jurisdiction is based, in particular whether it is based on COMI or an establishment.⁸⁸ Where insolvency proceedings are opened without a decision by a court, Member States may entrust the insolvency practitioner appointed in such proceedings to examine whether the Member State in which the proceedings are pending has jurisdiction, and the insolvency practitioner must specify in the decision opening the proceedings the grounds on which jurisdiction is based, in particular whether jurisdiction it is based on COMI or an establishment.⁸⁹

25–49 It is also provided that the debtor or any creditor may challenge, before a court, the decision opening main insolvency proceedings on grounds of international

⁸² EU insolvency proceedings regulation art.51.1. In Scotland, provision is made for the conversion of a protected trust deed into sequestration for the purposes of this provision: see Ch.22.

⁸³ EU insolvency proceedings regulation art.2(11).

⁸⁴ EU insolvency proceedings regulation art.51.2.

⁸⁵ European Commission Report, para.3.2.

⁸⁶ European Commission Report, para.3.2.

⁸⁷ European Commission Report, para.3.2.

⁸⁸ EU insolvency proceedings regulation art.4.1

⁸⁹ EU insolvency proceedings regulation art.4.2.

jurisdiction.⁹⁰ The decision opening main insolvency proceedings may also be challenged by other parties, or on grounds other than a lack of international jurisdiction, where national law so provides.⁹¹

Jurisdiction in actions deriving directly from insolvency proceedings and closely linked with them

Prior to the reforms, there was no specific provision relating to jurisdiction in insolvency-derived actions and the European Commission noted that the delin- **25-50**
 eation between the Brussels I regulation and the EC insolvency proceedings regulation was “one of the most controversial issues relating to cross-border insolvencies”.⁹²

As the Commission noted, a substantial body of case law had built up on the **25-51**
 issue of whether civil actions were insolvency-derived, in the sense that they derived directly from the insolvency proceedings and were closely linked with them, but the principle was codified only in relation to recognition, and so far as jurisdiction under the regulation was concerned rested purely on the case law.⁹³ The Commission concluded that the absence of an express rule on jurisdiction for insolvency-derived actions gave rise to uncertainty for practitioners not well-versed in the case law.⁹⁴ It also noted that there was criticism of the fact that an insolvency-derived action could not be conjoined with an action covered by the Brussels I regulation where appropriate.⁹⁵

Accordingly, it is now expressly provided that the courts of the Member State **25-52**
 in which insolvency proceedings have been opened will have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.⁹⁶ Furthermore, where such an action is related to an action in civil and commercial matters against the same defendant(s), the insolvency practitioner may bring both actions before the courts of the Member State in which the defendant is domiciled, or, if there are several defendants, before the courts of the Member State in which any of them is domiciled, if those courts have jurisdiction pursuant to the Brussels I regulation.⁹⁷ For this purpose, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.⁹⁸

⁹⁰ EU insolvency proceedings regulation art.5.1.

⁹¹ EU insolvency proceedings regulation art.5.2.

⁹² European Commission Report, para.3.3.

⁹³ European Commission Report, para.3.3. For the case law, at both European and domestic level, see *Seagon v Deko Marty Belgian NV* Case C-339/07; *German Graphics Graphische Maschinen GmbH v der Schee* Case C-292/08; *Byers v Yacht Bull Corporation* [2010] EWHC 133 (Ch); *Gibraltar Residential Properties Ltd v Gibralcon 2004 SA* [2010] EWHC 2595 (Ch); *Polymer Vision R & D Ltd v Van Dooren* [2011] EWHC 2951 (Ch); *F-Tex SLA v Lietuvos-Anglijos UAB “Jadecloud-Vilma”* CJEU C-213/10; *Schmid v Hertel* Case C-328/12; *Nickel & Goeldner Spedition GmbH v Kintra UAB* [2014] EUECJ C-157/13; *H v K* [2014] EUECJ C-295/13; *Marme Inversiones 2007 SL v Royal Bank of Scotland* [2016] EWHC1510;

⁹⁴ European Commission Report, para.3.3.

⁹⁵ European Commission Report, para.3.3.

⁹⁶ EU insolvency proceedings regulation art.6.1. Avoidance actions are the typical example of such actions.

⁹⁷ EU insolvency proceedings regulation art.6.2. The same applies to a debtor in possession if the national law allows the debtor in possession to bring actions on behalf of the insolvency estate: art.6.2.

⁹⁸ EU insolvency proceedings regulation art.6.3.

Appointment of temporary administrator

- 25-53** Where the court of a Member State which has jurisdiction to open main proceedings appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator may request any measures to secure and preserve any of the debtor's assets situated in another Member State as provided for under the law of that state for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.⁹⁹

The debtor's COMI

- 25-54** Despite the fact that COMI is a key concept in determining first, whether it applies at all, and secondly, whether there is jurisdiction to open main proceedings, the EC insolvency proceedings regulation did not define COMI, although there was a rebuttable presumption that in the case of a company or legal person, the registered office was the COMI,¹⁰⁰ and recital 13 of the regulation stated that the COMI should correspond to the place where the debtor conducted the administration of their interests on a regular basis and was therefore ascertainable by third parties.
- 25-55** In the context of bankruptcy, with regard to individual debtors, it may be noted that the Virgos-Schmit Report stated¹⁰¹:

"The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties . . .

By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence."

- 25-56** Reference to that report was made in an early case in England, *Skjevesland v Geveran Trading Co Ltd*,¹⁰² in which it was said that,

"with an individual, a natural person, his centre of main interests ought be the place where he can be contacted. If he is a person who is not a professional, that would be the place where he habitually resides; or if he is a professional person, that is the place of his professional domicile".

- 25-57** That approach was subsequently followed in the case of *Stojevic v Official Receiver*.¹⁰³ In that case, it was held, following the decision of the European Court of Justice in *Eurofood IFSC Ltd*,¹⁰⁴ that the concept of COMI had an

⁹⁹ EU insolvency proceedings regulation art.52.

¹⁰⁰ EC insolvency proceedings regulation art.3.1.

¹⁰¹ Virgos-Schmit Report, para.75.

¹⁰² *Skjevesland v Geveran Trading Co Ltd* [2003] B.C.C. 391.

¹⁰³ *Stojevic v Official Receiver* (2006) EWHC 3447 (Ch).

¹⁰⁴ *Eurofood IFSC Ltd* [2006] B.C.C. 397. See also the case of *Interedil Srl (in liquidation) v Fallimento Interedil Srl* [2012] B.C.C. 851.

autonomous meaning and had to be interpreted in a uniform way, independently of national legislation.¹⁰⁵ The starting point was recital 13 of the EC insolvency proceedings regulation, although this did not define COMI, and creditors of an individual who was neither a professional nor someone carrying on business in their own right would expect their interests to be administered from their place of habitual residence since that was where they could be contacted. In principle, therefore, the COMI for natural persons would be the place of their habitual residence. That approach was generally followed in later cases.¹⁰⁶

The case of *Eurofood* itself was concerned with a company debtor, and the circumstances in which the presumption in relation to the COMI of a company debtor may be rebutted, but as seen in *Stojevic*, the principles set out in that case are of general application. It was said that in relation to COMI: 25–58

“The scope of that concept is highlighted by the thirteenth recital in the Preamble to the Regulation, which states ‘The “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.’ That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with art.4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.”

The more recent case law on the COMI of individual debtors has tended to stress this aspect of the test for COMI.¹⁰⁷ 25–59

The European Commission noted that although the EC insolvency proceedings regulation covered the insolvency of natural persons irrespective of whether they were traders or consumers, it did not expressly address the COMI of individuals and that the evaluation study revealed inconsistencies in the practice of Member States.¹⁰⁸ It also noted that the determination of COMI was most difficult where a debtor relocated prior to the application for the opening of insolvency proceedings, and referred to the phenomenon of (abusive) COMI relocation which has become known as “bankruptcy tourism”, where individuals temporarily relocate their COMI in order to obtain a discharge from their debts on more favourable terms.¹⁰⁹ The issue of forum-shopping in this way is 25–60

¹⁰⁵ See also the later case of *Interedil Srl (in liquidation) v Fallimento Interedil Srl* [2012] B.C.C. 851.

¹⁰⁶ See *Official Receiver v Eichler* [2007] BPIR 1636 (although the bankruptcy in that case was later annulled on the facts: see *Re Eichler (A Bankrupt)* [2011] BPIR 1293); *Official Receiver v Mitterfellner* [2009] BPIR 1075; *Re Hagemeister* [2010] BPIR 1093. See also the earlier case of *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, in which the Court of Appeal also observed that COMI must be ascertainable by third parties, in particular creditors, and required an element of permanence.

¹⁰⁷ See *Irish Bank Resolution Corporation Ltd v Quinn* [2012] B.C.C. 608; *O'Donnell v Bank of Ireland* [2012] EWHC 3749; *Sparkasse Hilden Ratingen Velbert v Benk* [2012] EWHC 2432.

¹⁰⁸ European Commission Report, para.3.1.

¹⁰⁹ European Commission Report, para.3.1. As the Commission went on to acknowledge, the phenomenon is not confined to individuals, since companies may also relocate to take advantage

a vexed one. Recital 4 of the EC insolvency proceedings regulation narrated that it was necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position. On the other hand, there is nothing to stop a person, whether an individual or legal person, from relocating within the EU and, indeed, freedom of movement is regarded as one of the most cherished fundamental principles of the EU. There may also be “good” and “bad” forum-shopping: the Commission clearly regarded bankruptcy tourism as abusive, but considered that forum-shopping to obtain a more favourable restructuring regime was not necessarily abusive.¹¹⁰

25–61 These issues are now addressed to at least some extent in the EU insolvency proceedings regulation. It is now specifically provided that the debtor’s centre of main interests is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.¹¹¹ In addition, there are now rebuttable presumptions as to COMI for both companies and individuals. In the case of a company or legal person, there is a rebuttable presumption that the place of the registered office is the centre of its main interests, but that presumption applies only if the registered office has not been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings.¹¹² In the case of an individual exercising an independent business or professional activity, there is rebuttable presumption that their COMI is their principal place of business, but that presumption applies only where that principal place of business has not been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings.¹¹³ Finally, in the case of any other individual, there is a rebuttable presumption that their COMI is the place of their habitual residence, but that presumption applies only where the habitual residence has not been moved to another Member State within the six-month period prior to the request for the opening of insolvency proceedings.¹¹⁴ The temporal limitations seek to address the issue of (abusive) forum-shopping by ensuring that there will have to be a full examination of COMI in any case where there has been a relocation within the specified time limits on the principles set out in the *Eurofood* and *Interedil* cases.¹¹⁵ It may be noted that recital 5 of the EU insolvency proceedings regulation now narrates that it is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position *to the detriment of the general body of creditors [emphasis supplied]*.

25–62 Of course, bankruptcy law in Scotland is not concerned only with individual debtors but with specified entities. It is thought that such entities do not benefit from the presumption which applies in the case of a company or legal person because they do not have a registered office. As in any case where a rebuttable

of more favourable restructuring regimes. For a fuller discussion of the phenomenon of bankruptcy tourism, see Walter, A and Smith, A, “‘Bankruptcy Tourism’ under the EC Regulation on Insolvency Proceedings: A View from England and Wales” 2010 IIR 181; Fannon, IR, “Bankruptcy tourism—why and how?” 2013 Insolvency Intelligence 85.

¹¹⁰ European Commission Report, para.3.1.

¹¹¹ EU insolvency proceedings regulation art.3.1.

¹¹² EU insolvency proceedings regulation art.3.1.

¹¹³ EU insolvency proceedings regulation art.3.1.

¹¹⁴ EU insolvency proceedings regulation art.3.1.

¹¹⁵ See EU insolvency proceedings regulation, recitals 29–31.

presumption is disappplied, therefore, there will have to be a full examination of COMI on the principles set out in the *Eurofood* and *Interedil* cases.

The location of a debtor's COMI is a question of fact to be determined by the court.¹¹⁶ 25–63

The date for determining the debtor's COMI is the date when the opening of proceedings is requested.¹¹⁷ 25–64

Establishment

“Establishment” is defined as 25–65

“any place of operations where a debtor carries out, or has carried out in the three-month period prior to the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets”.¹¹⁸

It was held in the case of *Interedil Srl v Fallimento Interdil Srl and Intese Gestione Crediti SpA*¹¹⁹ that “establishment” must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity, and the presence alone of goods in isolation or bank accounts does not, in principle, meet that definition. 25–66

The definition has been amended slightly as a result of the reforms. The original definition referred to “goods” rather than “assets”: the latter is wider. In addition, the new definition clarifies that jurisdiction on this ground continues to exist where there is no longer an establishment provided the establishment only ceased to exist within the specified period.¹²⁰ 25–67

Applicable law: general

Articles 7–18 of the EU insolvency proceedings regulation establish uniform choice of law rules which replace, within their scope of application, the national rules of private international law.¹²¹ 25–68

Applicable law: the basic rule

The basic rule laid down in art. 7 of the EU insolvency proceedings regulation is that, subject to the exceptions provided for in the EU insolvency proceedings regulation itself, the law of the Member State where the proceedings are opened applies to the insolvency proceedings and their effects.¹²² This rule applies to both main and territorial proceedings. The European Commission concluded that there was no need for any changes to this rule.¹²³ 25–69

¹¹⁶ *Eurofood IFSC Ltd* [2006] B.C.C. 397.

¹¹⁷ *Staubitz-Schreiber* [2006] B.C.C. 639, ECJ.

¹¹⁸ EU insolvency proceedings regulation art.2(10).

¹¹⁹ *Interedil Srl v Fallimento Interdil Srl and Intese Gestione Crediti SpA* Case C-396/09 (ECJ).

¹²⁰ This change solved the problem which arose in *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, where the establishment was being wound up but had otherwise ceased to operate.

¹²¹ EU insolvency proceedings regulation, recital 66.

¹²² EU insolvency proceedings regulation art.7.1.

¹²³ European Commission Report, para.4.1.

25–70 The law of the Member State where the proceedings are opened determines the conditions for the opening of the proceedings, their conduct and their closure¹²⁴ and, in particular:

- (a) the debtors in respect of whom insolvency proceedings may be brought on account of their capacity¹²⁵;
- (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings¹²⁶;
- (c) the respective powers of the debtor and the insolvency practitioner¹²⁷;
- (d) the conditions under which set-off may be invoked¹²⁸;
- (e) the effects of insolvency proceedings on current contracts to which the debtor is party¹²⁹;
- (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending¹³⁰;
- (g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings¹³¹;
- (h) the rules governing the lodging, verification and admission of claims¹³²;
- (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through set-off¹³³;
- (j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition¹³⁴;
- (k) creditors' rights after the closure of insolvency proceedings¹³⁵;
- (l) who is to bear the costs and expenses incurred in the insolvency proceedings¹³⁶; and
- (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.¹³⁷

Applicable law: exceptions

25–71 The EU insolvency proceedings regulation makes provision for a number of exceptions to the basic rule in order to protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened.¹³⁸ The European Commission noted that some issues had been raised in relation to some of the exceptions, and identified issues in particular in relation to the exceptions for rights in rem, set-off, reservation of

¹²⁴ EU insolvency proceedings regulation art.7.2.

¹²⁵ EU insolvency proceedings regulation art.7.2(a).

¹²⁶ EU insolvency proceedings regulation art.7.2(b).

¹²⁷ EU insolvency proceedings regulation art.7.2(c).

¹²⁸ EU insolvency proceedings regulation art.7.2(d).

¹²⁹ EU insolvency proceedings regulation art.7.2(e).

¹³⁰ EU insolvency proceedings regulation art.7.2(f).

¹³¹ EU insolvency proceedings regulation art.7.2(g).

¹³² EU insolvency proceedings regulation art.7.2(h).

¹³³ EU insolvency proceedings regulation art.7.2(i).

¹³⁴ EU insolvency proceedings regulation art.7.2(j).

¹³⁵ EU insolvency proceedings regulation art.7.2(k).

¹³⁶ EU insolvency proceedings regulation art.7.2(l).

¹³⁷ EU insolvency proceedings regulation art.7.2(m).

¹³⁸ See EU insolvency proceedings regulation, recitals 68–73.

title, contracts of employment and detrimental acts.¹³⁹ It considered, however, that the main applicable law rules applied satisfactorily and did not require change.¹⁴⁰ No major changes have therefore been made.

Rights in rem

The first exception relates to third parties' rights in rem. This exception is recognised because such rights are regarded as being of "considerable importance" for the granting of credit.¹⁴¹ Article 8 of the EU insolvency proceedings regulation provides that the opening of insolvency proceedings will not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.¹⁴² The assets may be tangible or intangible; moveable or immovable; and specific or a changing collection of assets as a whole.¹⁴³ The Member State in which assets are situated is defined for various types of property.¹⁴⁴

The rights in rem are, in particular:

- (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage¹⁴⁵;
- (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee¹⁴⁶;
- (c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled¹⁴⁷; and
- (d) a right in rem to the beneficial use of assets.¹⁴⁸

It is also provided that the right, recorded in a public register and enforceable against third parties, based on which a right in rem may be obtained, shall itself be considered a right in rem.¹⁴⁹

These provisions do not, however, preclude any actions for voidness, voidability or unenforceability referred to in art.7.2(m) of the EU insolvency proceedings regulation.¹⁵⁰

The protection provided for rights in rem is not, however, absolute. The insolvency practitioner in main proceedings may request the opening of secondary

¹³⁹ European Commission Report, para.4.2. See also INSOL Europe's *Revision of the European Insolvency Regulation: Proposals by INSOL Europe* (2012) which proposed a number of changes.

¹⁴⁰ European Commission Report, para.4.2.

¹⁴¹ EU insolvency proceedings regulation, recital 68.

¹⁴² EU insolvency proceedings regulation art.8.1.

¹⁴³ EU insolvency proceedings regulation art.8.1.

¹⁴⁴ See EU insolvency proceedings regulation art.2(9). The various types of property are registered shares in companies, certain financial instruments, cash held in specified accounts, property and rights entered in a public register, European patents, copyright and related rights, tangible property and claims against third parties.

¹⁴⁵ EU insolvency proceedings regulation art.8.2(a).

¹⁴⁶ EU insolvency proceedings regulation art.8.2(b).

¹⁴⁷ EU insolvency proceedings regulation art.8.2(c).

¹⁴⁸ EU insolvency proceedings regulation art.8.2(d).

¹⁴⁹ EU insolvency proceedings regulation art.8.3.

¹⁵⁰ EU insolvency proceedings regulation art.8.4.

proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there¹⁵¹ and the opening of such proceedings may in turn affect the rights in rem.

Set-off

- 25–77** The second exception relates to set-off. As noted above, the basic rule is that the conditions under which set-off may be invoked are a matter for the law of the Member State where the proceedings are opened. However, art.9 of the EU insolvency proceedings regulation provides an exception to this where that law does not permit set-off in so far as it provides that the opening of insolvency proceedings will not affect the right of creditors to demand set-off of their claims against the claims of the debtor where such set-off is permitted by the law applicable to the insolvent debtor's claim.¹⁵² This provision does not, however, preclude any actions for voidness, voidability or unenforceability referred to in art.7.2(m).¹⁵³

Reservation of title

- 25–78** The third exception relates to reservation of title. As noted above, the basic rule is that the effects of insolvency proceedings on current contracts to which the debtor is party are a matter for the law of the Member State where the proceedings are opened. In view of the different treatment afforded to reservation of title in different states, however, art.10 of the EU insolvency proceedings regulation provides two qualifications to the basic rule.
- 25–79** The first is that the opening of insolvency proceedings against the purchaser of an asset will not affect the seller's rights under a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the state of opening of proceedings.¹⁵⁴ In these circumstances, therefore, the seller will be able to enforce their rights under the reservation of title if they are otherwise entitled to do so even if they would not have been allowed to do so by the law of the Member State where the proceedings are opened.
- 25–80** The second is that the opening of insolvency proceedings against the seller of an asset, after delivery of the asset, will not constitute grounds for rescinding or terminating the sale and will not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the state of the opening of proceedings.¹⁵⁵ In these circumstances, therefore, the buyer will be able to complete title to the asset if they fulfil their part of the contract even if they would not have been allowed to do so by the law of the Member State where the proceedings are opened.
- 25–81** As noted above in relation to the exception for rights in rem, the Member State in which assets are situated is defined for various types of property. These provisions do not, however, preclude any actions for voidness, voidability or unenforceability referred to in art.7.2(m).¹⁵⁶

¹⁵¹ See EU insolvency proceedings regulation, recital 68.

¹⁵² EU insolvency proceedings regulation art.9.1 and see recital 70.

¹⁵³ EU insolvency proceedings regulation art.9.2.

¹⁵⁴ EU insolvency proceedings regulation art.10.1.

¹⁵⁵ EU insolvency proceedings regulation art.10.2.

¹⁵⁶ EU insolvency proceedings regulation art.10.3.

Contracts relating to immoveable property

The fourth exception relates to contracts relating to immoveable property. As noted above, the basic rule is that the effects of insolvency proceedings on current contracts to which the debtor is party are a matter for the law of the Member State where the proceedings are opened, but art.11 of the EU insolvency proceedings regulation provides that the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property will be governed solely by the law of the Member State within the territory of which the immoveable property is situated.¹⁵⁷ However, the court which opened main insolvency proceedings has jurisdiction to approve the termination or modification of such a contract in specified circumstances.¹⁵⁸ **25-82**

This exception applies only where the property in question is situated in a Member State: where it is situated in a non-Member State, the basic rule will apply. **25-83**

Payments and financial markets

The fifth exception relates to payment systems and financial markets. This exception recognises the need for special protection of payment systems and financial markets and is intended to prevent the possibility of the mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner.¹⁵⁹ Article 12 of the EU insolvency proceedings regulation therefore provides that, without prejudice to art.8, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market will be governed solely by the law of the Member State applicable to that system or market.¹⁶⁰ **25-84**

This provision does not, however, preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.¹⁶¹ **25-85**

Contracts of employment

The sixth exception relates to contracts of employment. This exception is designed to protect employees and jobs.¹⁶² Article 13 of the EU insolvency proceedings regulation provides that the effects of insolvency proceedings on employment contracts and relationships will be governed solely by the law of the Member State applicable to the contract of employment.¹⁶³ However, the court of a Member State in which secondary insolvency proceedings may be opened retains jurisdiction to approve the termination or modification of such a contract even if no secondary proceedings have been opened.¹⁶⁴ **25-86**

¹⁵⁷ EU insolvency proceedings regulation art.11.1.

¹⁵⁸ EU insolvency proceedings regulation art.11.2.

¹⁵⁹ See EU insolvency proceedings regulation, recital 71.

¹⁶⁰ EU insolvency proceedings regulation art.12.1.

¹⁶¹ EU insolvency proceedings regulation art.12.2.

¹⁶² See EU insolvency proceedings regulation, recital 72.

¹⁶³ EU insolvency proceedings regulation art.13.1

¹⁶⁴ EU insolvency proceedings regulation art.13.2.

- 25-87** These provisions apply only where the employment contract or relationship is governed by the law of a Member State: where it is governed by the law of a non-Member State, the basic rule will apply. Other questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, will be determined by the law of the Member State where the proceedings are opened except where an undertaking has been given in order to avoid the opening of secondary proceedings.¹⁶⁵

Rights subject to registration

- 25-88** The seventh exception relates to rights subject to registration. Article 14 of the EU insolvency proceedings regulation provides that the effects of insolvency proceedings on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register will be determined by the law of the Member State under the authority of which the register is kept.

Community patents and trade marks

- 25-89** The eighth exception relates to European patents, Community trade marks and any other similar right which may be established by European Union law. Article 15 of the EU insolvency proceedings regulation provides that for the purposes of the EU insolvency proceedings regulation, a European patent, a Community trade mark or any other similar right established by EU law may be included only in main proceedings.

Detrimental acts

- 25-90** The ninth exception relates to what are described as detrimental acts. As noted above, the basic rule is that the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors are a matter for the law of the Member State where the proceedings are opened, but art.16 of the EU insolvency proceedings regulation disapplies that rule where the person who benefited from an act detrimental to all the creditors provides proof that the act is subject to the law of a Member State other than that of the state of the opening of proceedings and that law does not allow any means of challenging that act in the relevant case. Thus, a transaction which would have been challengeable under the rules of the law of the Member State where the proceedings are opened will escape challenge if it escapes challenge under the law of another Member State which is the governing law of the transaction. The onus of establishing this is on the person seeking to rely on art.13.¹⁶⁶ In principle, art.13 is not applicable to acts which take place after the opening of insolvency proceedings, but there may be exceptions.¹⁶⁷

- 25-91** This provision applies only where the transaction is governed by the law of a Member State: where it is governed by the law of a non-Member State, the basic rule will apply.

Protection of third party purchasers

- 25-92** The tenth exception relates to the protection of third-party purchasers. In the interests of maintaining confidence in public registers art.17 of the EU insolvency proceedings regulation provides that where, by an act concluded after

¹⁶⁵ See EU insolvency proceedings regulation, recital 72.

¹⁶⁶ *Nike European Operations Netherlands BV v Sportland Oy (in liquidation)* [2015] EUECJ C-310/14.

¹⁶⁷ *Lutz v Bäuerle* [2015] EUECJ C-557/13.

the opening of insolvency proceedings, the debtor disposes, for consideration, of an immoveable asset, a ship or an aircraft subject to registration in a public register or securities whose existence requires registration in a register laid down by law, the validity of that act will be governed by the law of the state within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

Lawsuits pending

The eleventh and final exception relates to lawsuits pending. As noted above, the basic rule is that the effects of insolvency proceedings on proceedings brought by individual creditors, *with the exception of lawsuits pending* [emphasis supplied], is a matter for the law of the Member State where the proceedings are opened. Article 18 of the EU insolvency proceedings regulation provides a special rule for pending lawsuits or arbitral proceedings to the effect that the effects of insolvency proceedings on a pending lawsuit or arbitral proceedings concerning an asset or a right which forms part of the debtor's estate will be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.¹⁶⁸ **25-93**

If the lawsuit or arbitral proceedings does not concern an asset or right which forms part of the debtor's estate or is pending in a non-Member State, this provision will not apply. **25-94**

Principles of recognition

Judgments opening insolvency proceedings

The EU insolvency proceedings regulation provides for the automatic recognition of a judgment opening insolvency proceedings in all other participating Member States. Article 19.1 provides that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to art.3 must be recognised in all the other Member States from the time it becomes effective in the state of the opening of proceedings. This rule applies even where insolvency proceedings could not be opened in relation to the debtor in the other Member State on account of the debtor's capacity.¹⁶⁹ It is specifically provided, however, that the recognition of main proceedings does not preclude the opening of territorial proceedings in the recognising Member State, any such proceedings being secondary proceedings.¹⁷⁰ **25-95**

Difficulties arise where the courts of different Member States each conclude that they have jurisdiction to open main proceedings or where a court in one Member State simply does not accept that the court of another Member State has such jurisdiction. Such difficulties arose in a number of cases concerning company debtors in the early days of the EC insolvency proceedings, and while this may be less likely to happen in the context of bankruptcy as opposed to corporate insolvency, it is possible. The difficulties were exemplified in the case of *Eurofood IFSC Ltd*,¹⁷¹ in which the European Court of Justice held that on a proper interpretation of the predecessor of this provision, which was in identical terms, main proceedings opened by a court in one Member State must be recognised by the courts in the other Member States without the latter being **25-96**

¹⁶⁸ See also EU insolvency proceedings regulation, recital 73.

¹⁶⁹ EU insolvency proceedings regulation art.19.1.

¹⁷⁰ EU insolvency proceedings regulation art.19.2.

¹⁷¹ *Eurofood IFSC Ltd* [2006] B.C.C. 397.

able to review the jurisdiction of the former. The court said that a party who wished to challenge the jurisdiction assumed by the court which had opened main proceedings must use the remedies available under the national law of the courts of the Member State in which the main proceedings were opened. The rule that insolvency proceedings opened in one Member State are to be recognised in all other Member States from the time they are effective in the state of the opening of proceedings is based on the principle of mutual trust, and it is inherent in this principle that the court of a Member State hearing an application for the opening of main proceedings checks that it has the necessary jurisdiction by examining, in a way which complies with the essential procedural guarantees required for a fair legal process, whether the debtor's COMI is situated in the Member State. The corollary of this is that the courts of the other Member States are required to recognise the decision opening main proceedings without being able to review the assessment made by the first court as to its jurisdiction. The introduction of explicit provisions relating to the examination of jurisdiction by the court seised of a request to open insolvency proceedings and the challenge of a decision to open main insolvency proceedings, discussed above, is meant to help to ensure that the process elucidated by the court in *Eurofood* happens as intended.

- 25–97** Where there is more than one decision purporting to open main proceedings, it is critical to be able to identify when the respective proceedings were opened in order to ascertain which decision is first. In *Eurofood*, the European Court of Justice held that a decision of the Irish court to appoint a provisional liquidator was a decision opening insolvency proceedings for the purpose of the predecessor of this provision. It considered that a decision to open insolvency proceedings must be regarded as including not only a decision formally described as such, but a decision handed down following an application, based on the debtor's insolvency, seeking the opening of insolvency proceedings encompassed by the regulation, where that decision involved divestment of the debtor (in the sense of the debtor's loss of the powers of management over their assets) and the appointment of a insolvency practitioner. By analogy, a decision of the sheriff appointing an interim trustee in sequestration would constitute a decision opening insolvency proceedings. The European Court of Justice refrained from expressing a view, however, on the issue of whether the presentation of a winding up petition could constitute the opening of proceedings where the date of presentation of the petition is the date of commencement of the proceedings in domestic law, although the Advocate General in his opinion, while refraining from giving a detailed answer to the question, was inclined to the view that it could.¹⁷² A similar issue arises in the case of a petition for sequestration, where the date of sequestration is the date of the first warrant to cite.¹⁷³ The European Commission noted that it was not always clear when the opening of insolvency proceedings became effective,¹⁷⁴ but the reforms do not explicitly address this issue. The position therefore remains uncertain.

Other judgments

- 25–98** The EU insolvency proceedings regulation also makes provision for the recognition and enforceability of judgments other than those opening insolvency proceedings. Such judgments are divided into two categories. The first category includes judgments concerning the course and closure of insolvency

¹⁷² See *Eurofood IFSC Ltd* [2005] B.C.C. 1021.

¹⁷³ See Ch.8.

¹⁷⁴ European Commission Report, para.5.

proceedings handed down by the court whose judgment opening those proceedings is recognised in accordance with art.19; compositions approved by that court; judgments deriving directly from the insolvency proceedings and closely linked with them whether handed down by that court or another court; and judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.¹⁷⁵ Such judgments must be recognised by other Member States with no further formalities and are enforced in accordance with arts 39–44 and 47–57 of the Brussels I Regulation.¹⁷⁶ The second category includes any other judgment and both recognition and enforcement of such judgments are governed by the Brussels I Regulation where applicable.¹⁷⁷

Public policy

A Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.¹⁷⁸ It is clear that the exception is intended to be used only in the most exceptional circumstances. In *Eurofood*, the European Court of Justice said that on a proper interpretation of this provision, a Member State might refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard which a person concerned by such proceedings enjoyed. It was for the court considering whether to refuse recognition to establish whether there had in fact been such a breach, but the court should not transpose its own conceptions of the requirement for an oral hearing and how fundamental such a requirement was in its own legal system, but must assess, having regard to the whole of the circumstances, whether or not the person in question was given sufficient opportunity to be heard. 25–99

Effects of recognition

Main proceedings

The judgment opening main proceedings produces, with no further formalities, the same effects in any other Member State as under the law of the state of the opening of the proceedings, unless the EU insolvency proceedings regulation provides otherwise and so long as there are no territorial proceedings in the other Member State.¹⁷⁹ 25–100

Territorial proceedings

The effects of territorial proceedings may not be challenged in any other Member State, but any restriction of creditors' rights, in particular any stay or discharge, will affect assets situated within the territory of another Member State only in the case of those creditors who have given their consent.¹⁸⁰ 25–101

Powers of insolvency practitioner

The insolvency practitioner appointed in main proceedings may exercise all the powers conferred on them by the law of the state of the opening 25–102

¹⁷⁵ EU insolvency proceedings regulation art.32.1.

¹⁷⁶ EU insolvency proceedings regulation art.32.1.

¹⁷⁷ EU insolvency proceedings regulation art.32.2.

¹⁷⁸ EU insolvency proceedings regulation art.33.

¹⁷⁹ EU insolvency proceedings regulation art.20.1.

¹⁸⁰ EU insolvency proceedings regulation art.20.2.

of proceedings in any other Member State so long as no other insolvency proceedings have been opened there and no preservation measures to the contrary have been taken there as a result of a request for the opening of insolvency proceedings there.¹⁸¹ They may, in particular, remove the debtor's assets from any Member State in which they are situated, subject to art.8 (third parties' rights in rem) and art.10 (reservation of title).¹⁸²

25-103 The insolvency practitioner appointed in territorial proceedings may seek the return of moveable property removed from the state of the opening of the territorial proceedings to another Member State after the opening of the territorial proceedings and may bring any action to set aside which is in the interests of the creditors.¹⁸³

25-104 An insolvency practitioner must comply with the law of the Member State in which they intend to take action, in particular with regard to procedures for the realisation of assets.¹⁸⁴ The powers that they may exercise do not include any coercive measures (unless ordered by a court) or right to rule on legal proceedings or disputes.¹⁸⁵

Proof of insolvency practitioner's appointment

25-105 The insolvency practitioner's appointment is evidenced by a certified copy of the original decision appointing them or by any other certificate issued by the court.¹⁸⁶ No legalisation or similar formality is required, although a translation into the official language or one of the official languages of the Member State in which they intend to act may be.¹⁸⁷

Publication

25-106 The EC insolvency proceedings provided for optional but not mandatory publication and registration of the opening of insolvency proceedings/the appointment of an insolvency practitioner in other Member States, and the European Commission noted that the absence of mandatory publication and registration was a problem.¹⁸⁸ The EU insolvency proceedings regulation now therefore contains provisions for mandatory publication and registration and the establishment of interconnected insolvency registers.

25-107 The insolvency practitioner must request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing them, be published in any other Member State in which the debtor has an establishment in accordance with the publication procedures provided for in that state.¹⁸⁹ The publication must specify, where appropriate, the insolvency practitioner appointed and whether the proceedings are main or territorial proceedings.¹⁹⁰ The insolvency practitioner may request such publication in any other Member State they deem necessary.¹⁹¹

¹⁸¹ EU insolvency proceedings regulation art.21.1.

¹⁸² EU insolvency proceedings regulation art.21.1.

¹⁸³ EU insolvency proceedings regulation art.21.2.

¹⁸⁴ EU insolvency proceedings regulation art.21.3.

¹⁸⁵ EU insolvency proceedings regulation art.21.3.

¹⁸⁶ EU insolvency proceedings regulation art.22.

¹⁸⁷ EU insolvency proceedings regulation art.22.

¹⁸⁸ European Commission Report, para.5.

¹⁸⁹ EU insolvency proceedings regulation art.28.1.

¹⁹⁰ EU insolvency proceedings regulation art.28.1.

¹⁹¹ EU insolvency proceedings regulation art.28.2.

In addition, the insolvency practitioner must take all necessary steps to register **25–108** information about the opening insolvency proceedings in the land register, company register or any other public register of a Member State in which the debtor has an establishment which is registered in a public register or in which the debtor has immoveable property where such registration is required by the law of that Member State.¹⁹² The insolvency practitioner may request such registration in any other Member State which allows it.¹⁹³

The costs of such publication and registration are costs and expenses in the **25–109** proceedings.¹⁹⁴

Articles 24–27 of the EU insolvency proceedings regulation make provision **25–110** for the establishment and operation of interconnected insolvency registers. In terms of these provisions, Member States are required to establish and maintain one or more registers in which information about insolvency proceedings is published.¹⁹⁵ The information must be published as soon as possible after the opening of the proceedings¹⁹⁶ and must be publicly available.¹⁹⁷ It must include certain mandatory information¹⁹⁸ and may also include any other documents or additional information Member States wish to include.¹⁹⁹

Member States are not obliged to include information in relation to individuals **25–111** not exercising an independent business or professional activity, or to make such information publicly available through the system of interconnection of the registers, provided that known foreign creditors are informed of specified information, but where a Member State utilises this opt-out, the insolvency proceedings do not affect the claims of foreign creditors who have not received the relevant information.²⁰⁰

The European Commission is to establish a decentralised system for the inter- **25–112** connection of insolvency registers through the European e-Justice Portal²⁰¹ and must adopt specified measures for this purpose by 26 June 2019.²⁰² The costs of the establishment, maintenance and future development of the system of interconnection of insolvency registers is to be financed from the general budget of the Union,²⁰³ but each Member State has to bear the costs of establishing and adjusting its national insolvency registers to make them interoperable with the European e-Justice Portal, as well as the costs of administering, operating and maintaining the registers.²⁰⁴

Member States must ensure that mandatory information is available free of **25–113** charge via the system of interconnection of insolvency registers,²⁰⁵ but are not precluded from charging a reasonable fee for access to any other documents or

¹⁹² EU insolvency proceedings regulation art.29.1.

¹⁹³ EU insolvency proceedings regulation art.29.2.

¹⁹⁴ EU insolvency proceedings regulation art.30.

¹⁹⁵ EU insolvency proceedings regulation art.24.1.

¹⁹⁶ EU insolvency proceedings regulation art.24.1.

¹⁹⁷ EU insolvency proceedings regulation art.24.2.

¹⁹⁸ EU insolvency proceedings regulation art.24.2.

¹⁹⁹ EU insolvency proceedings regulation art.24.3.

²⁰⁰ EU insolvency proceedings regulation art.24.4.

²⁰¹ EU insolvency proceedings regulation art.25.1.

²⁰² EU insolvency proceedings regulation art.25.2.

²⁰³ EU insolvency proceedings regulation art.26.1.

²⁰⁴ EU insolvency proceedings regulation art.26.2.

²⁰⁵ EU insolvency proceedings regulation art.27.1.

additional information.²⁰⁶ Access to certain information may be made conditional upon a request to the competent authority in a Member State and may be conditional upon the verification of the existence of a legitimate interest for accessing such information.²⁰⁷

Protection of third parties

- 25–114** The EU insolvency proceedings regulation contains provisions for the protection of third parties who have dealt with the debtor after the opening of proceedings in another Member State.
- 25–115** Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State when it should have been honoured for the benefit of the insolvency practitioner in those proceedings, the person honouring the obligation shall be deemed to have discharged it if they were unaware of the opening of proceedings.²⁰⁸
- 25–116** Where such an obligation is honoured before the publication of the opening of the proceedings/appointment of the insolvency practitioner, there is a rebuttable presumption that the person honouring the obligation was unaware of the opening of insolvency proceedings.²⁰⁹ Where the obligation is honoured after such publication, however, there is a rebuttable presumption that the person honouring the obligation was aware of the opening of proceedings.²¹⁰

Hotchpot

- 25–117** The EU insolvency proceedings regulation incorporates the “hotchpot rule”. Where a creditor, after the opening of main proceedings, obtains the total or partial satisfaction of their claim by any means, in particular through enforcement, on the assets belonging to the debtor situated within the territory of another Member State, they must return what they have obtained to the insolvency practitioner, subject to arts 8 (third parties’ rights in rem) and 10 (reservation of title).²¹¹ Furthermore, in order to ensure equal treatment of creditors, a creditor who has, in the course of insolvency proceedings, obtained a dividend on their claim may share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.²¹²

Secondary proceedings

- 25–118** As noted above, the opening of main proceedings in one Member State permits the opening of secondary proceedings in another Member State in which the debtor has an establishment.²¹³ Where the main proceedings required the debtor’s insolvency, this will not be re-examined in the secondary proceedings.²¹⁴

²⁰⁶ EU insolvency proceedings regulation art.27.2.

²⁰⁷ EU insolvency proceedings regulation arts 27.3 and 27.4.

²⁰⁸ EU insolvency proceedings regulation art.31.1. For a case in which it was held that a payment was not protected by this provision, see *Van Buggenhout v Banque Internationale à Luxembourg SA* [2013] EUECJ C-251/12.

²⁰⁹ EU insolvency proceedings regulation art.31.2.

²¹⁰ EU insolvency proceedings regulation art.31.2.

²¹¹ EU insolvency proceedings regulation art.23.1.

²¹² EU insolvency proceedings regulation art.23.2.

²¹³ See EU insolvency proceedings regulation art.34.

²¹⁴ EU insolvency proceedings regulation art.34. Prior to the reforms, it was not clear whether the question of a debtor’s insolvency could not be examined or could be examined but need not be: see *Bank Handlowy w Warszawie SA v Christianapol sp. z o.o* [2012] EUECJ C-116/11, in which

Secondary proceedings are restricted to the assets in the territory of the Member State in which they are opened.²¹⁵

As well as protecting the interests of local creditors, secondary proceedings were originally envisaged as providing a means for the insolvency practitioner in the main proceedings to achieve a more efficient administration of the debtor's estate in complex cases.²¹⁶ The European Commission found, however, that the insolvency practitioner in main proceedings applied for the opening of secondary proceedings in only a small number of cases and that secondary proceedings were used (and abused) for different reasons, in particular as a tool for the protection of local interests and as an instrument in jurisdictional conflicts.²¹⁷ The evaluation study estimated that the disadvantages of secondary proceedings were more significant than their advantages.²¹⁸ Particular issues included:

- (a) the fact that such proceedings had to be winding up proceedings;
- (b) the absence of specific rules on the procedure for opening secondary proceedings;
- (c) the fact that it was unclear whether insolvency practitioners in all Member States had the power to give a binding undertaking to those creditors who might apply for the opening of secondary proceedings that the preferential rights they would enjoy on the opening of secondary proceedings would be respected in the main proceedings in order to prevent the opening of main proceedings²¹⁹; and
- (d) the duties to co-operate and communicate were seen as too vague and lacking in so far as there was no provision for co-operation between courts and between insolvency practitioners and courts.

The provisions relating to secondary proceedings have therefore been extensively amended. In particular, secondary proceedings are no longer required to be winding up proceedings, and as noted at para.25–36 the concept of winding up proceedings is no longer part of the EU insolvency proceedings regulation. Specific rules relating to the decision to open secondary proceedings have been introduced. Provision has also been introduced for a binding undertaking in order to avoid the opening of secondary proceedings, creating what is sometimes referred to as synthetic secondary proceedings. Such an undertaking is likely to be rare in the context of bankruptcy as opposed to corporate insolvency, but appropriate provision has been made in relation to such undertakings in the Bankruptcy (Scotland) Act 2016.²²⁰ Enhanced provisions for co-operation and communication have also been introduced.

Applicable law

Except as otherwise provided in the EU insolvency proceedings regulation, the law applicable to secondary proceedings is that of the Member State in which the secondary proceedings are opened.²²¹

it was held that the former was the correct interpretation. The provision was, however, amended to make the position clear.

²¹⁵ EU insolvency proceedings regulation art.34.

²¹⁶ See EC insolvency proceedings regulation, recital 19.

²¹⁷ European Commission Report, para.6.

²¹⁸ European Commission Report, para.6.

²¹⁹ European Commission Report, para.6. The use of such undertakings had been pioneered in English cases such as *Re Collins and Aikman Europe SA* [2006] EWHC 1343 (Ch), where undertakings were given on the basis that it was within the powers of the insolvency practitioner under English law.

²²⁰ See further at para.25–122 onwards.

²²¹ EU insolvency proceedings regulation art.35.

Undertaking in order to avoid opening of secondary proceedings

- 25-122** In order to avoid the opening of secondary proceedings, the insolvency practitioner in the main proceedings may give a unilateral undertaking that when distributing the assets located in a Member State in which secondary proceedings could be opened, they will comply with the distribution and priority rights that creditors would have if secondary proceedings were opened in that Member State.²²² The undertaking must specify the factual assumptions on which it is based, in particular as to the value of the assets located in the Member State and the options available to realise the assets.²²³
- 25-123** Where such an undertaking has been given, the law applicable to the distribution of the proceeds from the realisation of assets, the ranking of creditors' claims and the rights of creditors in relation to the assets will be the law of the Member State in which secondary insolvency proceedings could have been opened.²²⁴ The assets are to be determined at the time at which the undertaking is given.²²⁵
- 25-124** The undertaking must be in writing²²⁶ and must be approved by the known local creditors.²²⁷ The rules on qualified majority and voting which apply to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened apply to the approval of the undertaking and creditors may participate in the vote by distance means of communication if the national law permits.²²⁸ The insolvency practitioner must inform the known local creditors of the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking.²²⁹
- 25-125** An undertaking given and approved in accordance with these provisions is binding on the estate.²³⁰ If secondary proceedings are subsequently opened, the insolvency practitioner in the main proceedings must transfer any assets removed from the territory of the Member State after the undertaking was given or their proceeds to the insolvency practitioner in the secondary proceedings.²³¹
- 25-126** The insolvency practitioner must inform local creditors about the intended distributions prior to distributing the assets and if the information does not comply with the terms of the undertaking or the applicable law, any local creditor may challenge the distribution before the courts of the Member State in which main proceedings have been opened in order to obtain a distribution in accordance with the terms of the undertaking and the applicable law.²³² No distribution can take place until the court has taken a decision on the challenge.²³³

²²² EU insolvency proceedings regulation art.36.1.

²²³ EU insolvency proceedings regulation art.36.1.

²²⁴ EU insolvency proceedings regulation art.36.2.

²²⁵ EU insolvency proceedings regulation art.36.2.

²²⁶ EU insolvency proceedings regulation art.36.4.

²²⁷ EU insolvency proceedings regulation art.36.5.

²²⁸ EU insolvency proceedings regulation art.36.5.

²²⁹ EU insolvency proceedings regulation art.36.5.

²³⁰ EU insolvency proceedings regulation art.36.6.

²³¹ EU insolvency proceedings regulation art.36.6.

²³² EU insolvency proceedings regulation art.36.7.

²³³ EU insolvency proceedings regulation art.36.7.

Local creditors may apply to the courts of the Member State in which main proceedings have been opened in order to require the insolvency practitioner in the main proceedings to take any suitable measures available under the law of that state which are necessary to ensure compliance with the terms of the undertaking.²³⁴ They may also apply to the courts of the Member State in which secondary proceedings could have been opened in order to require the court to take provisional or protective measures to ensure compliance by the insolvency practitioner with the terms of the undertaking.²³⁵ **25-127**

The insolvency practitioner is liable for any damage caused to local creditors as a result of any non-compliance.²³⁶ **25-128**

For the purpose of these provisions, an authority in the Member State where secondary insolvency proceedings could have been opened which is obliged to guarantee the payment of employees' outstanding claims resulting from contracts of employment or employment relationships is considered to be a local creditor if the national law so provides.²³⁷ **25-129**

Where a trustee in sequestration or a trustee under a protected trust deed intends to give such an undertaking, they must also comply with the requirements of s.14A of the Bankruptcy (Scotland) Act 2016.²³⁸ **25-130**

Where an insolvency practitioner in main proceedings in another Member State proposes to give an undertaking in order to avoid a Scottish sequestration or protected trust deed, the procedure for approval of the undertaking is set out in s.14B of the Bankruptcy (Scotland) Act 2016. **25-131**

Application to open secondary proceedings

The opening of secondary proceedings may be requested by the insolvency practitioner in the main proceedings or any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State in which the opening of secondary proceedings is requested.²³⁹ It is a matter for the law of each Member State who may apply for the opening of secondary proceedings.²⁴⁰ Secondary proceedings may be opened notwithstanding that the main proceedings are protective.²⁴¹ **25-132**

Where the insolvency practitioner in the main proceedings has given an undertaking to avoid the opening of secondary proceedings which has become binding, the application for the opening of secondary proceedings must be made within 30 days of receipt of notice of approval of the undertaking.²⁴² **25-133**

Decision to open secondary proceedings

A court seised of a request to open secondary insolvency proceedings must immediately give notice to the insolvency practitioner in the main proceedings and give them an opportunity to be heard on the request.²⁴³ **25-134**

²³⁴ EU insolvency proceedings regulation art.36.8.

²³⁵ EU insolvency proceedings regulation art.36.9.

²³⁶ EU insolvency proceedings regulation art.36.10.

²³⁷ EU insolvency proceedings regulation art.36.11.

²³⁸ See further Chs 12 (trustee in sequestration) and 22 (trustee under protected trust deed).

²³⁹ EU insolvency proceedings regulation art.37.1.

²⁴⁰ *Burgo Group SpA v Illochroma SA (in liquidation)* [2014] EUECJ C-327/13.

²⁴¹ *Bank Handlowy w Warszawie SA v Christianapol sp. z o.o* [2012] EUECJ C-116/11.

²⁴² EU insolvency proceedings regulation art.37.2.

²⁴³ EU insolvency proceedings regulation art.38.1.

- 25–135** Where the insolvency practitioner has given an undertaking to avoid the opening of secondary proceedings and opposes the opening of secondary proceedings, the court must refuse to open such proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.²⁴⁴ In any other case, if the court has a discretion as to whether to open proceedings under national law, the court may exercise that discretion accordingly.²⁴⁵
- 25–136** Where a temporary stay of individual enforcement proceedings has been granted to allow for negotiations between the debtor and the debtor's creditors, the court may stay the opening of secondary proceedings for a period not exceeding three months, subject to the proviso that suitable measures are in place to protect the interests of local creditors.²⁴⁶ In order to protect the interest of local creditors during the stay, the court may require the insolvency practitioner not to remove or dispose of any assets located in the Member State unless this is done in the ordinary course of business²⁴⁷ and may order any other measures unless these are incompatible with the national rules on civil procedure.²⁴⁸ Where an agreement in the negotiations has been concluded, the court must lift the stay *ex proprio motu* or at the request of any creditor.²⁴⁹ The stay may be lifted by the court *ex proprio motu* or at the request of any creditor if its continuation is detrimental to the creditor's rights.²⁵⁰
- 25–137** On the application of the insolvency practitioner in the main proceedings, the court may open a different type of insolvency proceedings to the type initially requested if the conditions for opening that type of proceedings are met and the type of proceedings is the most appropriate in the interests of the local creditors and coherence between the main and secondary proceedings.²⁵¹ This would not, however, be relevant in the context of bankruptcy in Scotland, since of the types of bankruptcy proceeding available, only sequestration is opened by the court.
- 25–138** The insolvency practitioner in the main proceedings may challenge the decision to open secondary proceedings before the courts of the Member State in which secondary proceedings have been opened on the grounds that the court has not complied with the requirements set out above.²⁵²

Co-ordination of main and secondary proceedings

- 25–139** The EU insolvency proceedings regulation contains a number of provisions for the co-ordination of main and secondary proceedings.
- 25–140** Article 41 contains provisions for co-operation and communication between insolvency practitioners. The insolvency practitioner in the main proceedings and the insolvency practitioner(s) in secondary proceedings must co-operate with each other so far as such co-operation is not incompatible with the rules applicable to the respective proceedings.²⁵³ Such co-operation may take any

²⁴⁴ EU insolvency proceedings regulation art.38.2.

²⁴⁵ *Burgo Group SpA v Illochroma SA (in liquidation)* [2014] EUECJ C-327/13.

²⁴⁶ EU insolvency proceedings regulation art.38.3.

²⁴⁷ EU insolvency proceedings regulation art.38.3.

²⁴⁸ EU insolvency proceedings regulation art.38.3.

²⁴⁹ EU insolvency proceedings regulation art.38.3.

²⁵⁰ EU insolvency proceedings regulation art.38.3.

²⁵¹ EU insolvency proceedings regulation art.38.4.

²⁵² EU insolvency proceedings regulation art.39.

²⁵³ EU insolvency proceedings regulation art.41.1.

form, including the conclusion of agreements or protocols.²⁵⁴ The insolvency practitioners must, so far as relevant²⁵⁵:

- (a) communicate as soon as possible any information relevant to the other proceedings, in particular regarding progress in lodging and verifying claims and measures aimed at rescuing or restructuring the debtor or at terminating the proceedings, subject to appropriate arrangements for protecting confidential information;
- (b) explore the possibility of restructuring the debtor and, if such a possibility exists, co-ordinate the development and implementation of a restructuring plan; and
- (c) co-ordinate the administration of the realisation or use of the debtor's assets and affairs: the insolvency practitioner in the secondary insolvency proceedings must give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary insolvency proceedings.

Guidance on co-operation can be found in the European Communication **25-141** and Co-operation Guidelines for Cross-Border Insolvency referred to in Ch.24.

Article 42 contains new provisions for co-operation and communication **25-142** between courts. A court which has opened insolvency proceedings or before which a request to open insolvency proceedings is pending must co-operate with any other such court to the extent that such co-operation is not incompatible with the rules applicable to each of the proceedings.²⁵⁶ The courts may, where appropriate, appoint an independent person or body acting on its instructions.²⁵⁷ The courts or appointed person or body may communicate directly with, or request information or assistance directly from, each other, subject to the proviso that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.²⁵⁸ Co-operation may be implemented by any means that the court considers appropriate and may concern, in particular²⁵⁹:

- (a) co-ordination in the appointment of the insolvency practitioners;
- (b) communication of information by any means considered appropriate by the court;
- (c) co-ordination of the administration and supervision of the debtor's assets and affairs;
- (d) co-ordination of the conduct of hearings;
- (e) co-ordination in the approval of protocols, where necessary.

Article 43 contains new provisions for co-operation and communication **25-143** between insolvency practitioners and courts. An insolvency practitioner in main proceedings must co-operate and communicate with any court which has opened secondary proceedings or before which a request to open secondary

²⁵⁴ EU insolvency proceedings regulation art.41.1.

²⁵⁵ EU insolvency proceedings regulation art.41.2.

²⁵⁶ EU insolvency proceedings regulation art.42.1.

²⁵⁷ EU insolvency proceedings regulation art.42.1.

²⁵⁸ EU insolvency proceedings regulation art.42.2.

²⁵⁹ EU insolvency proceedings regulation art.42.3.

proceedings is pending²⁶⁰; an insolvency practitioner in independent territorial or secondary insolvency proceedings must co-operate and communicate with the court which has opened main proceedings or before which a request to open main proceedings is pending²⁶¹; and an insolvency practitioner in independent territorial or secondary proceedings must also co-operate and communicate with any court which has opened other independent territorial or secondary proceedings or before which a request to open independent territorial or secondary insolvency proceedings is pending.²⁶² In each case, such co-operation and communication must be compatible with the rules applicable to each of the proceedings or must not entail any conflict of interest.²⁶³ Co-operation may be implemented by any appropriate means, including those specified in the provisions relating to co-operation and communication between courts discussed above.²⁶⁴

25–144 Courts must not charge each other costs for implementing co-operation and communication.²⁶⁵

25–145 Article 45 contains provisions for exercise of creditors' rights. Any creditor may lodge their claim in both the main proceedings and any secondary proceedings²⁶⁶ and provision is also made for the cross-lodging of claims by the insolvency practitioners in the main and any secondary proceedings provided that this is in the interests of the creditors in their own proceedings and subject to the right of any creditor to oppose the lodging of their claim in any other proceedings or to withdraw their claim where the applicable law allows.²⁶⁷ In addition, the insolvency practitioner in both main and secondary proceedings is empowered to participate in any other proceedings on the same basis as a creditor, including by attending creditors' meetings.²⁶⁸

25–146 Article 46 contains provisions for a stay of the process of realisation of assets. It allows the insolvency practitioner in the main proceedings to apply to the court which opened secondary proceedings for a *sist* of these proceedings in whole or in part, and such an application may be refused only if it is manifestly of no interest to the creditors in the main proceedings.²⁶⁹ A *sist* may be for up to three months and may be continued or renewed for further periods of up to three months and the court may require the insolvency practitioner in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors.²⁷⁰ The court must terminate such a *sist* *either* on the application of the insolvency practitioner in the main proceedings *or*, if the *sist* no longer appears justified by the interests of creditors in the main or the secondary proceedings or otherwise, *either ex proprio motu* or on the application of a creditor or the insolvency practitioner in the secondary proceedings.²⁷¹

²⁶⁰ EU insolvency proceedings regulation art.43.1(a).

²⁶¹ EU insolvency proceedings regulation art.43.1(b).

²⁶² EU insolvency proceedings regulation art.43.1(c).

²⁶³ EU insolvency proceedings regulation art.43.1.

²⁶⁴ EU insolvency proceedings regulation art.43.2.

²⁶⁵ EU insolvency proceedings regulation art.44.

²⁶⁶ EU insolvency proceedings regulation art.45.1.

²⁶⁷ EU insolvency proceedings regulation art.45.2.

²⁶⁸ EU insolvency proceedings regulation art.45.3.

²⁶⁹ EU insolvency proceedings regulation art.46.1.

²⁷⁰ EU insolvency proceedings regulation art.46.1.

²⁷¹ EU insolvency proceedings regulation art.46.2.

Article 47 contains provisions for the insolvency practitioner in main proceedings to propose a restructuring plan. It provides that where secondary proceedings may be brought to an end by a rescue plan, composition or similar measure, the insolvency practitioner in the main proceedings may propose such a measure themselves.²⁷² These provisions are not, however, relevant in the context of bankruptcy in Scotland. **25-147**

Article 48 provides that the closure of insolvency proceedings does not prevent the continuation of other insolvency proceedings concerning the same debtor which are still open.²⁷³ This is without prejudice to art.49, which provides that if there are any assets remaining in secondary proceedings after the payment of all the claims allowed under those proceedings, these must be transferred to the insolvency practitioner in the main proceedings. **25-148**

As noted above, where main proceedings are opened after the opening of independent territorial proceedings, the independent territorial proceedings effectively become secondary proceedings²⁷⁴ and there is provision for secondary proceedings of one type to be converted into another type in certain cases.²⁷⁵ **25-149**

Information for creditors and lodgement of their claims

The EU insolvency proceedings regulation provides important rights for creditors in a Member State who are faced with submitting their claims in insolvency proceedings in another Member State. The European Commission noted that there were practical problems relating to certain aspects of the lodging of claims, in particular language barriers, costs, time limits, and lack of relevant information.²⁷⁶ The provisions on information and lodgement of claims have therefore been extensively revised, in particular with the introduction of standard forms for the lodging of claims. The provisions are set out in Ch.IV. **25-150**

Right to lodge claims

Any foreign creditor has the right to lodge claims in insolvency proceedings by any means of communication which are accepted by the law of the state of the opening of the proceedings and representation by a lawyer or other legal professional may not be mandatory for this purpose.²⁷⁷ **25-151**

A foreign creditor is defined as a creditor that has its habitual residence, domicile or registered office in a Member State other than the state of the opening of proceedings, including the tax authorities and social security authorities of Member States.²⁷⁸ The definition effectively means that the decision in *Government of India v Taylor*²⁷⁹ to the effect that foreign revenue claims are not enforceable in the domestic courts and cannot therefore be the subject of a claim in domestic insolvency proceedings is disapplied in cases in which the EU insolvency proceedings regulation applies. **25-152**

²⁷² EU insolvency proceedings regulation art.47.1.

²⁷³ EU insolvency proceedings regulation art.48.1.

²⁷⁴ EU insolvency proceedings regulation art.50.

²⁷⁵ EU insolvency proceedings regulation art.51.

²⁷⁶ European Commission Report, para.9.

²⁷⁷ EU insolvency proceedings regulation art.53.

²⁷⁸ EU insolvency proceedings regulation art.2(12).

²⁷⁹ *Government of India v Taylor* [1955] A.C. 491.

Duty to inform creditors

- 25-153** As soon as insolvency proceedings are opened in a Member State, the court or the insolvency practitioner must immediately inform the known foreign creditors.²⁸⁰ In a Scottish sequestration or protected trust deed, such notification will fall to be given by the trustee.
- 25-154** The notification must be by individual notice, which must include details of time limits, any penalties laid down in regard to such time limits, the body or authority empowered to accept the lodging of claims and any other material information, and must specify whether creditors whose claims are preferential or secured in rem are required to lodge their claims.²⁸¹ It must also include a copy of the standard form for the lodging of claims, referred to further below, or information on where that form is available.²⁸²
- 25-155** The information must be provided using a standard notice form published in the European e-Justice Portal bearing the heading “notice of insolvency proceedings” in all the official languages of the institutions of the Union.²⁸³ It must be sent in the official language (or one of the official languages) of the state of the opening of proceedings or in another language which the state has indicated it can accept if it can be assumed that that language is easier to understand for the foreign creditors.²⁸⁴
- 25-156** The use of the standard form is not obligatory in insolvency proceedings relating to an individual not exercising a business or professional activity if creditors are not required to lodge their claims in order to have them taken into account in the proceedings.²⁸⁵

Procedure for lodging claims

- 25-157** Any foreign creditor may lodge its claim using a standard claims form bearing the heading “lodgement of claims” in all the official languages of the institutions of the Union.²⁸⁶
- 25-158** The form must include prescribed information, not all of which is compulsory,²⁸⁷ and be accompanied by copies of any supporting documents.²⁸⁸ The creditor may lodge their claim in a different form provided it contains the prescribed information.²⁸⁹
- 25-159** Claims may be lodged in any official language of the institutions of the Union, but the creditor may be required to provide a translation in the official language (or one of the official languages) of the state of the opening of proceedings or in another language which the state has indicated it can accept.²⁹⁰ Each Member

²⁸⁰ EU insolvency proceedings regulation art.54.1.

²⁸¹ EU insolvency proceedings regulation art.54.2.

²⁸² EU insolvency proceedings regulation art.54.2.

²⁸³ EU insolvency proceedings regulation art.54.3.

²⁸⁴ EU insolvency proceedings regulation art.54.3.

²⁸⁵ EU insolvency proceedings regulation art.54.4.

²⁸⁶ EU insolvency proceedings regulation art.55.1.

²⁸⁷ EU insolvency proceedings regulation art.55.3.

²⁸⁸ EU insolvency proceedings regulation art.55.2.

²⁸⁹ EU insolvency proceedings regulation art.55.4.

²⁹⁰ EU insolvency proceedings regulation art.55.5.

State must indicate whether it accepts any official language of the institutions of the Union other than its own for the purpose of the lodging of claims.²⁹¹

Claims must be lodged within the period stipulated by the law of the state of the opening of proceedings, subject to specified minimum periods.²⁹² **25–160**

If there is any doubt in relation to a claim, the creditor must be given the opportunity to provide additional evidence on the existence and the amount of the claim.²⁹³ **25–161**

Data protection

The EU insolvency proceedings regulation introduced new provisions on data protection. They are set out in Ch.VI. **25–162**

It is provided that the national rules implementing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data will apply to the processing of personal data carried out in Member States pursuant to the EU insolvency proceedings regulation, provided that processing operations referred to in art.3.2 of that Directive are not concerned.²⁹⁴ In addition, Regulation (EC) No.45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data will apply to the processing of personal data carried out by the Commission pursuant to the EU insolvency proceedings regulation.²⁹⁵ **25–163**

Provision is also made for the responsibilities of Member States in relation to the processing of personal data in national insolvency registers,²⁹⁶ the responsibilities of the Commission in connection with the processing of personal data,²⁹⁷ the Commission's obligations to publish information about its role in data processing,²⁹⁸ the storage of personal data²⁹⁹ and access to personal data via the European e-Justice Portal.³⁰⁰ **25–164**

THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Introduction

As noted in Ch.24, the Cross-Border Insolvency Regulations 2006³⁰¹ enact, with modifications, the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997, hereafter referred to as “the UNCITRAL Model Law”. **25–165**

²⁹¹ EU insolvency proceedings regulation art.55.5.

²⁹² EU insolvency proceedings regulation art.55.6.

²⁹³ EU insolvency proceedings regulation art.55.7.

²⁹⁴ EU insolvency proceedings regulation art.78.1.

²⁹⁵ EU insolvency proceedings regulation art.78.2.

²⁹⁶ EU insolvency proceedings regulation art.79.

²⁹⁷ EU insolvency proceedings regulation art.80.

²⁹⁸ EU insolvency proceedings regulation art.81.

²⁹⁹ EU insolvency proceedings regulation art.82.

³⁰⁰ EU insolvency proceedings regulation art.83.

³⁰¹ Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

25–166 The Insolvency Act 2000 made provision for regulations to give effect, with or without modifications, to the UNCITRAL Model Law.³⁰² The form in which it was to be enacted was the subject of detailed consultation. The Insolvency Service issued a consultation paper entitled *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain* together with a draft of the proposed Cross-Border Insolvency Regulations in August 2005 and a *Summary of Responses and Government Reply* was published in March 2006. The regulations came into force on 4 April 2006³⁰³ and provide that the UNCITRAL Model Law shall have the force of law of Great Britain in the form set out in Sch.1 to the Regulations,³⁰⁴ hereafter referred to as “the Model Law as enacted”. The UNCITRAL Model Law was also subsequently enacted in Northern Ireland.³⁰⁵

25–167 The Model Law as enacted modifies the UNCITRAL Model Law in a number of ways. The Government’s declared intention was

“to stay as close to the drafting in the Model Law as possible to try and ensure consistency, certainty and harmonisation with other States enacting the Model Law and to provide a guide for other States who are considering enacting the law”.³⁰⁶

25–168 Notwithstanding this, it has been observed that there are

“numerous points of divergence . . . between the original text of the UNCITRAL Model Law and the version which has been enacted in Great Britain”.³⁰⁷

These differences are highlighted where relevant in the discussion below.

25–169 The desire to stay as close as possible to the drafting in the UNCITRAL Model Law means that the Model Law as enacted contains a number of terms unfamiliar to Scots law. It is, however, specifically provided³⁰⁸ that without prejudice to any practice of the courts as to the matters which may otherwise be considered, the courts in interpreting the Model Law as enacted may consider specified documents, namely the UNCITRAL Model Law itself, any documents of UNCITRAL and its working group relating to the preparation of the UNCITRAL Model Law and the Guide to Enactment of the UNCITRAL Model Law made in May 1997.³⁰⁹ In addition, the Model Law as enacted itself provides that in its interpretation, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.³¹⁰ As noted in Ch.24, the *Guide to Enactment* made in 1997 was

³⁰² Insolvency Act 2000 s.14.

³⁰³ Cross-Border Insolvency Regulations 2006 reg.1(1).

³⁰⁴ Cross-Border Insolvency Regulations 2006 reg.2(1).

³⁰⁵ See Cross-Border Insolvency Regulations (Northern Ireland) 2007 (SI 2007/115).

³⁰⁶ Insolvency Service, *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain* (August 2005), Executive Summary, para.7. See also the Explanatory Memorandum to the Cross-Border Insolvency Regulations 2006, para.7.18.

³⁰⁷ Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), Supplement, para.8.103. For a detailed, article by article commentary, see Look Chan Ho, “England”, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*, Look Chan Ho (ed), 2nd edn (Plymouth: Global Law and Business, 2009).

³⁰⁸ Cross-Border Insolvency Regulations 2006 reg.2(2).

³⁰⁹ Guide to Enactment of the UNCITRAL Model Law (UNCITRAL document A/CN.9/442).

³¹⁰ Model Law as enacted art.8. In this respect, the *UNCITRAL Model Law on Cross-Border: The Judicial Perspective* (2013), referred to in Ch.24, may prove a useful source of case law from other jurisdictions.

replaced with a new *Guide to Enactment and Interpretation* published in January 2014.³¹¹

It may be noted that the UNCITRAL Model Law deals with issues of jurisdiction only indirectly and it does not contain any choice-of-law rules. Its focus is on practical issues relating to the recognition and effect of insolvency proceedings: access by foreign insolvency officeholders and creditors to domestic courts; recognition of foreign insolvency proceedings; relief to assist foreign insolvency proceedings; and co-operation between courts and insolvency officeholders and through co-ordination of concurrent insolvency proceedings. It has been said that the strategy underlying the Model Law is to achieve effectiveness through selectivity and that by identifying those issues which are of the greatest functional importance in the successful management of a cross-border insolvency case, the UNCITRAL Model Law represents “an exercise in realism and ‘the art of the possible’”.³¹² This would seem to be borne out in practice. 25–170

There is very little Scottish case law on the Cross-Border Insolvency Regulations 2006, but there is now a considerable body of English case law to which reference may be made. Much of it relates to corporate insolvency law rather than bankruptcy, although as noted below, the first case under the Cross-Border Insolvency Regulations 2006 was a bankruptcy case. The case law is therefore of more limited relevance in terms of providing examples which are pertinent to bankruptcy law, but the principles applied may be equally relevant in the context of bankruptcy and are referred to accordingly. 25–171

Modification of British insolvency law

The Cross-Border Insolvency Regulations 2006 provide that British insolvency law (as defined in art.2 of the Model Law as enacted) and Pt 3 of the Insolvency Act 1986 (receivership) are to apply with such modifications as the context requires for the purpose of giving effect to the Cross-Border Insolvency Regulations 2006³¹³ and that where there is any conflict between any provision of British insolvency law or Pt 3 of the Insolvency Act 1986 and the Cross-Border Insolvency Regulations 2006, the latter prevail.³¹⁴ 25–172

“British insolvency law” as so defined means:

25–173

- (a) in relation to England and Wales, provision extending to England and Wales and made by or under the Insolvency Act 1986 (with the exception of Pt 3 of that Act) or by or under that Act as extended or applied by or under any other enactment (excluding these Regulations)³¹⁵; and
- (b) in relation to Scotland, provision extending to Scotland and made by or under the Insolvency Act 1986 (with the exception of Pt 3 of that Act), the Bankruptcy (Scotland) Act 1985 or by or under those Acts

³¹¹ See United Nations, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (January 2014).

³¹² Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), para.8.16. See also Pottow, J, “Procedural Incrementalism: A Model for International Bankruptcy” 45 *Virginia Journal of International Law* 935 at 940 (2004–2005).

³¹³ Cross-Border Insolvency Regulations 2006 reg.3(1).

³¹⁴ Cross-Border Insolvency Regulations 2006 reg.3(2).

³¹⁵ Model Law as enacted art.2(a)(i).

as extended or applied by or under any other enactment (excluding these Regulations).³¹⁶

25–174 Like s.426 of the Insolvency Act 1986, therefore, insolvency law is defined exclusively by reference to statute law and does not therefore include those aspects of the law which are derived solely from the common law.

25–175 The Model Law as enacted also provides that to the extent that it conflicts with EU insolvency proceedings regulation, the latter prevails.³¹⁷ Arguably, this provision is strictly speaking unnecessary, since the EU insolvency proceedings regulation has this effect automatically, but it provides a useful reminder on the face of the Model Law as enacted. The combined effect of these provisions is that the Model Law prevails over British insolvency law, but the EU insolvency proceedings regulation prevails over both.

25–176 It is specifically provided that nothing in s.388 of the Insolvency Act 1986 (meaning of “act as insolvency practitioner”) applies to anything done by a foreign representative under or by virtue of the Cross-Border Insolvency Regulations 2006 or in relation to relief granted or co-operation or co-ordination provided under the Regulations.³¹⁸

Co-operation between courts exercising jurisdiction in relation to cross-border insolvency

25–177 The Cross-Border Insolvency Regulations 2006 make provision for the enforcement within Great Britain of orders made thereunder and for the co-operation of courts having jurisdiction thereunder within Great Britain in similar terms to those of s.426 of the Insolvency Act 1986. Thus, it is provided that an order made by a court in either part of Great Britain in the exercise of its jurisdiction under the Cross-Border Insolvency Regulations 2006 shall be enforced in the other part of Great Britain as if it were made by a court exercising the corresponding jurisdiction in that other part.³¹⁹ This does not, however, require a court in either part of Great Britain to enforce, in relation to property situated in that part, any order made by a court in the other part of Great Britain.³²⁰ In addition, it is provided that the courts in either part of Great Britain having jurisdiction under the Cross-Border Insolvency Regulations 2006 shall assist the courts having the corresponding jurisdiction in the other part of Great Britain.³²¹

Procedural matters

25–178 Schedule 3 to the Cross-Border Insolvency Regulations 2006 contains a number of provisions relating to procedural matters in Scotland. Schedule 5 contains forms.

Scope of the Model Law as enacted

25–179 The Model Law as enacted applies where³²²:

³¹⁶ Model Law as enacted art.2(a)(ii). The reference to the Bankruptcy (Scotland) Act 1985 would now have to be read as a reference to the Bankruptcy (Scotland) Act 2016.

³¹⁷ Model Law as enacted art.3.

³¹⁸ Cross-Border Insolvency Regulations 2006 reg.8.

³¹⁹ Cross-Border Insolvency Regulations 2006 reg.7(1).

³²⁰ Cross-Border Insolvency Regulations 2006 reg.7(2).

³²¹ Cross-Border Insolvency Regulations 2006 reg.7(3).

³²² Model Law as enacted art.1(1).

- (1) assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding;
- (2) assistance is sought in a foreign state in connection with a proceeding under British insolvency law;
- (3) a foreign proceeding and a proceeding under British insolvency law in respect of the same debtor are taking place concurrently; and
- (4) creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under British insolvency law.

For these purposes, “foreign court” is defined as “a judicial or other authority competent to control or supervise a foreign proceeding”³²³; “foreign representative” is defined as

“a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding”³²⁴;

and “foreign proceeding” is defined as

“a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”.³²⁵

In contrast to the EU insolvency proceedings regulation, there is (and in fact could realistically be) no list of foreign proceedings which satisfy that definition, and the court will therefore have to consider in each case whether the foreign proceedings satisfy that definition.³²⁶ It may be noted that US Ch.7 bankruptcy proceedings in relation to an individual debtor have been recognised as foreign proceedings.³²⁷

The Model Law as enacted does not apply in an intra-UK context,³²⁸ although as noted above, there is provision for the enforcement of orders made under it within the UK.

The Model Law as enacted does not define the debtors to whom it applies, but it has been held that it applies to a debtor recognised as such in the jurisdiction where the foreign proceedings were taking place but which would not have been recognised as such in English law.³²⁹ The Model Law as enacted does, however, provide that it does not apply to proceedings in relation to certain

³²³ Model Law as enacted art.2(f).

³²⁴ Model Law as enacted art.2(j).

³²⁵ Model Law as enacted art.2(i).

³²⁶ See, for example, *Re Stanford International Bank Ltd* [2010] EWCA Civ 137; *Re Stocznia Gdynia SA v Bud-Bank Leasing Sp. z o.o* [2010] B.C.C. 255.

³²⁷ *Re Rajapakse* unreported 23 November 2006 (Registrar Nicholls), referred to at [2007] BPIR 99.

³²⁸ *Hynd’s Trustee, Petitioner* [2009] CSH 76.

³²⁹ *Rubin v Eurofinance SA* [2009] EWHC 2129 (Ch). This point was not challenged on subsequent appeals.

specified entities.³³⁰ The number of entities excluded from the scope of the Model Law as enacted has been subject to criticism.³³¹

- 25–184** There are specific provisions regulating the interaction of the Model Law as enacted with specified provisions relating to the financial markets,³³² the Third Parties (Rights of Insurers) Act 2010³³³ and certain provisions of English land law.³³⁴
- 25–185** A British insolvency officeholder is specifically authorised to act in a foreign state on behalf of a proceeding under British insolvency law in so far as permitted by the applicable foreign law.³³⁵ For these purposes, “British insolvency officeholder” is defined, so far as relevant to bankruptcy law in Scotland, as a person acting as an insolvency practitioner within the meaning of s.388 of the Insolvency Act 1986 (which would include a trustee or interim trustee in sequestration and a trustee under a trust deed) and AiB when acting as trustee or interim trustee in sequestration.³³⁶
- 25–186** Nothing in the Model Law as enacted prevents the court from refusing to take an action if that action would be manifestly contrary to the public policy of Great Britain or any part of it.³³⁷ It has been said that the fact that foreign proceedings may differ from those of this country, as they invariably do, even in relation to creditors’ rights in respect of priorities, would not constitute a reason for refusing recognition and relief on the grounds of public policy.³³⁸
- 25–187** Nothing in the Model Law as enacted limits the power of a court or a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain.³³⁹ Accordingly, as discussed above, assistance will continue to be available at common law, under s.426 of the Insolvency Act 1986 and under the EU insolvency proceedings regulation where these apply, either in addition to any assistance available under the Model Law as enacted or where the Model Law as enacted does not apply.

Jurisdiction

- 25–188** The court which has jurisdiction in relation to the recognition of foreign proceedings and co-operation with foreign courts under the Model Law as enacted is, in Scotland, the Court of Session.³⁴⁰
- 25–189** The Court of Session will have jurisdiction where the debtor has in Scotland: (i) a place of business; (ii) in the case of an individual, a place of residence; or

³³⁰ Model Law as enacted art.1(2). The entities specified would generally be subject to corporate insolvency rather than bankruptcy law.

³³¹ See, for example, Fletcher, IF, *Insolvency in Private International Law*, 2nd edn (Oxford: OUP, 2005), Supplement, para.8.85. It may be noted that it was originally intended that certain of these entities, namely credit institutions and insurance companies, would be considered for future inclusion within the scope of the Model Law as enacted as soon as practicable: Explanatory Memorandum to the Cross-Border Insolvency Regulations 2006, para.7.20. This has not, however, happened at the time of writing.

³³² Model Law as enacted art.1(4).

³³³ Model Law as enacted art.1(5).

³³⁴ Model Law as enacted art.1(6), (7).

³³⁵ Model Law as enacted art.5.

³³⁶ Model Law as enacted art.2(b).

³³⁷ Model Law as enacted art.6.

³³⁸ See *Re Stocznia Gdynia SA v Bud-Bank Leasing Sp. z o.o* [2010] B.C.C. 255.

³³⁹ Model Law as enacted art.7.

³⁴⁰ Model Law as enacted art.4(1).

(iii) assets.³⁴¹ It will also have jurisdiction where it considers for any other reason that Scotland is the appropriate forum to consider the question or provide the assistance requested.³⁴²

In considering whether it is the appropriate forum to hear an application for recognition of a foreign proceeding, the court must take into account the location of any court in which a proceeding under British insolvency law is taking place in relation to the debtor and the likely location of any future proceedings under British insolvency law in relation to the debtor.³⁴³ **25-190**

Access of foreign representatives and creditors to courts in Great Britain

Chapter II of the Model Law as enacted makes provision for access of foreign representatives and creditors to the courts in Great Britain. **25-191**

A foreign representative is entitled to apply directly to a court in Great Britain.³⁴⁴ **25-192**
This may be contrasted with the “court to court” model which applies under s.426 of the Insolvency Act 1986. Such an application is necessary before any relief can be sought under the Cross-Border Insolvency Regulations 2006.³⁴⁵

The making of an application by a foreign representative under the Model Law as enacted does not of itself subject either the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of Great Britain or any part of it for any purpose other than the application.³⁴⁶ **25-193**

A foreign representative in either a foreign main proceeding or a foreign non-main proceeding may apply to commence a proceeding under British insolvency law if the conditions for commencing such a proceeding are otherwise met.³⁴⁷ There is no requirement for the foreign proceeding to have been recognised in this case. **25-194**

For this purpose, “foreign main proceeding” is defined as a foreign proceeding taking place in the state where the debtor has the centre of its main interests.³⁴⁸ **25-195**
“Centre of main interests” is not defined, although for the purposes of recognition, there is a rebuttable presumption in the case of an individual that the individual’s habitual residence is their COMI.³⁴⁹ The same concept is, however, utilised by the EU insolvency proceedings regulation, and the UNCITRAL Model Law deliberately used the same concept in order to build on the emerging harmonisation of the notion of what constitutes main proceedings.³⁵⁰ It was therefore recognised that the jurisprudence interpreting what is now the EU insolvency proceedings regulation would be relevant to interpretation of the UNCITRAL Model Law³⁵¹ and it has been held in England that the same

³⁴¹ Model Law as enacted art.4(2)(a).

³⁴² Model Law as enacted art.4(2)(b).

³⁴³ Model Law as enacted art.4(3).

³⁴⁴ Model Law as enacted art.9.

³⁴⁵ *Erste Group Bank AG v JSC “VMZ Red October”* [2013] EWHC 2926 (Ch). Nothing turned on this point on appeal.

³⁴⁶ Model Law as enacted art.10.

³⁴⁷ Model Law as enacted art.11. Applications for sequestration by a foreign representative under the Model Law as enacted are considered in Ch.7.

³⁴⁸ Model Law as enacted art.2(g).

³⁴⁹ Model Law as enacted art.16(3).

³⁵⁰ *UNCITRAL Guide to Enactment and Interpretation* (2013), para.81.

³⁵¹ *UNCITRAL Guide to Enactment and Interpretation* (2013), para.82.

interpretation should be applied in relation to both instruments.³⁵² In that case, The Chancellor said:

“I can see nothing in the respective contexts of Uncitral and the EC Regulation to require different meanings to be given to the phrase COMI. In both of them the phrase is used to identify the proceedings which should take priority, in one form or another, over other similar proceedings taken in other jurisdictions. In both of them the concern is that persons dealing with the debtor should be able to know before insolvency intervenes which system of law would govern the eventual insolvency of their counterparty. Further as both Uncitral and the EC Regulation apply in England and Wales it is essential that each should be interpreted in a manner consistent with the other.”³⁵³

- 25–196** “Foreign non-main proceeding” is defined as a foreign proceeding, other than a foreign main proceeding, taking place in a state where the debtor has an establishment.³⁵⁴ “Establishment” is defined as “any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services”.³⁵⁵ This term is also utilised by what is now the EU insolvency proceedings regulation, and this inspired the use of the term in the UNCITRAL Model Law.³⁵⁶ The definition of the term in the UNCITRAL Model Law differed slightly from the definition in the EC insolvency proceedings regulation, but the definition in the latter has, as noted above, now been amended so that the two definitions coincide more closely.
- 25–197** A foreign representative is entitled to participate in a proceeding relating to the debtor under British insolvency law on recognition of the foreign proceeding.³⁵⁷
- 25–198** Foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under British insolvency law as creditors in Great Britain, subject to the proviso that this does not affect the ranking of claims in a proceeding under British insolvency law.³⁵⁸ The claim of a foreign creditor must not, however, be given a lower priority than that of general unsecured claims solely because the creditor is a foreign creditor,³⁵⁹ nor may such a claim be challenged solely on the ground that it is a claim by a foreign tax or social security authority, although it may be challenged on the ground that it is in whole or part a penalty or on any other ground on which it might be rejected in a proceeding under British insolvency law.³⁶⁰

³⁵² See *Re Stanford International Bank Ltd* [2010] EWCA Civ 137.

³⁵³ See *Re Stanford International Bank Ltd* [2010] EWCA Civ 137 at para.54. For a different view, see Look Chan Ho, “Overview”, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*, Look Chan Ho (ed), 2nd edn (Plymouth: Global Law and Business, 2009).

³⁵⁴ Model Law as enacted art.2(h).

³⁵⁵ Model Law as enacted art.2(e).

³⁵⁶ *UNCITRAL Guide to Enactment and Interpretation* (2013), para.88.

³⁵⁷ Model Law as enacted art.12.

³⁵⁸ Model Law as enacted art.13(1), (2).

³⁵⁹ Model Law as enacted art.13(2). Bankruptcy law in Scotland does not contain any provision in terms of which foreign creditors are ranked differently from domestic creditors in the same category.

³⁶⁰ Model Law as enacted art.13(3). The provision with respect to foreign tax and social security creditors represents a departure from the common law: see discussion of the common law at para.25–152 in the context of the EU insolvency proceedings regulation.

Specific provision is made for notification to foreign creditors. Where notification is to be given under British insolvency law to creditors in Great Britain, notification must also be given to known creditors who do not have addresses in Great Britain, and the court may order appropriate steps to be taken with a view to notifying creditors whose addresses are not known.³⁶¹ Notification must be made to the foreign creditors individually, unless the court considers that under the circumstances some other form of notification would be more appropriate *or* the notification to creditors in Great Britain is to be by advertisement only, in which case the notification to the known foreign creditors may be by advertisement in such foreign newspapers as the British insolvency officeholder considers most appropriate.³⁶² Any notification of the right to file claims given to foreign creditors must indicate a reasonable time period for filing claims, specify the place for their filing, indicate whether secured creditors need to file their secured claims and contain any other information required to be included in a notification to creditors pursuant to the law of Great Britain and the orders of the court.³⁶³ 25-199

Applications for recognition

Chapter III of the Model Law as enacted makes provision, *inter alia*, for recognition of a foreign proceeding. 25-200

A foreign representative may apply to the court for recognition of the foreign proceeding in which they have been appointed.³⁶⁴ The application is by petition.³⁶⁵ It must be accompanied by: 25-201

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative *or* a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative *or*, in the absence of either of these, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative³⁶⁶;
- (b) a statement identifying all foreign proceedings, proceedings under British insolvency law and requests under s.426 of the Insolvency Act 1986 in respect of the debtor known to the foreign representative³⁶⁷;
- (c) an affidavit sworn by the foreign representative as to the matters averred in the petition.³⁶⁸ The affidavit must also state whether, in the opinion of the applicant, the EU insolvency proceedings regulation applies to any proceedings relating to the debtor which are known to the foreign representative and, if so, whether those proceedings are main, secondary or territorial proceedings³⁶⁹;

³⁶¹ Model Law as enacted art.14(1).

³⁶² Model Law as enacted art.14(2).

³⁶³ Model Law as enacted art.14(3).

³⁶⁴ Model Law as enacted art.15(1).

³⁶⁵ Rules of the Court of Session r.62.91(2). The petition must contain averments as to the various matters specified in r.62.92(1). The petitioner must seek an order for service on the persons specified in r.62.91(3) so far as relevant.

³⁶⁶ Model Law as enacted art.15(2) and Rules of the Court of Session r.62.92(3)(b).

³⁶⁷ Model Law as enacted art.15(3) and Rules of the Court of Session r.62.92(3)(b). A s.426 request is defined as a request for assistance in accordance with the Insolvency Act 1986 s.426 made to a court in any part of the UK: art.2(1).

³⁶⁸ Rules of the Court of Session r.62.92(3)(a).

³⁶⁹ Rules of the Court of Session r.62.92(4).

- (d) any other evidence which in the opinion of the applicant will assist the court in determining whether the proceeding in respect of which the application is made is a foreign proceeding as defined by art.2 of the Model Law as enacted and whether the foreign representative is a foreign representative as so defined.³⁷⁰ If the application is accompanied by a certified copy decision or certificate from the foreign court which indicates that the foreign proceeding is a foreign proceeding as so defined and that the foreign representative is a foreign representative as so defined, the court is entitled to so presume³⁷¹;
- (e) evidence that the debtor has its centre of main interests or an establishment, as the case may be, within the country where the foreign proceedings are taking place.³⁷² As referred to above, in the case of an individual, there is a rebuttable presumption that their habitual residence is their COMI³⁷³; and
- (f) a translation into English of the documents supplied in support of the application for recognition.³⁷⁴

25-202 The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.³⁷⁵ The need for full and frank disclosure in the application has been stressed.³⁷⁶

Hearing on application

25-203 At the hearing of the application for recognition of insolvency proceedings, specified persons may appear or be represented.³⁷⁷ The specified persons who are relevant in the case of bankruptcy, as opposed to corporate insolvency, are:

- (a) the foreign representative;
- (b) the debtor and, in the case of a partnership, any person who is a member of the partnership;
- (c) any British insolvency officeholder acting in relation to the debtor;
- (d) any Member State insolvency practitioner of the debtor in main proceedings;
- (e) any foreign representative in any other foreign proceeding regarding the debtor;
- (f) any person who has presented a petition for the sequestration of the debtor's estates in Scotland;
- (g) the Financial Conduct Authority, if the debtor is a debtor who is of interest to it³⁷⁸;
- (h) the Prudential Regulation Authority, if the debtor is a debtor who is of interest to it³⁷⁹; and
- (g) with the permission of the court, any other person who appears to have an interest justifying their appearance.

³⁷⁰ Rules of the Court of Session r.62.92(3)(c).

³⁷¹ Model Law as enacted art.16(1).

³⁷² Rules of the Court of Session r.62.92(3)(d).

³⁷³ Model Law as enacted art.16(3).

³⁷⁴ Model Law as enacted art.15(4).

³⁷⁵ Model Law as enacted art.16(2).

³⁷⁶ See *Nordic Trustee ASA v OGX Petroleo E Gas SA* [2016] EWHC 25 (Ch).

³⁷⁷ Cross-Border Insolvency Regulations Sch.3, para.6(1).

³⁷⁸ A debtor who is of interest to the Financial Conduct Authority is defined in Cross-Border Insolvency Regulations Sch.3, para.1(3).

³⁷⁹ A debtor who is of interest to the Prudential Regulation Authority is defined in Cross-Border Insolvency Regulations Sch.3, para.1(3A).

Decision on application

The application for recognition of foreign proceedings must be decided upon at the earliest possible time.³⁸⁰ Subject to the provisions of art.6 of the Model Law as enacted (the public policy exception), a foreign proceeding must be recognised if it is a foreign proceeding as defined in art.2 of the Model Law as enacted, the foreign representative is a foreign representative as so defined and the relevant procedural requirements have been complied with.³⁸¹ The proceeding will be recognised as a foreign main proceeding if it is taking place in the state where the debtor has the centre of its main interests or as a foreign non-main proceeding if the debtor has an establishment in the foreign state.³⁸² 25–204

In the first application for recognition under the Cross-Border Insolvency Regulations 2006, the English court granted an application for recognition made by the trustee of an individual debtor in US Ch.7 bankruptcy proceedings where the debtor had property in England and made a number of observations designed to give assistance to practitioners involved in such applications, although not all of these are applicable in Scotland as a result of differences in procedure.³⁸³ 25–205

Where a recognition order is made, the foreign representative must, as soon as reasonably practicable, send a certified copy of the order to the debtor and give notice of the making of the order to specified persons.³⁸⁴ The specified persons who are relevant in the case of bankruptcy, as opposed corporate insolvency, are: 25–206

- (a) any British insolvency officeholder acting in relation to the debtor;
- (b) any Member State insolvency practitioner appointed in main proceedings in relation to the debtor;
- (c) any foreign representative in any other foreign proceeding regarding the debtor known to the foreign representative;
- (d) the petitioner in any pending petition for the sequestration of the debtor's estates in Scotland;
- (e) the Financial Conduct Authority, if the debtor is of interest to it;
- (f) the Prudential Regulation Authority, if the debtor is of interest to it;
- and
- (g) such other persons as the court may direct.

The order must also be advertised once in the *Edinburgh Gazette* and once in such newspaper as the foreign representative thinks most appropriate for ensuring that the making of the order comes to the notice of the debtor's creditors.³⁸⁵ 25–207

³⁸⁰ Model Law as enacted art.17(3).

³⁸¹ Model Law as enacted art.17(1).

³⁸² Model Law as enacted art.17(2).

³⁸³ *Re Rajapakse* unreported 23 November 2006 (Registrar Nicholls), referred to at [2007] BPIR 99 and discussed in Griffiths, N and Hogarth, L, "Cross-border insolvencies: English court hears first UNCITRAL application" 2007 Recovery pp.34, 35. See also Griffiths, N and Johnson, S, "Re Rajapakse—the final chapter" 2008 Recovery 33.

³⁸⁴ Cross-Border Insolvency Regulations Sch.3, para.7(1), (2) and (3).

³⁸⁵ Cross-Border Insolvency Regulations Sch.3, para.7(5)(a). The advertisement must be in Form ML8 in Sch.5.

- 25–208** Where a recognition order is made in respect of a foreign main proceeding, the clerk of the court must forthwith send a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register³⁸⁶ and the recording of the order has the effect as from the date of the order of an inhibition and of a citation in an adjudication of the debtor's heritable estate at the instance of the foreign representative.³⁸⁷ The effect expires at the end of the period of three years beginning with the date of the order or on the earlier recording of a modification or termination order,³⁸⁸ but the foreign representative may, if recognition of the foreign proceeding has not been modified or terminated, renew the effect by sending a memorandum in the prescribed form to the keeper of the register of inhibitions and adjudications for recording in that register before the end of the three-year period and any subsequent three-year period.³⁸⁹
- 25–209** Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have fully or partially ceased to exist, and in such a case, the court may, on the application of the foreign representative or a person affected by recognition or *ex proprio motu*, modify or terminate the recognition either altogether or for a limited time and on such terms and conditions as it thinks fit.³⁹⁰ The court must not, however, make a modification or termination order *ex proprio motu* unless the foreign representative and the debtor have either had an opportunity of being heard on the question or have consented in writing to such an order.³⁹¹ An application for a modification or termination order ("a review application") is made by note in the process and must be accompanied by an affidavit sworn by the applicant as to specified matters.³⁹² The same persons may appear or be represented at a hearing on an application for modification or termination as may appear or be represented at a hearing on an application for recognition.³⁹³ Any modification or termination order must be notified and advertised in the same way as a recognition order³⁹⁴ and the clerk of the court must forthwith send a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register.³⁹⁵
- 25–210** From the time of the lodging of the application for recognition, the foreign representative must inform the court promptly of any substantial change in the status of the foreign proceeding or their appointment and of any other foreign proceeding, proceeding under British insolvency law or request under s.426 of the Insolvency Act 1986 regarding the debtor which becomes known to them.³⁹⁶ Such information is to be given by way of amendment to the petition.³⁹⁷

³⁸⁶ Cross-Border Insolvency Regulations Sch.3, para.8(1).

³⁸⁷ Cross-Border Insolvency Regulations Sch.3, para.8(2).

³⁸⁸ Cross-Border Insolvency Regulations Sch.3, para.8(4). Modification and termination are discussed further at para.25–209.

³⁸⁹ Cross-Border Insolvency Regulations Sch.3, para.8(5).

³⁹⁰ Model Law as enacted art.17(4) and see *Nordic Trustee ASA v OGX Petroleo E Gas SA* [2016] EWHC 25 (Ch).

³⁹¹ Cross-Border Insolvency Regulations Sch.3, para.5(1).

³⁹² Rules of the Court of Session r.62.96(1), (2).

³⁹³ Cross-Border Insolvency Regulations Sch.3, para.4(1)(a)(iv) and 6(1).

³⁹⁴ Cross-Border Insolvency Regulations Sch.3, para.7(1), (2), (3) and (5).

³⁹⁵ Cross-Border Insolvency Regulations Sch.3, para.8(3).

³⁹⁶ Model Law as enacted art.18.

³⁹⁷ Rules of the Court of Session r.62.92(5).

Interim remedy

Chapter III of the Model Law as enacted makes provision, *inter alia*, for remedy which may be obtained under the Model Law as enacted. **25-211**

At any time from the time an application for recognition of any foreign proceeding is lodged until it is decided, the court may grant an interim remedy where this is urgently required to protect the assets of the debtor or the interests of creditors,³⁹⁸ including:

- (a) restraining execution against the debtor's assets³⁹⁹;
- (b) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy⁴⁰⁰; and
- (c) suspending the right to transfer, encumber or otherwise dispose of assets, examining witnesses, taking of evidence and delivery of information, and any additional remedy available to a British insolvency officeholder.⁴⁰¹

An application for an interim remedy is made by note in the process and must be accompanied by an affidavit sworn by the applicant as to specified matters.⁴⁰² **25-213**

In granting or denying an interim remedy, the court must be satisfied that the interests of the creditors (including any secured creditors or parties to hire-purchase agreements) and other interested persons including, if appropriate, the debtor, are adequately protected.⁴⁰³ A "secured creditor" is defined as a creditor of the debtor who holds in respect of their debt a security over property of the debtor⁴⁰⁴ and "security" is defined as meaning, in relation to Scotland, any security (whether heritable or moveable), any floating charge and any right of lien or preference and any right of retention (other than a right of compensation or set off).⁴⁰⁵ A "hire-purchase agreement" is defined as including a conditional sale agreement, a chattel leasing agreement and a retention of title agreement.⁴⁰⁶ **25-214**

The court may refuse to grant an interim remedy if it would interfere with the administration of a foreign main proceeding⁴⁰⁷ and it may grant any interim remedy subject to such conditions as it considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of their functions.⁴⁰⁸ Where an interim remedy is granted, the order of the court must be notified and advertised in the same way as a recognition order⁴⁰⁹ and, where it consists of or includes suspension of the **25-215**

³⁹⁸ Model Law as enacted art.19(1).

³⁹⁹ Model Law as enacted art.19(1)(a).

⁴⁰⁰ Model Law as enacted art.19(1)(b).

⁴⁰¹ Model Law as enacted art.19(1)(c).

⁴⁰² Rules of the Court of Session r.62.93(1), (2).

⁴⁰³ Model Law as enacted art.22(1). The concept of adequate protection is discussed further at para.25-224.

⁴⁰⁴ Model Law as enacted art.2(m).

⁴⁰⁵ Model Law as enacted art.2(n).

⁴⁰⁶ Model Law as enacted art.2(k).

⁴⁰⁷ Model Law as enacted art.19(3).

⁴⁰⁸ Model Law as enacted art.22(2).

⁴⁰⁹ Cross-Border Insolvency Regulations Sch.3, paras 4(1)(b)(ii) and 7(1), (2), (3) and (5).

right to transfer, encumber or otherwise dispose of assets including heritable property, the clerk of the court must forthwith send a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register.⁴¹⁰ It is provided that, unless it is extended on the granting of recognition, any interim remedy will terminate when the application for recognition is decided,⁴¹¹ but there is also provision for the court, on the application of the foreign representative or a person affected by the interim remedy or *ex proprio motu*, to modify or terminate any interim remedy granted under these provisions.⁴¹² The court must not, however, make a modification or termination order *ex proprio motu* unless the foreign representative and the debtor have either had an opportunity of being heard on the question or have consented in writing to such an order.⁴¹³ An application for a modification or termination order ("a review application") is made by note in the process and must be accompanied by an affidavit sworn by the applicant as to specified matters.⁴¹⁴ The same persons may appear or be represented at a hearing on an application for modification or termination as may appear or be represented at a hearing on an application for recognition.⁴¹⁵ In modifying or terminating any interim remedy, the court must be satisfied that the interests of the creditors (including any secured creditors or parties to hire-purchase agreements) and other interested persons including, if appropriate, the debtor, are adequately protected.⁴¹⁶ Any modification or termination order must be notified and advertised in the same way as a recognition order⁴¹⁷ and the clerk of the court must forthwith send a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register.⁴¹⁸

Automatic effects where foreign main proceedings are recognised

25-216 Where foreign main proceedings are recognised, certain effects follow automatically. Thus: (i) the commencement or continuation of any action or proceeding concerning the debtor's assets, rights, obligations or liabilities; (ii) execution against the debtor's assets; and (iii) the right to transfer, encumber or otherwise dispose of the debtor's assets are all affected in the same way, and to the same extent, as if the debtor's estate had been sequestrated, subject to the powers of the court and the prohibitions, limitations, exceptions and conditions as would apply in such a case.⁴¹⁹

25-217 This automatic effect, hereafter referred to as the automatic stay, is, however, limited in a number of ways. It is specifically provided that it does not affect any right to take steps to enforce a security over the debtor's property, any right to take steps to repossess goods in the debtor's possession under a hire-purchase agreement, any right exercisable under, by virtue of or in connection with specified provisions regulating the effect of insolvency in relation to the financial markets or any right of a creditor to set off where any such right would have been exercisable if the debtor's estate had been sequestrated.⁴²⁰

⁴¹⁰ Cross-Border Insolvency Regulations Sch.3, para.8(1).

⁴¹¹ Model Law as enacted art.19(2).

⁴¹² Model Law as enacted art.22(3).

⁴¹³ Cross-Border Insolvency Regulations Sch.3, para.5(1).

⁴¹⁴ Rules of the Court of Session r.62.96.

⁴¹⁵ Cross-Border Insolvency Regulations Sch.3, paras 4(1)(a)(iv) and 6(1).

⁴¹⁶ Model Law as enacted art.22(1). The concept of adequate protection is discussed further at para.25-224.

⁴¹⁷ Cross-Border Insolvency Regulations Sch.3, paras 4(1)(b)(v) and 7(1), (2), (3) and (5).

⁴¹⁸ Cross-Border Insolvency Regulations Sch.3, para.8(3).

⁴¹⁹ Model Law as enacted art.20(1), (2).

⁴²⁰ Model Law as enacted art.20(3).

Furthermore, it does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor or the right to commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature where the action or proceedings are brought in the exercise of those functions.⁴²¹ It is also specifically provided that it does not affect the right to request or otherwise initiate the commencement of a proceeding under British insolvency law or the right to lodge claims in such a proceeding.⁴²²

The court may, on the application of the foreign representative or a person affected by the automatic stay or *ex proprio motu*, modify or terminate the automatic stay or any part of it, either altogether or for a limited time, on such terms and conditions as the court thinks fit.⁴²³ The matter is one for the discretion of the court and there is now a substantial body of case law in England as to the circumstances in which the automatic stay may or may not be modified to allow arbitration proceedings.⁴²⁴ The same requirements apply in relation to the making and, where relevant, the subsequent notification, advertisement and registration of an order for modification or termination of the automatic stay as in the case of an order for modification or termination of any interim remedy. **25–218**

Discretionary remedy

Where foreign non-main proceedings are recognised, no effects follow automatically. It is a matter for the discretion of the court what remedy (if any) should, if sought, be granted following the recognition of foreign non-main proceedings. Similarly, it is a matter for the discretion of the court what remedy (if any) should, if sought, be granted in addition to the automatic stay in the case of foreign main proceedings. **25–219**

Article 21 of the Model Law as enacted provides that on the recognition of a main or non-main foreign proceeding, the court may, at the request of the foreign representative, grant any appropriate remedy where this is necessary to protect the assets of the debtor or the interests of the creditors,⁴²⁵ including: **25–220**

- (a) restraining the commencement of, or sisting existing, actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not already been restrained or sisted by the automatic stay which follows the recognition of foreign main

⁴²¹ Model Law as enacted art.20(4).

⁴²² Model Law as enacted art.20(5).

⁴²³ Model Law as enacted art.20(6).

⁴²⁴ See, in particular, *Re Armada Shipping SA* [2011] EWHC 216 (Ch) (where it was held that arbitration proceedings should be allowed to proceed subject to conditions without deciding whether they had in fact been automatically stayed); *United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd* [2013] EWHC 4335 (Ch) (where the automatic stay was lifted to allow an arbitration to proceed); *American Energy Group Ltd v Hycarbex Asia Pte Ltd (in liquidation)* [2014] EWHC 1091 (Ch) (where the automatic stay was lifted to allow an arbitration to proceed); *VTB Bank (Austria) AG v Kombinat Aluminjuma Podgorica AD* [2015] EWHC 750 (Ch) (where the lifting of the automatic stay with a view to allowing arbitral proceedings was refused for lack of sufficient information); *Re Pan Ocean Ltd* [2015] EWHC 1500 (Ch) (where the automatic stay was lifted to allow an arbitration to proceed); *Re Lemma Europe Insurance Co Ltd* [2016] EWCA Civ 484 (where the lifting of the automatic stay with a view to allowing an arbitration to proceed was refused); and *Nordic Trustee ASA v OGX Petroleo E Gas SA* [2016] EWHC 25 (Ch) (where the automatic stay was lifted on agreement of the parties to allow an arbitration to proceed).

⁴²⁵ Model Law as enacted art.21(1).

proceedings.⁴²⁶ It is specifically provided that no such restraint or stay will affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor or the right to commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature where the action or proceedings are brought in the exercise of those functions⁴²⁷;

- (b) restraining execution against the debtor's assets to the extent it has not been restrained by the automatic stay which follow the recognition of foreign main proceedings⁴²⁸;
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent that this right has not been suspended by the automatic stay which follow the recognition of foreign main proceedings⁴²⁹;
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.⁴³⁰ There are cases in England where an order has been made for the production of documents⁴³¹;
- (e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court⁴³²;
- (f) extending any interim remedy⁴³³; and
- (g) granting any additional remedy that may be available to a British insolvency officeholder under the law of Great Britain.⁴³⁴ Examples of other remedies which have been granted in England include the making of an income payments order in relation to an individual debtor,⁴³⁵ allowing the foreign representative the right to intercept the debtor's postal and electronic communications⁴³⁶ and preventing a creditor relying on rights of set-off after the commencement of insolvency.⁴³⁷

25-221 In addition, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected.⁴³⁸

⁴²⁶ Model Law as enacted art.21(1)(a).

⁴²⁷ Model Law as enacted art.21(4).

⁴²⁸ Model Law as enacted art.21(1)(b).

⁴²⁹ Model Law as enacted art.21(1)(c).

⁴³⁰ Model Law as enacted art.21(1)(d).

⁴³¹ See *Picard v FIM Advisers LLP* [2010] EWHC 1299 (Ch); *Re Chesterfield United Inc* [2012] EWHC 244 (Ch).

⁴³² Model Law as enacted art.21(1)(e).

⁴³³ Model Law as enacted art.21(1)(f).

⁴³⁴ Model Law as enacted art.21(1)(g). It is specifically provided that this includes any remedy provided under para.43 of Sch.B1 to the Insolvency Act 1986 (moratorium on other legal process on administration), and there a number of English cases in which such a remedy has been granted: see *Samsun Logix Corporation v DEF* [2009] EWHC 576 (Ch); *Re Pan Oceanic Maritime Inc* [2010] EWHC 1734; *Re Transfield ER Cape Ltd* [2010] EWHC 2851 (Ch); *Re 19 Entertainment Ltd* [2016] EWHC 1545 (Ch). It is thought, however, that any such remedy would be appropriate only in a corporate insolvency context and not in a bankruptcy context.

⁴³⁵ *Thurmond v Rajapakse* [2008] BPIR 283.

⁴³⁶ Order of the High Court, 16 February 2011, referred to in *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (2013), para.54.

⁴³⁷ *Atlas Bulk Shipping AS v Navios International Inc* [2011] EWHC 878 (Ch).

⁴³⁸ Model Law as enacted art.21(2). Remittal of assets was granted in *Thurmond v Rajapakse*

There are some cases in which a remedy has been refused. In *Re Pan Ocean Co Ltd*,⁴³⁹ it was held that a notice terminating a contract was not something which could be stayed by the court and the court's power to grant any other remedy did not extend to a remedy which would not be available to the court in a domestic insolvency. In *Rubin v Eurofinance SA*,⁴⁴⁰ it was said that the Model Law was not designed to provide for the reciprocal enforcement of judgments. 25–222

An application for a remedy under these provisions is made by note in the process and must be accompanied by an affidavit sworn by the applicant as to specified matters.⁴⁴¹ The same persons may appear or be represented at a hearing on an application for a remedy under these provisions as may appear or be represented at a hearing on an application for recognition.⁴⁴² 25–223

In granting or denying any remedy under these provisions, the court must be satisfied that the interests of the creditors (including any secured creditors or parties to hire-purchase agreements) and other interested persons including, if appropriate, the debtor, are adequately protected.⁴⁴³ The concept of adequate protection is not one which is familiar in Scots (or indeed English) Law, but perhaps surprisingly, there has been little discussion of exactly what is meant by adequate protection in the case law: the courts when making an order have tended simply to state that they are satisfied that there is adequate protection without elaborating on that concept.⁴⁴⁴ 25–224

In granting a remedy to a representative of a foreign non-main proceeding, the court must be satisfied that the remedy relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.⁴⁴⁵ 25–225

The court may grant any remedy subject to such conditions as it considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of their functions.⁴⁴⁶ 25–226

Where a remedy is granted, the order of the court must be notified and advertised in the same way as a recognition order⁴⁴⁷ and, where it consists of or includes suspension of the right to transfer, encumber or otherwise dispose of assets including heritable property, the clerk of the court must forthwith send a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register.⁴⁴⁸ 25–227

[2008] BPIR 283 and *Re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2010] EWHC 2099 (Ch). The concept of adequate protection is discussed further at para.25–224.

⁴³⁹ *Re Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch).

⁴⁴⁰ *Rubin v Eurofinance SA* [2012] UKSC 46.

⁴⁴¹ Rules of the Court of Session r.62.94.

⁴⁴² Cross-Border Insolvency Regulations Sch.3, paras 4(1)(a)(ii) and 6(1).

⁴⁴³ Model Law as enacted art.22(1).

⁴⁴⁴ See, for example, *Thurmond v Rajapakse* [2008] BPIR 283; *Picard v FIM Advisers LLP* [2010] EWHC 1299 (Ch); *Re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2010] EWHC 2099 (Ch); *Re Armada Shipping SA* [2011] EWHC 216 (Ch).

⁴⁴⁵ Model Law as enacted art.21(3).

⁴⁴⁶ Model Law as enacted art.22(2). For examples of cases where the court has imposed conditions, see *Re Armada Shipping SA* [2011] EWHC 216 (Ch); *Re Chesterfield United Inc* [2012] EWHC 244 (Ch).

⁴⁴⁷ Cross-Border Insolvency Regulations Sch.3, paras 4(1)(b)(iii) and 7(1), (2), (3) and (5).

⁴⁴⁸ Cross-Border Insolvency Regulations Sch.3, para.8(1).

- 25-228** The court may, on the application of the foreign representative or a person affected by the remedy or *ex proprio motu*, modify or terminate any remedy granted under these provisions.⁴⁴⁹ The same requirements apply in relation to the making and, where relevant, the subsequent notification, advertisement and registration of an order for modification or termination of any remedy as in the case of an order for modification or termination of any interim remedy.
- 25-229** Provision is made for a foreign representative, following the recognition of any foreign proceedings, to apply to the court for an order under or in connection with any of the statutory provisions for the challenge of gratuitous alienations, unfair preferences, orders on divorce or dissolution of a civil partnership, excessive pension contributions and extortionate credit transactions.⁴⁵⁰ Where a proceeding under British law is taking place in relation to the debtor, however, the foreign representative may only make such an application with the permission of the Court of Session.⁴⁵¹ If such permission is granted, the court may also order the relevant proceedings under British insolvency law to be transferred to the Court of Session if those proceedings are taking place in Scotland in another court.⁴⁵² The relevant statutory provisions will apply, subject to specified modifications, whether or not the debtor's estate has been sequestrated.⁴⁵³ Where the foreign proceeding is a non-main proceeding, the court must be satisfied that the application relates to assets which, under the law of Great Britain, should be administered in the foreign non-main proceeding.⁴⁵⁴ On making an order on the application, the court may give such directions regarding the distribution of any proceeds of the claim by the foreign representative as it thinks fit to ensure the interests of creditors in Great Britain are adequately protected.⁴⁵⁵ The right of a British insolvency officeholder to challenge any transaction under the relevant statutory provisions is not affected.⁴⁵⁶
- 25-230** Finally, it is provided that on recognition of any foreign proceeding, the foreign representative may intervene in any proceedings in which the debtor is a party provided the requirements of the law of Great Britain are met.⁴⁵⁷

Co-operation with foreign courts and foreign representatives

- 25-231** Chapter IV of the Model Law as enacted makes provision for co-operation with foreign courts and foreign representatives.
- 25-232** The court is empowered (but not compelled) to co-operate to the maximum extent possible with foreign courts and foreign representatives, either directly or through a British insolvency officeholder,⁴⁵⁸ and is entitled to communicate directly with, or request information or assistance directly from, foreign courts and foreign representatives.⁴⁵⁹ This is one of the areas where the Model Law as enacted is different from the UNCITRAL Model Law, which provides for mandatory co-operation.

⁴⁴⁹ Model Law as enacted art.22(3).

⁴⁵⁰ Model Law as enacted art.23(1).

⁴⁵¹ Model Law as enacted art.23(6).

⁴⁵² Cross-Border Insolvency Regulations Sch.3, para.11.

⁴⁵³ Model Law as enacted art.23(2), (3).

⁴⁵⁴ Model Law as enacted art.23(5).

⁴⁵⁵ Model Law as enacted art.23(7).

⁴⁵⁶ Model Law as enacted art.23(8).

⁴⁵⁷ Model Law as enacted art.24.

⁴⁵⁸ Model Law as enacted art.25(1).

⁴⁵⁹ Model Law as enacted art.25(2).

A British insolvency officeholder, in the exercise of their functions and subject to the supervision of the court, is required, so far as consistent with their other duties under the law of Great Britain, to co-operate to the maximum extent possible with foreign courts or foreign representatives⁴⁶⁰ and is entitled to communicate directly with foreign courts and foreign representatives.⁴⁶¹ This is another of the areas where the Model Law as enacted is different from the UNCITRAL Model Law, which contains no qualification on the requirement of the officeholder to co-operate. **25-233**

Any such co-operation may be implemented by any appropriate means,⁴⁶² including: **25-234**

- (a) appointment of a person to act at the direction of the court;
- (b) communication of information by any means considered appropriate by the court;
- (c) co-ordination of the administration and supervision of the debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the co-ordination of proceedings; and
- (e) co-ordination of concurrent proceedings regarding the same debtor.

The UNCITRAL *Practice Guide on Cross-Border Insolvency Co-operation* published in 2011 referred to in Ch.24 gives further guidance on co-operation under the UNCITRAL Model Law. **25-235**

Concurrent proceedings

Chapter V of the Model Law as enacted makes provision for concurrent proceedings. **25-236**

Following recognition of a foreign main proceeding, the effects of any proceeding under British insolvency law in relation to the same debtor are restricted to assets of the debtor located in Great Britain and, to the extent necessary to implement co-operation and co-ordination under arts 25-27 of the Model Law as enacted, any other assets of the debtor which, under the law of Great Britain, should be administered in that proceeding.⁴⁶³ There is no restriction, however, on the opening of such "territorial" proceedings. **25-237**

Where a foreign proceeding and a proceeding under British insolvency law are taking place concurrently in relation to the same debtor, the court may seek co-operation and co-ordination under arts 25-27.⁴⁶⁴ Different provisions apply depending on whether or not the proceeding in Great Britain is already taking place at the time the application for recognition of the foreign proceeding is lodged. Where the proceeding in Great Britain is taking place at the time the application for recognition of the foreign proceeding is lodged, any remedy or interim remedy granted must be consistent with the proceeding in Great Britain and, where the foreign proceeding is recognised as a foreign main proceeding, the automatic stay does not apply.⁴⁶⁵ Where the proceeding in Great Britain commences after the application for recognition of the foreign proceeding is **25-238**

⁴⁶⁰ Model Law as enacted art.26(1).

⁴⁶¹ Model Law as enacted art.26(2).

⁴⁶² Model Law as enacted art.27.

⁴⁶³ Model Law as enacted art.28.

⁴⁶⁴ Model Law as enacted art.29.

⁴⁶⁵ Model Law as enacted art.29(a).

lodge, the court must review any remedy or interim remedy which is in effect and modify or terminate it if it is inconsistent with the proceeding in Great Britain; where the foreign proceeding is a main proceeding, the automatic stay must be modified or terminated if it is inconsistent with the proceeding in Great Britain; and the court must review any proceedings brought by the foreign representative under the statutory provisions for the challenge of prior transactions and give such directions as it thinks fit in relation to those proceedings.⁴⁶⁶ In either case, in granting, extending or modifying any remedy granted to a representative in a foreign non-main proceeding, the court must be satisfied that the remedy relates to assets which, under the law of Great Britain, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.⁴⁶⁷

25–239 Where there is more than one foreign proceeding regarding the same debtor, the court may seek co-operation and co-ordination under arts 25–27.⁴⁶⁸ In such a case, any remedy or interim remedy granted to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding.⁴⁶⁹ Furthermore, where a foreign main proceeding is recognised after an application for recognition of a foreign non-main proceeding has been lodged, any remedy or interim remedy in effect must be reviewed by the court and modified or terminated if it is inconsistent with the foreign main proceeding.⁴⁷⁰ Finally, where a foreign non-main proceeding is recognised after another foreign non-main proceeding has been recognised, the court must grant, modify or terminate any remedy in effect for the purpose of facilitating co-ordination of the proceedings.⁴⁷¹

25–240 Recognition of a foreign main proceeding gives rise to a rebuttable presumption that the debtor is apparently insolvent for the purpose of commencing a proceeding under British insolvency law.⁴⁷²

25–241 Article 32 of the Model Law as enacted gives effect to the “hotchpot” rule.

Provisions relating to foreign representatives

25–242 Provision is made for the situation where a foreign representative dies or for any other reason ceases to be the foreign representative in foreign proceedings following the making of a recognition order.⁴⁷³

25–243 In such a case, a person who has succeeded the former foreign representative or is otherwise holding office as foreign representative in the foreign proceeding may apply to the court for an order confirming their status as replacement foreign representative for the purpose of proceedings under the Cross-Border Insolvency Regulations 2006.⁴⁷⁴ Such an application is made by note in the process, which must include averments as to specified matters and must be accompanied by an affidavit sworn by the replacement foreign representative

⁴⁶⁶ Model Law as enacted art.29(b).

⁴⁶⁷ Model Law as enacted art.29(c).

⁴⁶⁸ Model Law as enacted art.30.

⁴⁶⁹ Model Law as enacted art.30(a).

⁴⁷⁰ Model Law as enacted art.30(b).

⁴⁷¹ Model Law as enacted art.30(c).

⁴⁷² Model Law as enacted art.31.

⁴⁷³ Cross-Border Insolvency Regulations 2006 Sch.3, para.2(1).

⁴⁷⁴ Cross-Border Insolvency Regulations 2006 Sch.3, para.2(3).

as to these matters and *either* a certificate from the foreign court affirming the cessation of the appointment of the former representative and the appointment of the applicant as foreign representative in the foreign proceeding *or*, in the absence of such a certificate, any other evidence acceptable to the court.⁴⁷⁵ The same persons may appear or be represented at a hearing on such an application as may appear or be represented at a hearing on an application for recognition.⁴⁷⁶ Where the application is granted, the order of the court must be notified and advertised in the same way as a recognition order.⁴⁷⁷ Where the court dismisses the application, it may, if it thinks fit, make an order terminating recognition of the foreign proceeding and making such provision as it thinks fit in relation to any matters arising in connection with that termination⁴⁷⁸ and in such a case, the provision that the court must not make a termination order *ex proprio motu* unless the foreign representative and the debtor have either had an opportunity of being heard on the question or have consented in writing to such an order does not apply.⁴⁷⁹ Any termination order must be notified and advertised in the same way as a recognition order⁴⁸⁰ and the clerk of the court must forthwith send a certified copy of the order to the keeper of the register of inhibitions and adjudications for recording in that register.⁴⁸¹

The court, on the application a British insolvency officeholder acting in relation to the debtor, a creditor of the debtor or, with the permission of the court, any other person who appears to have an interest, may examine the conduct of a person who is or purports to be, or has been or has purported to be, a foreign representative in relation to a debtor.⁴⁸² The application is made by petition⁴⁸³ and must allege that the foreign representative or purported foreign representative has misapplied or retained money or other property of the debtor, become accountable for money or other property of the debtor, breached a fiduciary or other duty in relation to the debtor or been guilty of misfeasance.⁴⁸⁴ The court may order the person to repay, restore or account for money or property, pay interest or contribute a sum to the debtor's property by way of compensation for breach of duty or misfeasance.⁴⁸⁵ 25-244

Rights to inspect the court process and obtain copies of orders

Specified persons have the right, at all reasonable times, to inspect the court process relating to any proceedings brought under the Cross-Border Insolvency Regulations 2006⁴⁸⁶ and to require the foreign representative in those proceedings to furnish them with a copy of any court order in the proceedings, unless a copy of the court order has been served on the person or notice of the making of the order has been given to them.⁴⁸⁷ 25-245

⁴⁷⁵ Rules of the Court of Session r.62.95.

⁴⁷⁶ Cross-Border Insolvency Regulations Sch.3, paras 4(1)(a)(iii) and 6(1).

⁴⁷⁷ Cross-Border Insolvency Regulations Sch.3, paras 4(1)(b)(iv) and 7(1), (2), (3) and (5).

⁴⁷⁸ Cross-Border Insolvency Regulations 2006 Sch.3, para.2(4).

⁴⁷⁹ Cross-Border Insolvency Regulations 2006 Sch.3, para.2(4).

⁴⁸⁰ Cross-Border Insolvency Regulations Sch.3, paras 4(1)(b)(v) and 7(1), (2), (3) and (5).

⁴⁸¹ Cross-Border Insolvency Regulations Sch.3, para.8(3).

⁴⁸² Cross-Border Insolvency Regulations Sch.3, para.3(1), (2).

⁴⁸³ Rules of the Court of Session r.62.91(2).

⁴⁸⁴ Cross-Border Insolvency Regulations Sch.3, para.3(3).

⁴⁸⁵ Cross-Border Insolvency Regulations Sch.3, para.3(4).

⁴⁸⁶ Cross-Border Insolvency Regulations Sch.3, para.9.

⁴⁸⁷ Cross-Border Insolvency Regulations Sch.3, para.10.

COMMON LAW

25-246 Scots common law has traditionally adopted a generous approach to the recognition and enforcement of foreign insolvency proceedings. No formal application for recognition of foreign insolvency proceedings is necessary and, in certain circumstances, a foreign officeholder may act without taking any formal steps in Scotland at all.⁴⁸⁸

25-247 Recognition will generally be accorded to a foreign sequestration or its equivalent if is granted by a competent court and regular according to the law of the country in which it is made.⁴⁸⁹ In *Obers v Paton's Trustee*,⁴⁹⁰ it was argued that the court ought not to recognise a sequestration granted in France of a debtor who, although trading in France, was a domiciled Scot. In response to this argument, the Lord President said:

"The refusal to recognise a sequestration in bankruptcy which is valid by the law of the country in which it has been granted can only be justified on the ground that it is contrary to the principles of Scotch law when dealing with international rights to recognise the sequestration of a foreigner. But the fact is that our own law takes no account of the domicile of succession when asked to sequester the estates of a trader, but on the contrary, habitually and deliberately sequesters the estates of foreigners who carry on business in this country. It seems difficult to the degree of impossibility for this Court to decline on principle to recognise if done abroad what it is itself bound to do and does daily at home."

25-248 This suggests that if jurisdiction in the foreign proceedings is based on the same or similar grounds of jurisdiction to those available in Scots law,⁴⁹¹ recognition will be unproblematic. It may be more problematic, however, if the jurisdiction in the foreign proceedings is based on a lesser connection, or is regarded as exorbitant. It is thought that recognition might be refused also on public policy grounds.

25-249 In *Obers v Paton's Trustee*,⁴⁹² the French *syndic* was seeking to reduce a prior transaction of the debtor as a gratuitous alienation.⁴⁹³ In many cases, however, the foreign trustee (or equivalent) will be seeking to lay claim to the debtor's property in Scotland. In general, a foreign trustee may claim the debtor's moveable property in Scotland without further procedure.⁴⁹⁴ In the case of heritage, it is implicit from the cases that this is not the case, but the court may assist the trustee in realising the debtor's heritage subject to appropriate conditions.⁴⁹⁵ A foreign sequestration will affect only those assets which could

⁴⁸⁸ *Araya v Coghill*, 1921 S.C. 462. The lack of a requirement for a formal application for recognition may be contrasted with the position in many other jurisdictions where a formal exequatur is necessary.

⁴⁸⁹ *Araya v Coghill*, 1921 S.C. 462.

⁴⁹⁰ *Obers v Paton's Trustee*, 1897 24 R. 719.

⁴⁹¹ Jurisdiction is discussed in Ch.7.

⁴⁹² *Obers v Paton's Trustee*, 1897 24 R. 719.

⁴⁹³ See further Ch.14.

⁴⁹⁴ *Araya v Coghill*, 1921 S.C. 462. See also *Strother v Read*, 1 July 1803 FC; *Selkrig v Davies* (1814) 2 Dow 230; *Colville v James* (1862) 1 M. 41; *Obers v Paton's Trustee*, 1897 24 R. 719; *Home's Trustee v Homes' Trustees*, 1926 S.L.T. 214.

⁴⁹⁵ See *Araya v Coghill*, 1921 S.C. 462. Cf *Rattray v White* (1842) 4 D. 880, which involved an English bankruptcy which, in terms of the applicable English statute, vested the debtor's heritage wherever situated in the trustee: it was held that the registration of the vesting order and appointment of the trustee in the Register of Sasines had the effect of transferring a real right in the debtor's heritage in Scotland to the trustee.

have been assigned by the debtor at the date of the foreign order and the trustee takes the property *tantum et tale*.⁴⁹⁶ The foreign proceedings must confer a right to the assets on the foreign trustee.⁴⁹⁷

The Scottish court may sist or dismiss court proceedings in Scotland on the ground of *forum non conveniens* where the matter at issue would be more appropriately resolved in foreign insolvency proceedings⁴⁹⁸ and may interdict the carrying out of diligence by creditors in Scotland where there are foreign proceedings.⁴⁹⁹ The court may also interdict a creditor over whom it has jurisdiction from taking action against the debtor or the debtor's property abroad.⁵⁰⁰ An order of a foreign court purporting to stay automatically all proceedings worldwide has not been recognised as directly achieving that effect in England,⁵⁰¹ and it is thought that the same approach would be taken in Scotland. It has been held in an English corporate insolvency case that in an appropriate case, there may be direct communication between English and foreign courts,⁵⁰² and it is thought that there is no reason why the same should not apply on bankruptcy in Scotland. **25-250**

A discharge granted in foreign insolvency proceedings will be recognised in Scotland if it has the effect of discharging a debt under the proper law of the debt but not otherwise.⁵⁰³ **25-251**

Difficult issues may arise at common law if there is both a Scottish sequestration and its foreign equivalent as happened in the case of *Stewart v Auld*.⁵⁰⁴ Traditionally, Scots law has taken the view that there can only be one sequestration or its equivalent. Thus, in *Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd*,⁵⁰⁵ the Lord President said: **25-252**

"In a sequestration under our statute of 1856 the entire estate of the bankrupt is transferred to the trustee wherever situated, and his title is of a very effective and strong kind; it makes him for the benefit of the creditors the absolute and exclusive proprietor of that estate, fortified by every kind of title that a statute is capable of conferring upon him. And, therefore, in such a case as that, it is quite impossible to say that there can be a second sequestration either in the same country or in a different country from that in which the first has taken place; the whole estate is vested in one person, and it cannot, therefore, become *pro parte* vested in some other person by a subsequent proceeding."

Such a situation will usually be avoided as a result of the application of the rules on concurrent proceedings discussed in Ch.8, although as noted there, the **25-253**

⁴⁹⁶ *Galbraith v Grimshaw*, 1910 A.C. 508; *Anantapudmanabhaswami v Official Receiver of Secunderabad* [1933] A.C. 394; *Morley's Trustee v Aitken*, 1982 S.C. 73.

⁴⁹⁷ *Colville v James* (1862) 1 M. 41.

⁴⁹⁸ *Okell v Foden* (1884) 11 R. 906; *Edinburgh & Glasgow Bank v Ewan* (1852) 14 D. 547.

⁴⁹⁹ *Strother v Read* 1 July 1803 FC; *Selkirk v Davies* (1814) 2 Dow 230.

⁵⁰⁰ *Lindsay v Paterson* (1840) 2 D. 1373. See also *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41.

⁵⁰¹ *Felixstowe Dock and Railway Co v United States Lines Inc* [1989] Q.B. 360.

⁵⁰² *Re T and N Ltd* [2004] EWHC 2878 (Ch).

⁵⁰³ *Rochead v Scot* (1724) Mor 4566; *Christie v Stratton* (1746) Mor 4569; *Creditors of Galbreath v Galbreath* (1762) Mor 4575; *Blackwood v Cathcart* (1763) Mor 4579; *Rose v McLeod* (1825) 4 S. 311.

⁵⁰⁴ *Stewart v Auld* (1851) 13 D. 1337.

⁵⁰⁵ *Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd* (1888) 15 R.

court or AiB (as the case may be) has a discretion in dealing with an application for sequestration where analogous foreign proceedings are pending or already exist. Alternatively, as noted in Ch.9, an award of sequestration could be recalled on the basis, *inter alia*, that one or more awards of sequestration or analogous remedies has also been granted. Otherwise, the different sets of proceedings will simply proceed independently in so far as possible.⁵⁰⁶

25–254 In the context of corporate insolvency, the courts have been prepared to declare Scottish insolvency proceedings to be ancillary to foreign proceedings in appropriate cases,⁵⁰⁷ although the full implications of doing so have yet to be worked out, in particular the extent to which domestic insolvency law rules may be disappplied in the ancillary proceedings and assets remitted from the ancillary proceedings to the foreign main proceedings.⁵⁰⁸ Thus, in *McGrath v Riddell*, two of the four judges in the House of Lords who expressed an opinion on the matter said *obiter* that it would be permissible at common law, subject to certain conditions, to remit the assets ingathered in an ancillary liquidation in England to the main liquidation in Australia for distribution in that liquidation notwithstanding that this would involve the disapplication of the rules for distribution in the English liquidation, while the other two judges who expressed an opinion considered that it would not. Corporate insolvency, however, may be regarded as qualitatively different from sequestration. In *Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd*,⁵⁰⁹ following on from what he said as quoted above, the Lord President said:

“But a liquidation is followed by a very different state of matters. The estate of the company is not transferred from the company to the liquidator, it remains vested in the company just as it was before the winding-up order, and the liquidator is a mere administrator of the affairs of the company. He can do nothing in the way of using action or diligence except in the name of the company; and the company never becomes dissolved, and never is completely divested of its estate until the liquidation has come to an end. It may, therefore, very well be, that although there is a winding-up in the colony which would enable the liquidator there to ingather the whole assets of the company, if he can reach them, it may aid him very much in the performance of that duty that there should be another liquidation in England or elsewhere where also the company has been carrying on business. There seems to me to be nothing incompatible in the coexistence of the two. Therefore the suggestion that the English liquidation is invalid and cannot possibly coexist with the Queensland liquidation I think is out of the case.”

25–255 The concept of secondary proceedings in the context of bankruptcy as well as corporate insolvency is, of course, now provided for in both the EU insolvency proceedings regulation and the Cross-Border Insolvency Regulations 2006. It is thought, however, that this does not alter the position at common law.

25–256 The use of the common law to provide assistance in cross-border cases has recently been the subject of a series of high-level decisions in England that

⁵⁰⁶ *Stewart v Auld* (1851) 13 D. 1337.

⁵⁰⁷ See, for example, *Marshall, Petitioner* (1895) 22 R. 697.

⁵⁰⁸ See *Re B.C.C.I (No.10)* [1996] B.C.C. 980; *Morris, Noter* [2007] CSOH 165; *McGrath v Riddell* [2008] UKHL 21.

⁵⁰⁹ *Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd* (1888) 15 R. 935

has, regrettably, left the law in some confusion. The decisions all relate to corporate insolvency rather than bankruptcy, but are discussed here because a number of the issues which they raise might equally well arise in the context of bankruptcy, and the discussion of the underlying principles which apply in cross-border cases is equally relevant to bankruptcy.

The first decision was that of the Privy Council in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc.*² 25-257 In that case, the Privy Council accepted the principle, albeit qualified by exceptions on pragmatic grounds, of unity and universality, and held that the Manx court had jurisdiction to assist the defenders as appointed representatives in US Ch.11 proceedings to give effect to a confirmed plan of reorganisation in those proceedings. It took the view that while it was doubtful that assistance at common law could take the form of applying provisions of foreign insolvency law which formed no part of the domestic system, the court must at least be able to provide assistance by doing whatever it could have done in a domestic insolvency and thus avoid the unnecessary opening of parallel insolvency proceedings. That approach was followed in the case of *Schmitt v Deichmann*,⁵¹⁰ in which the English court granted a German insolvency officeholder the use of certain statutory powers under English law in order to avoid the necessity of opening parallel proceedings in England. It was rejected, however, by the Irish Supreme Court in the case of *Re Flightlease (Ireland) Ltd.*⁵¹¹

In *McGrath v Riddell*,³ referred to above, the principle of modified universalism was also accepted, although as noted above, the opinions of the judges who expressed a view on the matter were split as to the application of the common law to the circumstances of that case. In the subsequent case of *Re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft*,⁵¹² however, the court expressed the view that the remittal of assets was possible at common law at least where the scheme of distribution in the main proceedings was *pari passu*. 25-258

There then followed two cases involving the enforcement of foreign judgments obtained by default in the course of insolvency proceedings which were heard together in the Supreme Court: *Rubin v Eurofinance SA and New Cap Reinsurance Corporation (In Liquidation) v Grant*.⁵¹³ 25-259 In the *Rubin* case, it was held by a majority of 4:1 (Lord Clarke dissenting) that such judgments could only be enforced in accordance with the traditional private international law rules for enforcement of judgments and could not be enforced at common law on the basis of a special insolvency rule.⁵¹⁴ Lord Collins, with whom Lords Walker and Sumption agreed, expressly said that he considered the case of *Cambridge Gas* had been wrongly decided, but Lord Clarke expressed a contrary view and Lord Mance specifically reserved his opinion on the matter.

The most recent case is *Singularis Holdings Ltd v PricewaterhouseCoopers*,⁵¹⁵ 25-260 another decision of the Privy Council, which concerned an attempt by

⁵¹⁰ *Schmitt v Deichmann* [2012] EWHC 62 (Ch).

⁵¹¹ *Re Flightlease (Ireland) Ltd* [2012] IESC 12.

⁵¹² *Re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2009] EWHC 2099 (Ch).

⁵¹³ *Rubin v Eurofinance SA and New Cap Reinsurance Corporation (In Liquidation) v Grant* [2012] UKSC 46.

⁵¹⁴ There has been subsequent case law on the applicability of those principles in insolvency cases: see *Erste Group Bank AG London Branch v JSC "VMZ Red October"* [2013] EWHC 2926, on appeal [2015] EWCA Civ 379; *Vizcaya Partners Ltd v Picard* [2016] UKPC 5.

⁵¹⁵ *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36.

liquidators to obtain information. The view was expressed obiter by a majority of 3:2 (Lords Neuberger and Mance dissenting) that there was a power at common law to order the production of information, subject to certain limits. Lord Collins, however, also expressed the view that the decision in *Schmitt v Deichmann*, discussed above, was wrong in so far as it extended statutory powers to a foreign officeholder by analogy and all of the judges appear to have been in agreement that the idea expressed in *Cambridge Gas* that the court must be able, without more, to provide assistance to foreign insolvency proceedings by doing whatever it could have done in a domestic insolvency went too far. The principle of modified universalism was once again affirmed, but within limits.

25–261 It was said by Lord Neuberger in *Singularis Holdings Ltd* that:

“The extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic on which the Board, the House of Lords and the Supreme Court have not been conspicuously successful in giving clear or consistent guidance.”

25–262 This may be regarded as something of an understatement. Nonetheless, it does seem clear that the underlying principle to be applied in cross-border cases, which would apply equally in the context of bankruptcy, is that of modified universalism. The precise limits of the application of that principle are less clear. It appears possible to say that judgments obtained in the course of insolvency proceedings may only be enforced in accordance with the traditional private international law rules for enforcement of judgments. Information may be obtained within limits. Remittal of assets to foreign main proceedings may be possible at least in certain cases, but for the reasons discussed above, this is not thought to be relevant in the context of bankruptcy at common law. There does not appear to be anything in the recent case law, however, to suggest that the other forms of assistance given by Scottish courts in the past as discussed above would no longer apply.

INDEX

Abandonment of claims

management and realisation of estate,
12-39—12-42

Abandonment of property

post-sequestration dealings with estate,
11-175

Abatement of debts

distribution of estate, 16-111

Accession by creditors

protected trust deeds, 22-85
trust deeds, 22-19

Accountant in Bankruptcy

appointment, 4-04—4-05
bankruptcy restriction orders,
17-93—17-94
consultation with, 12-09
daily schedule of sequestrations, 8-07
executive agency functions
 accountability, 4-61
 advisory board, 4-61
 agency framework document, 4-59
 audit committee, 4-61
 best value services, 4-60
 conflicts with statutory functions,
 4-63
 debt management, 4-58, 4-60
 debt relief, 4-58, 4-60
 policy function, 4-60
 structure, 4-62
 supervising bankruptcy process, 4-60
history of office, 4-03
information-sharing, 4-55
introduction, 4-01—4-02
legislative developments and, 2-32
pre-application moratoriums
 notice to AiB, 5-04—5-07
 response to notice by AiB, 5-11
procedural irregularities
 power to cure, 12-104—12-107
protected trust deeds
 supply of information to AiB,
 22-122—22-123
recall of award
 generally, 9-25—9-38
 remit to sheriff, 9-46
 review of an appeal against decision,
 9-47—9-49
 where AiB trustee, 9-39—9-45
status
 Executive Agency, 4-07—4-08
 officer of court, 4-06
statutory functions
 advice, 4-53
 annual report, 4-34—4-35
 areas for future development,
 4-54—4-56
 bankruptcy restrictions, 4-44—4-45
 commissioners in sequestration,
 exercising functions of, 4-39

debt arrangement scheme administrator,
4-12

debtor's discharge, 4-42—4-43

delegation, 4-11

determining appeals, 4-48

determining debtor applications,
4-24—4-25

determining specified matters in
sequestrations, 4-40—4-41

fees, 4-49—4-52

generally, 4-09—4-10

interim trustee, acting as, 4-36—4-38

issues arising from, 4-57

register of insolvencies, 4-26—4-33

review of decisions, 4-46—4-47

supervisory functions, 4-13—4-23

trustee in sequestration, acting as,
4-36—4-38

supervisory functions

auditing accounts, 4-22

complaints, 4-13

Consultation on Bankruptcy Law Reform
(2012), 4-23

directions to trustees, 4-16—4-17

disclosure of documents, 4-15

Notes for Guidance, 4-14

offences, 4-19—4-20

reporting trustees to recognised
professional body, 4-21

trustees' failure to perform duties, 4-18

trustee, acting as

accounts in bankruptcy, 16-130—16-134

discharge of debtor, 17-59—17-62

discharge of trustee, 18-14—18-16,
19-12

generally, 4-36—4-38

interim trustee, 10-44—10-49

procedure on completion of

 administration of estate, 18-07

recall of sequestration, 9-39—9-45

scheme of division, 16-130—16-134

Accounts

accounting periods, 16-113—16-117

balancing of accounts in bankruptcy,
16-72—16-87

distribution in accordance with accounting
periods, 16-118—16-122

protected trust deeds, 22-124—22-127

where trustee AiB, 16-130—16-134

where trustee not AiB, 16-123—16-129

Acqurienda

protected trust deeds, 22-70—22-71

vesting of estate in trustees, 11-14—11-21

Adjudication of creditors' claims

claims submitted for voting at other
meetings, 16-24—16-34

claims submitted for voting at statutory
meeting, 16-23

generally, 16-22

Adjudication

- regulation of diligence
on sequestration, 15–35—15–41
- outwith sequestration, 15–15—15–18

Administration of estate

- applications to sheriff in relation to trustee's actions, 12–94
- defects in procedure
 - generally, 12–95—12–99
 - power of AiB to cure, 12–104—12–107
 - power of sheriff to cure, 12–100—12–103
- directions applications, 12–89—12–93
- introduction, 12–01—12–02
- managing and realising estate
 - abandonment and compromise of claims, 12–39—12–42
 - co-operation of debtor, 12–46—12–47
 - contracts, 12–22—12–36
 - council tax, 12–37
 - debtor's account of current state of affairs, 12–44—12–45
 - family home, 12–65—12–88
 - general powers of trustees, 12–18
 - generally, 12–17
 - heritable property subject to security, 12–53—12–64
 - money received by trustee, 12–43
 - property charges, 12–38
 - redirection of mail, 12–19—12–21
 - sale of estate, 12–48—12–52
- recovering estate
 - generally, 12–13—12–15
 - prior transactions, 12–16
- seederunt book, 12–108—12–113
- trustees' powers and duties
 - appointment of agents, 12–07
 - commissioners' advice, 12–08
 - compliance with directions, 12–10—12–11
 - consultation with AiB, 12–09
 - EU law, 12–12
 - fiduciary duties, 12–05
 - incompetence, 12–06
 - representation of creditors, 12–03—12–04
 - representation of debtor, 12–03
 - role of trustee, 12–03

Advice

- Accountant in Bankruptcy, 4–53
- commissioners, 12–08

Advisory board

- AiB executive agency functions, 4–61

Agents

- appointment, 12–07

Aliment

- creditors' claims, 16–43—16–46

Alternatives to sequestration

- composition, 20–07—20–09
- debt arrangement scheme, 20–10—20–11
- introduction, 20–01—20–03
- judicial factors, 20–14—20–16
- trust deed for creditors, 20–12—20–13
- voluntary arrangements with creditors, 20–04—20–06

American Law Institute

- international initiatives in cross-border insolvency, 24–33

Annual report

- Accountant in Bankruptcy, 4–34—4–35

Appeals

- Accountant in Bankruptcy, 4–48
- debt arrangement scheme
 - decision on application, 21–91
 - generally, 21–150, 21–157—21–158
 - revocation, 21–130
- debt payment programmes, 21–116
- debtor contribution orders, 11–162—11–165
- discharge of debtor, 17–63—17–64
- protected trust deeds, 22–145—22–149

Applicable law

- cross-border insolvency
 - EU Insolvency Regulation, 25–68—25–71
 - Insolvency Act 1986, 25–16—25–17

Applications

- debt arrangement scheme
 - additional requirements in cases of entities, 21–62
 - consent of creditors, 21–63—21–70
 - debts to be included, 21–50—21–54
 - decision on, 21–80—21–91
 - effect of registration, 21–73—21–78
 - fees, 21–72
 - form of, 21–48—21–49
 - proposals for payment, 21–55—21–61
 - submission, 21–71
 - withdrawal, 21–79
- directions, 12–89—12–93

Applications for sequestration

- authorised person, 7–172—7–181
- combined applications, 7–205
- creditor applications
 - estate of body corporate or unincorporated body, 7–182—7–193
 - estate of deceased debtor, 7–73—7–81
 - estate of living debtors, 7–29—7–44
 - estate of partnership, 7–143—7–154
 - estate of trust, 7–107—7–118
- debtor applications
 - accompanying documents, 7–18—7–28
 - criteria for, 7–12—7–17
 - determination of application, 8–06—8–08
 - effect of, 7–217—7–218
 - form of application, 7–18—7–28
 - inappropriate applications, 8–05
 - incomplete applications, 8–04
 - jurisdiction, 7–210—7–211, 7–216
 - requirement for money advice, 7–05—7–11
- debtor contribution orders, 11–138
- estate of body corporate or unincorporated body
 - by authorised person, 7–172—7–181
 - by Member State insolvency practitioner, 7–199—7–203
 - by qualified creditor, 7–182—7–193
 - by temporary administrator, 7–194—7–198
- introduction, 7–170—7–171

estate of deceased debtor
 by executor, 7-63—7-72
 by Member State insolvency practitioner,
 7-87—7-91
 by qualified creditor, 7-73—7-81
 by temporary administrator, 7-82—7-86
 by trustee under trust deed, 7-92—7-96
 introduction, 7-62

estate of living debtors
 by debtor, 7-05—7-28
 by Member State insolvency practitioner,
 7-50—7-54
 by qualified creditor, 7-29—7-44
 by temporary administrator,
 7-45—7-49
 by trustee under trust deed, 7-55—7-61
 introduction, 7-04

estate of partnership
 by Member State insolvency practitioner,
 7-160—7-164
 by partnership, 7-132—7-142
 by qualified creditor, 7-143—7-154
 by temporary administrator,
 7-155—7-159
 by trustee under trust deed,
 7-165—7-169
 generally, 7-129—7-131

estate of trust
 by majority of trustees, 7-98—7-106
 by Member State insolvency practitioner,
 7-124—7-128
 by qualified creditor, 7-107—7-118
 by temporary administrator,
 7-119—7-123
 introduction, 7-97

executor, 7-63—7-72

foreign representative under cross-border
 insolvency regulations, 7-204

introduction, 7-01—7-03

jurisdiction
 carrying on business, 7-214
 debtor applications, 7-210—7-211, 7-216
 established place of business, 7-212
 EU insolvency proceedings regulation,
 7-215
 generally, 7-206—7-207
 habitual residence, 7-213
 petitions for sequestration,
 7-208—7-209

Member State insolvency practitioner
 estate of body corporate or
 unincorporated body, 7-199—7-203
 estate of deceased debtor, 7-87—7-91
 estate of living debtors, 7-50—7-54
 estate of partnership, 7-160—7-164
 estate of trust, 7-124—7-128

temporary administrator
 estate of body corporate or unincorporated
 body, 7-194—7-198
 estate of deceased debtor, 7-82—7-86
 estate of living debtors, 7-45—7-49
 estate of partnership, 7-155—7-159
 estate of trust, 7-119—7-123

trustees under trust deed
 estate of living debtors, 7-55—7-61
 estate of partnership, 7-165—7-169

Appointments

Accountant in Bankruptcy, 4-04—4-05
 agents, 12-07
 interim trustees in sequestration
 considerations to be taken into account,
 10-10—10-11
 generally, 10-07—10-09
 new interim trustee, 10-20
 notification of appointment,
 10-12—10-13, 10-21—10-22

judicial factors
 effect of, 23-30
 generally, 23-03
 Judicial Factors (Scotland) Act 1889,
 23-08—23-09
 other appointments, 22-12—23-14
 partnership estate, 23-05—23-07
 procedure for obtaining appointment,
 23-15—23-17
 Solicitors (Scotland) Act 1980, 23-04
 subsequent to judicial composition,
 23-10—23-11

trustees in sequestration
 considerations to be taken into account,
 10-59
 debtor applications for sequestration,
 10-57—10-58
 following revival or sequestration, 10-98
 generally, 8-49—8-50, 10-53
 minimal asset cases, 19-05
 petitions for sequestration,
 10-54—10-56

Arrest warrants

cross-border insolvency, 25-18

Arrestments

debt payment programmes, 21-94
 regulation of diligence
 on sequestration, 15-25
 outwith sequestration, 15-07—15-14

Attachment

property exempt from, 11-55—11-69
 regulation of diligence
 on sequestration, 15-25—15-34
 outwith sequestration, 15-07—15-14

Audit committee

AiB executive agency, 4-61

Audits

Accountant in Bankruptcy, 4-22
 trust deeds for creditors, 22-29

Authorisation

insolvency practitioners
 full authorisation, 4-92
 partial authorisation, 4-93
 procedures of professional bodies,
 4-101
 recognition of professional bodies,
 4-94—4-99
 regulatory framework, 4-103
 Secretary of State's powers, 4-100
 statutory framework for, 4-91
 transitional provisions, 4-102
 post-sequestration dealings with estate,
 11-175

Awards of sequestration

date of sequestration, 8-31—8-35
 debtor applications

- determination of application,
 - 8-06—8-08
 - generally, 8-02—8-03
 - inappropriate applications, 8-05
 - incomplete applications, 8-04
 - refusal of award, 8-44—8-46
 - registration, 8-36
- introduction, 8-01
- petitions for sequestration
 - concurrent proceedings, 8-23—8-28
 - determination of petition, 8-14—8-22
 - generally, 8-08
 - hearing, 8-13
 - refusal of award, 8-47—8-48
 - registration of warrant to cite, 8-37—8-38
 - warrant to cite, 8-09—8-12
- procedure following award
 - appointment of trustees, 8-49—8-50
 - debtor's statement of assets and liabilities, 8-53—8-58
 - debtor's statement of undertakings, 8-51—8-52
 - notification of award, 8-49—8-50
 - statutory meeting, 8-59—8-67
 - trustee's statement of affairs, 8-53—8-58
- recall of award
 - Accountant in Bankruptcy, by, 9-25—9-49
 - introduction, 9-02—9-05
 - non-entitled spouse or civil partner, by, 9-50—9-53
 - petitions for recall, 9-06—9-24
- reduction of award, 9-54—9-58
- refusal of award
 - debtor applications, 8-44—8-46
 - generally, 8-43
 - petitions for sequestration, 8-47—8-48
- registration
 - debtor application, 8-36
 - effect of registration, 8-39—8-42
 - warrant to cite, 8-37—8-38
- review of award
 - damages for wrongful sequestration, 9-62
 - introduction, 9-01
 - petition to nobile officium, 9-60—9-61
 - recall of award, 9-02—9-53
 - reduction of award, 9-54—9-58
 - suspension and interdict, 9-59
- sequestration not to fall asleep, 8-29
- statutory meeting
 - calling of, 8-60—8-62
 - introduction, 8-59
 - procedure at meeting, 8-63—8-66
 - procedure where no statutory meeting, 8-67
- transfer of sequestration, 8-30
- Bank accounts**
 - effect of sequestration, 11-98—11-99
- Bank transactions**
 - post-sequestration dealings with estate, 11-175

Bankruptcy restriction orders

- Accountant in Bankruptcy, 4-44—4-45
- breach, 17-129
- duration of order, 17-105—17-107
- effects of, 17-118—17-122
- expenses, 17-130—17-132
- grounds for making, 17-100—17-104
- initial procedure, 17-90—17-92
- interim orders, 17-108—17-111
- introduction, 17-83—17-89
- procedure where application to sheriff, 17-95—17-99
- procedure where made by AiB, 17-93—17-94
- publications, 17-116—17-117
- recall of sequestration, 17-123—17-128
- register of insolvencies, 4-29
- registration, 17-116—17-117
- revocation, 17-112—17-114
- variation, 17-112—17-114

Bankruptcy restriction undertakings

- Accountant in Bankruptcy, 4-44—4-45
- breach, 17-129
- effects of, 17-118—17-122
- generally, 17-115
- publications, 17-116—17-117
- register of insolvencies, 4-29
- registration, 17-116—17-117

Best value services

- AiB executive agency functions, 4-60

Bodies corporate

- applications for sequestration of estate of
 - by authorised person, 7-172—7-181
 - by Member State insolvency practitioner, 7-199—7-203
 - by qualified creditor, 7-182—7-193
 - by temporary administrator, 7-194—7-198
- introduction, 7-170—7-171

Burden of proof

- excessive pension contributions, 14-89
- extortionate credit transactions, 14-107
- gratuitous alienations, 14-28
- orders on divorces or dissolution of civil partnership, 14-79

Business debt arrangement scheme

- proposals for, 2-31

Calling up

- administration of estate, 12-56

Caution

- insolvency practitioners, 4-106—4-107
- post-sequestration dealings with estate, 11-180

Centre of main interests

- EU Insolvency Regulation, 25-54—25-64

Cessio bonorum

- history of bankruptcy law, 2-06

Chair

- creditors' meetings, 10-142

Challenging prior transactions

- background, 14-02—14-04
- common law
 - generally, 14-07—14-12
 - gratuitous alienations, 14-41—14-48
 - unfair preferences, 14-63—14-72

- excessive pension contributions
 - burden of proof, 14-89
 - generally, 14-83—14-85
 - persons who may challenge, 14-86
 - remedies, 14-90—14-92
 - what can be challenged, 14-87—14-88
- extortionate credit transactions
 - burden of proof, 14-107
 - generally, 14-101—14-103
 - remedies, 14-108—14-111
 - time limits, 14-106
 - what can be challenged, 14-104—14-105
- gratuitous alienations
 - burden of proof, 14-28
 - common law, 14-41—14-48
 - defences, 14-29—14-31
 - meaning of “associate”, 14-21—14-26
 - transactions which can be challenged, 14-18—14-19
 - persons who may challenge, 14-16—14-17
 - remedies, 14-32—14-40
 - statutory provisions, 14-14—14-40
 - time limits, 14-20
 - timing of alienation, 14-27
- interrelationship of provisions, 14-13
- introduction, 14-01
- orders on divorces or dissolution of civil partnership
 - burden of proof, 14-79
 - generally, 14-73—14-74
 - persons who may challenge, 14-75
 - remedies, 14-80—14-82
 - time limits, 14-78
 - what can be challenged, 14-76—14-77
- pension-sharing cases, 14-93—14-100
- statutory provisions, 14-05—14-06
- unfair preferences
 - common law, 14-63—14-72
 - creation of preference, 14-55
 - exemptions, 14-57
 - nature of preference, 14-56
 - persons who may challenge, 14-51
 - remedies, 14-58—14-62
 - statutory preferences, 14-49—14-62
 - time limits, 14-54
 - what can be challenged, 14-52—14-53
- Charity trustees**
 - disqualification of debtor, 17-20—17-21
- Choice of law**
 - cross-border insolvency, 24-10
- Civil partnerships**
 - orders on dissolution
 - burden of proof, 14-79
 - generally, 14-73—14-74
 - persons who may challenge, 14-75
 - remedies, 14-80—14-82
 - time limits, 14-78
 - what can be challenged, 14-76—14-77
 - recall of award of sequestration, 9-50—9-53
- Commissioners in sequestration**
 - Accountant in Bankruptcy exercising functions of, 4-39
 - background to current law, 10-03—10-06
 - election, 10-113—10-114
 - functions, 10-118—10-123
 - introduction, 10-01—10-02, 10-112
 - meetings of, 10-124—10-128
 - nature of office, 10-129—10-130
 - removal, 10-116—10-117
 - resignation, 10-115
 - supervision of, 10-131—10-133
- Common law**
 - challenging prior transactions
 - generally, 14-07—14-12
 - gratuitous alienations, 14-41—14-48
 - unfair preferences, 14-63—14-72
 - cross-border insolvency, 25-246—25-262
 - offences, 17-43—17-44
- Community benefit societies**
 - sequestration of, 6-07
- Community patents**
 - EU Insolvency Regulation, 25-89
- Community trade marks**
 - EU Insolvency Regulation, 25-89
- Companies**
 - sequestration of, 6-06
- Complaints**
 - Accountant in Bankruptcy, 4-13
- Composition contracts**
 - alternatives to sequestration, 20-07—20-09
 - creditors' claims, 16-54—16-55
 - debt arrangement scheme and, 21-136—21-140
- Compromise of claims**
 - management and realisation of estate, 12-39—12-42
- Concurrent proceedings**
 - cross-border insolvency, 25-236—25-241
- Consent to disposal**
 - family home, 12-71—12-73
- Consigned sums**
 - effect of sequestration, 11-100—11-101
- Contingent debts**
 - creditors' claims, 16-47—16-53
- Contingent rights**
 - re-vesting of estate in debtor, 11-189—11-191
 - vesting of estate in trustees, 11-46—11-48
- Contracts**
 - management and realisation of estate, 12-22—12-36
- Contributions from income**
 - protected trust deeds, 22-111
- Convention on Certain Aspects of Bankruptcy 1990**
 - international initiatives in cross-border insolvency, 24-28
- Convention on Insolvency Proceedings 1995**
 - international initiatives in cross-border insolvency, 24-29
- Co-obligants' rights and liabilities**
 - creditors' claims, 16-65—16-71
- Co-operative societies**
 - sequestration of, 6-07
- Copies of orders**
 - cross-border insolvency, 25-245
- Council tax**
 - management and realisation of estate, 12-37

Creditors

- applications for sequestration
 - estate of body corporate or unincorporated body, 7-182-7-193
 - estate of deceased debtor, 7-73-7-81
 - estate of living debtors, 7-29-7-44
 - estate of partnership, 7-143-7-154
 - estate of trust, 7-107-7-118

creditors' meetings

- adjournment, 10-150
- appeals against resolutions, 10-143
- calling of meeting, 10-138-10-141
- chair, 10-142
- generally, 10-137
- lack of notice, effect of, 10-144
- location, 10-145
- majority decision-making, 10-148
- minutes, 10-151
- notice, 10-140
- objections, 10-149
- proxies, 10-146
- quorum, 10-147
- introduction, 10-134-10-136

Creditors' claims

adjudication of claims

- claims submitted for voting at other meetings, 16-24-16-34
- claims submitted for voting at statutory meeting, 16-23
- generally, 16-22

amount of claim

- aliment and periodical allowance, 16-43-16-46
- composition contracts, 16-54-16-55
- contingent debts, 16-47-16-53
- general rule, 16-36-16-42
- generally, 16-35
- partnership debts, 16-62-16-63
- secured debts, 16-56-16-61
- student loans, 16-64

balancing accounts in bankruptcy,

16-72-16-87

co-obligants' rights and liabilities,

16-65-16-71

EU Insolvency Regulation

- duty to inform creditors, 25-153-25-156
- generally, 25-150
- procedure, 25-157-25-161
- right to lodge, 25-151-25-152

introduction, 16-01-16-02

minimal asset cases, 19-10

submission of claims

- effect of submission, 16-19-16-21
- evidence relating to claims, 16-18
- false claims, 16-15-16-16
- foreign currency claims, 16-11-16-12
- form of claim, 16-09-16-10
- generally, 16-03-16-04
- prescription and limitation, 16-19-16-20
- recording claims, 16-17
- submission of different claim, 16-13-16-14
- time limits, 16-05-16-08
- trust deeds for creditors, 22-28

Creditors' committees

- disqualification of debtor, 17-26-17-27

Criminal injuries compensation

- effect of sequestration, 11-104

Cross-border insolvency

- choice of law, 24-10
- common law, 25-246-25-262
- Cross-border Insolvency Regulations 2006
 - applications for recognition, 25-200-25-202
 - automatic effects, 25-216-25-218
 - concurrent proceedings, 25-236-25-241
 - cooperation with foreign courts and representatives, 25-231-25-235
 - copies of orders, 25-245
 - decision on application, 25-204-25-210
 - discretionary remedies, 25-219-25-230
 - foreign representatives' access to UK courts, 25-191-25-199
 - hearing on application, 25-203
 - inspection of court process, 25-245
 - interim remedies, 25-211-25-215
 - introduction, 25-165-25-171
 - judicial cooperation, 25-177
 - jurisdiction, 25-188-25-190
 - modification of UK insolvency law, 25-172-25-176
 - procedural matters, 25-178
 - provisions relating to foreign representatives, 25-242-25-244
 - scope of Model law, 25-179-25-187
- elements of case, 24-03
- EU Insolvency Regulation
 - applicable law, 25-68-25-71
 - centre of main interests, 25-54-25-64
 - community patents, 25-89
 - community trade marks, 25-89
 - contracts of employment, 25-86-25-87
 - creditors' claims, 25-150-25-161
 - data protection, 25-162-25-164
 - detrimental acts, 25-90-25-91
 - effects of recognition, 25-100-25-117
 - establishment, 25-65-25-67
 - financial markets, 25-84-25-85
 - immoveable property, 25-82-25-83
 - international jurisdiction, 25-41-25-53
 - introduction, 25-19-25-27
 - payment systems, 25-84-25-85
 - pending actions, 25-93-25-94
 - principles of recognition, 25-95-25-99
 - protection of third party purchasers, 25-92
 - reservation of title, 25-78-25-81
 - rights in rem, 25-72-25-76
 - rights subject to registration, 25-88
 - scheme of, 25-40
 - scope of, 25-29-25-39
 - secondary proceedings, 25-118-25-149
 - set off, 25-77
 - structure of proceedings, 25-28
- foreign representatives
 - access to UK courts, 25-191-25-199
 - applications for sequestration, 7-204
 - cooperation with, 25-231-25-235

- provisions relating to, 25–242—25–244
- harmonisation, 24–36—24–39
- Insolvency Act 1986**
 - applicable law, 25–16—25–17
 - enforcement, 25–13
 - introduction, 25–07—25–08
 - judicial cooperation, 25–14—25–17
 - meaning of insolvency law, 25–09—25–12
 - nature of assistance, 25–15
 - procedure, 25–14
 - warrants for arrest, 25–18
- international initiatives**
 - American Law Institute, 24–33
 - Convention on Certain Aspects of Bankruptcy 1990, 24–28
 - Convention on Insolvency Proceedings 1995, 24–29
 - Cross-Border Insolvency Concordat 1995, 24–30
 - European Communication and Co-operation Guidelines for Cross-Border Insolvency, 24–32
 - generally, 24–27
 - INSOL International, 24–35
 - International Insolvency Institute, 24–33
 - Judicial Insolvency Network, 24–34
 - UNCITRAL Model Law on Cross-Border Insolvency, 24–31
- introduction, 24–01—24–02, 25–01—25–06
- issues arising in, 24–04—24–08
- jurisdiction, 24–09
- legislative developments, 2–24, 2–27
- national initiatives, 24–23—24–26
- need for special rules, 24–13—24–15
- recognition and effect, 24–11—24–12
- theoretical debate
 - generally, 24–16
 - modified versions of theories, 24–22
 - territorialism, 24–20—24–21
 - universalism, 24–17—24–19
- Cross-Border Insolvency Concordat 1995**
 - international initiatives in cross-border insolvency, 24–30
- Current state of affairs**
 - management and realisation of estate, 12–44—12–45
 - minimal asset cases, 19–09
 - recovery of documents and information, 13–20—13–21
- Damages**
 - wrongful sequestration, 9–62
- Data protection**
 - EU Insolvency Regulation, 25–162—25–164
- Death**
 - interim trustees in sequestration, 10–19
 - trustees in sequestration, 10–86
- Deathbed expenses**
 - distribution of estate, 16–94—16–95
- Debt arrangement scheme**
 - see also Pre-application moratorium*
 - administrator, 21–13
 - alternatives to sequestration, 20–10—20–11
 - appeals, 21–150, 21–157—21–158
 - application
 - additional requirements in cases of entities, 21–62
 - consent of creditors, 21–63—21–70
 - debts to be included, 21–50—21–54
 - decision on, 21–80—21–91
 - effect of registration, 21–73—21–78
 - fee, 21–72
 - form of, 21–48—21–49
 - proposals for payment, 21–55—21–61
 - submission, 21–71
 - withdrawal, 21–79
 - background to scheme, 21–04—21–08
 - changes to scheme, 21–09—21–11
 - composition and, 21–136—21–140
 - decision on application
 - appeals, 21–91
 - approval, 21–80—21–82
 - fair and reasonable test, 21–83—21–84
 - notice of approval, 21–87—21–88
 - rejection, 21–89—21–90
 - standard and discretionary conditions, 21–85—21–86
 - dispensing powers, 21–144—21–145
 - error correction, 21–141—21–143
 - introduction, 21–01—21–03
 - legislative developments, 2–23, 2–25, 2–30
 - money advisers
 - approval of, 21–15—21–20
 - fees, 21–21
 - functions and duties, 21–22—21–27
 - generally, 21–14
 - revocation of approval, 21–28—21–30
 - suspension of approval, 21–28—21–30
 - outline of scheme, 21–12
 - payments distributors
 - approval of, 21–32—21–33
 - fees, 21–34
 - functions of, 21–35—21–36
 - generally, 21–31
 - revocation of approval, 21–37—21–39
 - suspension of approval, 21–37—21–39
 - register of, 4–27, 21–146—21–149
 - review, 21–151—21–156
 - revocation
 - appeals, 21–130
 - application, 21–119—21–121
 - by administrator, 21–118
 - completion, 21–132—21–135
 - decision to revoke, 21–124
 - effect of, 21–126—21–129
 - grounds, 21–122—21–123
 - notification, 21–125
 - register, 21–131
 - scope of scheme
 - exclusions, 21–42—21–44
 - generally, 21–40
 - joint debt payment programmes, 21–45
 - limitations, 21–46—21–47
 - requirement to have debts, 21–41
 - trust deeds for creditors and, 22–38
- Debt management**
 - AiB executive agency functions, 4–58, 4–60

Debt payment programmes

- arrestments, 21–94
- awards of sequestration and, 8–20—8–22
- effect of, 21–92
- fees, 21–93
- interest, 21–93
- moratorium on diligence, 21–96—21–97
- obligations on creditors, 21–101
- restrictions on credit, 21–98—21–100
- subsequent sequestration, 21–102
- trust deeds, 21–95, 21–102
- variation
 - appeals, 21–116
 - approval, 21–111—21–113
 - effect of, 21–117
 - fee for application, 21–109
 - generally, 21–103—21–107
 - grounds for, 21–108
 - notification of decision, 21–114—21–115
 - procedure, 21–110
 - rejection, 21–111—21–113

Debt relief

- AiB executive agency functions, 4–58, 4–60

Debtor applications

- accompanying documents, 7–18—7–28
- awards of sequestration
 - determination of application, 8–06—8–08
 - generally, 8–02—8–03
 - inappropriate applications, 8–05
 - incomplete applications, 8–04
 - refusal of award, 8–44—8–46
 - registration, 8–36
- criteria for, 7–12—7–17
- effect of, 7–217—7–218
- form of application, 7–18—7–28
- jurisdiction, 7–210—7–211, 7–216
- requirement for money advice, 7–05—7–11

Debtor contribution orders

- appeals, 11–162—11–165
- debtor applications for sequestration, 11–138
- deductions from earnings and other income, 11–147—11–152
- effect, 11–146
- generally, 11–137
- payment breaks, 11–158—11–161
- payment period, 11–144—11–145
- petitions for sequestration, 11–135
- quashing of order, 11–153—11–157
- review of decisions, 11–162—11–165
- terms of order, 11–140—11–143
- variation, 11–153—11–157

Debtor protection

- family home, 12–66

Debtors

see also **Current state of affairs**

- bankruptcy restrictions
 - breach, 17–129
 - duration of order, 17–105—17–107
 - effects of, 17–118—17–122
 - expenses, 17–130—17–132
 - grounds for making, 17–100—17–104
 - initial procedure, 17–90—17–92
 - interim orders, 17–108—17–111
 - introduction, 17–83—17–89

- procedure where application to sheriff, 17–95—17–99
- procedure where made by AiB, 17–93—17–94
- publications, 17–116—17–117
- recall of sequestration, 17–123—17–128
- registration, 17–116—17–117
- revocation, 17–112—17–114
- variation, 17–112—17–114

bankruptcy restriction undertakings

- breach, 17–129
- effects of, 17–118—17–122
- generally, 17–115
- publications, 17–116—17–117
- registration, 17–116—17–117

discharge

- background, 17–47—17–52
- effect of discharge, 17–75—17–82
- minimal asset cases, 17–65—17–66
- provisions for, 17–53
- review and appeal of AiB decision, 17–63—17–64
- trustee not AiB, 17–54—17–58
- untraced debtors, 17–67—17–74
- where AiB trustee, 17–59—17–62

disqualifications

- charity trustees, 17–20—17–21
- director of company, 17–18—17–19
- generally, 17–09
- health boards, 17–24
- justice of the peace, 17–14
- local authority disqualifications, 17–12—17–13
- membership of creditors' committees, 17–26—17–27
- parliamentary disqualifications, 17–10—17–11
- pension trustees, 17–22—17–23
- professional disqualifications, 17–15—17–17
- registered social landlords, 17–25
- duty to co-operate with trustee, 17–05—17–08

- effects of sequestration, 17–03—17–04
- introduction, 17–01—17–02

offences

- Bankruptcy (Scotland) Act 2016, 17–29—17–42
- common law, 17–43—17–44
- failure to come to Scotland when required by court, 17–33
- general offences, 17–31—17–32
- introduction, 17–28

- obtaining credit without disclosing relevant information, 17–35—17–40

- pledge or disposal of property obtained on credit, 17–34

- proceedings for, 17–41—17–42
- reporting of, 17–45—17–46
- specific offences, 17–29—17–30

sequestration of estate of deceased debtor

- by executor, 7–63—7–72
- by Member State insolvency practitioner, 7–87—7–91
- by qualified creditor, 7–73—7–81

by temporary administrator, 7-82—7-86
 by trustee under trust deed, 7-92—7-96
 introduction, 7-62
 sequestration of estate of living debtors
 by debtor, 7-05—7-28
 by Member State insolvency practitioner,
 7-50—7-54
 by qualified creditor, 7-29—7-44
 by temporary administrator, 7-45—7-49
 by trustee under trust deed, 7-55—7-61
 introduction, 7-04

Debtor's state of affairs
see **Current state of affairs**

Deceased debtors
 vesting of estate in trustees, 11-22

Deductions from earnings
 debtor contribution orders, 11-147—11-152

Default notices
 administration of estate, 12-57

Diligence
 effect of sequestration, 11-83
 introduction, 15-01—15-05
 regulation of on sequestration
 adjudications, 15-35—15-41
 arrestments, 15-25
 attachments, 15-25—15-34
 confirmations as executor creditor,
 15-42—15-43
 generally, 15-19—15-21
 inhibitions, 15-22—15-24
 mails and duties, 15-46—15-47
 poundings of the ground, 15-44—15-45
 sequestration for rent, 15-48
 regulation of outwith sequestration
 adjudications, 15-15—15-18
 arrestments, 15-07—15-14
 attachments, 15-07—15-14
 generally, 15-06

Directions
 Accountant in Bankruptcy, 4-16—4-17
 applications for, 12-89—12-93
 compliance with, 12-10—12-11
 protected trust deeds, 22-120—22-121

Directors
 disqualification of debtor, 17-18—17-19

Discharge of debtor
 Accountant in Bankruptcy, 4-42—4-43
 background, 17-47—17-52
 effect of discharge, 17-75—17-82
 minimal asset cases, 17-65—17-66, 19-11
 protected trust deeds
 effect of discharge, 22-137—22-138
 generally, 22-132
 procedure, 22-133—22-136
 provisions for, 17-53
 review and appeal of AiB decision,
 17-63—17-64
 trust deeds for creditors, 22-30—22-31
 trustee not AiB, 17-54—17-58
 untraced debtors, 17-67—17-74
 where AiB trustee, 17-59—17-62

Discharge of trustee
 end of sequestration
 effect of discharge, 18-17
 trustee AiB, 18-14—18-16
 trustee not AiB, 18-09—18-13

generally, 10-106
 minimal asset cases, 19-12
 protected trust deeds
 effect of discharge, 22-142—22-143
 procedure, 22-139—22-141
 retention of documents, 22-144
 trust deeds for creditors, 22-32

Disclosure
 Accountant in Bankruptcy, 4-15

Disqualifications
 charity trustees, 17-20—17-21
 director of company, 17-18—17-19
 generally, 17-09
 health boards, 17-24
 justice of the peace, 17-14
 local authority disqualifications,
 17-12—17-13
 membership of creditors' committees,
 17-26—17-27
 parliamentary disqualifications,
 17-10—17-11
 pension trustees, 17-22—17-23
 professional disqualifications,
 17-15—17-17
 registered social landlords, 17-25

Dissolution of civil partnership
 orders on
 burden of proof, 14-79
 generally, 14-73—14-74
 persons who may challenge,
 14-75
 remedies, 14-80—14-82
 time limits, 14-78
 what can be challenged, 14-76—14-77

Distribution of estate
 abatement of debts, 16-111
 accounts
 accounting periods, 16-113—16-117
 distribution in accordance with
 accounting periods, 16-118—16-122
 where trustee AiB, 16-130—16-134
 where trustee not AiB, 16-123—16-129
 deathbed and funeral expenses,
 16-94—16-95
 expenses of petitioning or concurring
 creditor, 16-96—16-97
 introduction, 16-88—16-89
 judicial factors, 23-27—23-28
 minimal asset cases, 19-10
 order of priority, 16-90—16-93
 ordinary debts, 16-106
 post-sequestration interest,
 16-107—16-108
 postponed debts, 16-109—16-110
 preferred debts, 16-98—16-105
 protected trust deeds, 22-118—22-119
 scheme of division
 where trustee AiB, 16-130—16-134
 where trustee not AiB, 16-123—16-129
 surplus, 16-112
 trust deeds for creditors, 22-28

Divorce
 orders on
 burden of proof, 14-79
 generally, 14-73—14-74
 persons who may challenge, 14-75

- remedies, 14–80—14–82
- time limits, 14–78
- what can be challenged, 14–76—14–77
- Employment contracts**
 - EU Insolvency Regulation, 25–86—25–87
- End of sequestration**
 - discharge of trustee
 - effect of discharge, 18–17
 - trustee AiB, 18–14—18–16
 - trustee not AiB, 18–09—18–13
 - introduction, 18–01
 - judicial composition, 18–02—18–03
 - no judicial composition, 18–04—18–05
 - procedure on completion of administration
 - of estate
 - trustee AiB, 18–07
 - trustee not AiB, 18–06
 - unclaimed dividends, 18–08
 - revival of sequestration
 - judicial composition, 18–19—18–22
 - no judicial composition, 18–23—18–31
 - sequestered estate, 18–18
- Enforcement**
 - cross-border insolvency, 25–13
- Establishment**
 - EU Insolvency Regulation, 25–65—25–67
- EU Insolvency Regulation**
 - applicable law, 25–68—25–71
 - centre of main interests, 25–54—25–64
 - community patents, 25–89
 - community trade marks, 25–89
 - contracts of employment, 25–86—25–87
 - creditors' claims
 - duty to inform creditors, 25–153—25–156
 - generally, 25–150
 - procedure, 25–157—25–161
 - right to lodge, 25–151—25–152
 - data protection, 25–162—25–164
 - detrimental acts, 25–90—25–91
 - effects of recognition
 - hotchpot, 25–117
 - main proceedings, 25–100
 - powers of insolvency practitioner, 25–102—25–104
 - proof of insolvency practitioner's appointment, 25–105
 - publication, 25–106—25–113
 - territorial proceedings, 25–101
 - third party protection, 25–114—25–116
 - establishment, 25–65—25–67
 - financial markets, 25–84—25–85
 - hotchpot, 25–117
 - immoveable property, 25–82—25–83
 - insolvency practitioners
 - powers, 25–102—25–104
 - proof of appointment, 25–105
 - international jurisdiction
 - actions derived from insolvency proceedings, 25–50—25–52
 - appointment of temporary administrator, 25–53
 - examination of jurisdiction, 25–47—25–49
 - generally, 25–41
 - main proceedings, 25–42
 - territorial proceedings, 25–43—25–46
 - introduction, 25–19—25–27
 - main proceedings
 - co-ordination of main and secondary proceedings, 25–139—25–149
 - effects of recognition, 25–100
 - jurisdiction, 25–42
 - payment systems, 25–84—25–85
 - pending actions, 25–93—25–94
 - principles of recognition
 - judgments opening insolvency proceedings, 25–95—25–97
 - other judgments, 25–98
 - public policy, 25–99
 - publication, 25–106—25–113
 - reservation of title, 25–78—25–81
 - rights in rem, 25–72—25–76
 - rights subject to registration, 25–88
 - scheme of, 25–40
 - scope of, 25–29—25–39
 - secondary proceedings
 - applicable law, 25–121
 - application to open, 25–132—25–133
 - co-ordination of main and secondary proceedings, 25–139—25–149
 - decision to open, 25–134—25–138
 - generally, 25–118—25–120
 - undertaking to avoid, 25–122—25–131
 - set off, 25–77
 - structure of proceedings, 25–28
 - territorial proceedings
 - effects of recognition, 25–101
 - jurisdiction, 25–43—25–46
 - third party protection, 25–92, 25–114—25–116
- European Communication and Co-operation Guidelines for Cross-Border Insolvency**
 - international initiatives in cross-border insolvency, 24–32
- Examination of persons**
 - appearance before trustee, 13–24—13–25
 - generally, 13–22—13–23
 - private examination, 13–26
 - procedure, 13–28—13–36
 - public examination, 13–27
- Executor creditor**
 - confirmations as, 15–42—15–43
- Executors**
 - applications for sequestration of deceased debtor, 7–63—7–72
- Extortionate credit transactions**
 - burden of proof, 14–107
 - generally, 14–101—14–103
 - remedies, 14–108—14–111
 - time limits, 14–106
 - what can be challenged, 14–104—14–105
- Family home**
 - see also* **Heritable property**
 - administration of estate
 - consent to disposal, 12–71—12–73
 - debtor protection, 12–66
 - generally, 12–65
 - human rights, 12–68
 - meaning of “family home”, 12–68—12–70

- order for division and sale, 12–74—12–88
- possession and occupation, 12–67
- re-vesting of estate in debtor, 11–192—11–198
- trust deeds for creditors, 22–57
- vesting of estate in trustees, 11–32—11–38
- Fees**
 - Accountant in Bankruptcy, 4–49—4–52
 - debt arrangement scheme
 - applications, 21–72
 - money advisers, 21–21
 - payments distributors, 21–34
 - debt payment programmes
 - generally, 21–93
 - variation, 21–109
- Fiduciary duties**
 - administration of estate, 12–05
- Financial education**
 - education, 17–133—17–137
- Financial markets**
 - EU Insolvency Regulation, 25–84—25–85
- Foreign currency claims**
 - creditors' claims, 16–11—16–12
- Foreign property**
 - effect of sequestration, 11–96—11–97
- Foreign representatives**
 - cross-border insolvency
 - access to UK courts, 25–191—25–199
 - applications for sequestration, 7–204
 - cooperation with, 25–231—25–235
 - provisions relating to, 25–242—25–244
- Friendly societies**
 - sequestration of, 6–07
- Funeral expenses**
 - distribution of estate, 16–94—16–95
- Gratuitous alienations**
 - burden of proof, 14–28
 - common law, 14–41—14–48
 - defences, 14–29—14–31
 - meaning of “associate”, 14–21—14–26
 - transactions which can be challenged, 14–18—14–19
 - persons who may challenge, 14–16—14–17
 - remedies, 14–32—14–40
 - statutory provisions, 14–14—14–40
 - time limits, 14–20
 - timing of alienation, 14–27
- Health boards**
 - disqualification of debtor, 17–24
- Hearings**
 - petitions for sequestration, 8–13
 - warrants to cite, 8–10
- Heritable property**
 - see also* **Family home**
 - protected trust deeds, 22–112—22–116
 - re-vesting of estate in debtor, 11–192—11–198
 - vesting of estate in trustees, 11–24—11–41
- History of bankruptcy law**
 - early bankruptcy laws (1621 to 1772), 2–08—2–09
 - future bankruptcy legislation, 2–38—2–43
 - introduction, 2–01—2–03
 - Model Law on Cross-Border Insolvency, 2–27
 - modern bankruptcy legislation
 - Bankruptcy (Scotland) Act 1913, 2–18
 - Bankruptcy (Scotland) Act 1985, 2–19—2–22
 - Bankruptcy (Scotland) Act 1993, 2–21
 - Bankruptcy (Scotland) Act 2016, 2–33
 - Bankruptcy and Debt Advice (Scotland) Act 2014, 2–32
 - Bankruptcy and Diligence etc. (Scotland) Act 2007, 2–25—2–26
 - Consultation on Bankruptcy Law Reform* (2012), 2–31
 - Cross-Border Insolvency Regulations 2006, 2–27
 - Debt Arrangement and Attachment (Scotland) Act 2002, 2–23
 - debt arrangement scheme developments, 2–23, 2–25, 2–30
 - Deregulation Act 2015, 2–35
 - Enterprise Act 2002, 2–24
 - EU law, 2–24, 2–36
 - Financial Services (Banking Reform) Act 2013, 2–34
 - Home Owner and Debtor Protection (Scotland) Act 2010, 2–28—2–29
 - Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017, 2–37
 - Scottish Office Consultation Papers, 2–22, 2–25
 - Small Business, Enterprise and Employment Act 2015, 2–35
 - pre-bankruptcy laws, 2–04—2–07
 - subsequent developments
 - 18th century, 2–10—2–12
 - 19th century, 2–12—2–16
 - 20th century, 2–17
- Hotchpot**
 - EU Insolvency Regulation, 25–117
- Human rights**
 - family home, 12–68
- Immoveable property**
 - EU Insolvency Regulation, 25–82—25–83
- Income contributions**
 - background, 11–126—11–131
 - common financial tool, 11–132—11–136
 - debtor contribution orders
 - appeals, 11–162—11–165
 - debtor applications for sequestration, 11–138
 - deductions from earnings and other income, 11–147—11–152
 - effect, 11–146
 - generally, 11–137
 - payment breaks, 11–158—11–161
 - payment period, 11–144—11–145
 - petitions for sequestration, 11–135
 - quashing of order, 11–153—11–157
 - review of decisions, 11–162—11–165
 - terms of order, 11–140—11–143
 - variation, 11–153—11–157
- Inhibitions**
 - regulation of diligence on sequestration, 15–22—15–24
- INSOL International**
 - international initiatives in cross-border insolvency, 24–35

Insolvency Practices Council

establishment of, 4-105

Insolvency practitioners

see also **Member State insolvency practitioners**

authorisation

full authorisation, 4-92

partial authorisation, 4-93

procedures of professional bodies, 4-101

recognition of professional bodies, 4-94-4-99

regulatory framework, 4-103

Secretary of State's powers, 4-100

statutory framework for, 4-91

transitional provisions, 4-102

caution, 4-106-4-107

EU Insolvency Regulation

powers, 25-102-25-104

proof of appointment, 25-105

Insolvency Practices Council, 4-105

introduction, 4-64-4-66

Joint Insolvency Committee, 4-104

market study, 4-73

qualification to act as

authorisation, 4-91-4-105

caution, 4-106-4-107

generally, 4-88

status, 4-89-4-90

related activities, 4-108

status, 4-89-4-90

statutory framework

changes to, 4-70-4-83

establishment of, 4-67-4-69

scope of provisions, 4-84-4-87

Insolvency Service

complaints handling, 4-76

Interest

debt payment programmes, 21-93

post-sequestration interest

distribution of estate, 16-107-16-108

Interim attachments

see **Attachments**

Interim bankruptcy restriction orders

register of insolvencies, 4-29

Interim trustees in sequestration

see also **Trustees in sequestration;**

Trustees under trust deed; Vesting of estate in trustees

Accountant in Bankruptcy acting as,

4-36-4-38

appointment of

considerations to be taken into account, 10-10-10-11

generally, 10-07-10-09

new interim trustee, 10-20

notification of appointment, 10-12-10-13, 10-21-10-22

background to current law, 10-03-10-06

functions, 10-25-10-26

introduction, 10-01-10-02

powers

general powers, 10-32

generally, 10-27

giving debtor instructions,

10-28-10-31

grant by sheriff, 10-33-10-34

monies received, 10-37

obtaining information, 10-35

property subject to proceeds of crime orders, 10-36

recovery of documents and information, 13-04-13-08

replacement

death, 10-19

generally, 10-14

handover to new trustee, 10-23-10-24

new interim trustee, 10-20

notification of appointment of new trustee, 10-21-10-22

removal, 10-15-10-16

resignation, 10-17-10-18

supervision, 10-50-10-52

where not appointed trustee

generally, 10-38

interim trustee AiB, 10-44-10-49

interim trustee not AiB, 10-39-10-43

International Insolvency Institute

international initiatives in cross-border insolvency, 24-33

Joint Insolvency Committee

establishment of, 4-104

Judicial composition

end of sequestration, 18-02-18-03

revival of sequestration, 18-19-18-22

Judicial cooperation

cross-border insolvency

Cross-border Insolvency Regulations

2006, 25-177

Insolvency Act 1986, 25-14-25-17

Judicial factors

alternatives to sequestration, 20-14-20-16

appointment

effect of, 23-30

generally, 23-03

Judicial Factors (Scotland) Act 1889, 23-08-23-09

other appointments, 22-12-23-14

partnership estate, 23-05-23-07

procedure for obtaining appointment, 23-15-23-17

Solicitors (Scotland) Act 1980, 23-04

subsequent to judicial composition, 23-10-23-11

features of

distribution of estate, 23-27-23-28

functions and powers, 23-22-23-26

remuneration, 23-29

sequestration of estate, 23-18-23-21

introduction, 23-01-23-02

reform proposals, 23-34-23-36

sequestration and, 23-31-23-33

Judicial Insolvency Network

international initiatives in cross-border insolvency, 24-34

Jurisdiction

applications for sequestration

carrying on business, 7-214

debtor applications, 7-210-7-211, 7-216

established place of business, 7-212

EU insolvency proceedings regulation, 7-215

generally, 7-206—7-207
habitual residence, 7-213
petitions for sequestration,
7-208—7-209
cross-border insolvency, 24-09
EU Insolvency Regulation
actions derived from insolvency
proceedings, 25-50—25-52
appointment of temporary administrator,
25-53
examination of jurisdiction,
25-47—25-49
generally, 25-41
main proceedings, 25-42
territorial proceedings, 25-43—25-46
Justices of the peace
disqualification of debtor, 17-14
Landlord's hypothec
effect of sequestration, 11-77—11-78
Limited liability partnerships
sequestration of, 6-06
Limited partnerships
sequestration of, 6-07, 6-09
Mail redirection
management and realisation of estate,
12-19—12-21
Mail and duties
regulation of diligence on sequestration,
15-46—15-47
Managing estate
abandonment and compromise of claims,
12-39—12-42
appointment of agents, 12-07
co-operation of debtor, 12-46—12-47
commissioners' advice, 12-08
compliance with directions,
12-10—12-11
consultation with AiB, 12-09
contracts, 12-22—12-36
council tax, 12-37
debtor's account of current state of affairs,
12-44—12-45
EU law, 12-12
family home, 12-65—12-88
fiduciary duties, 12-05
general powers of trustees, 12-18
generally, 12-17
heritable property subject to security,
12-53—12-64
incompetence, 12-06
money received by trustee, 12-43
property charges, 12-38
redirection of mail, 12-19—12-21
representation of creditors,
12-03—12-04
representation of debtor, 12-03
role of trustee, 12-03
sale of estate, 12-48—12-52
Member State insolvency practitioners
applications for sequestration
estate of body corporate or
unincorporated body, 7-199—7-203
estate of deceased debtor, 7-87—7-91
estate of living debtors, 7-50—7-54
estate of partnership, 7-160—7-164
estate of trust, 7-124—7-128

Minimal asset cases

ceasing to be such, 19-13—19-18
discharge of debtor, 17-65—17-66
introduction, 19-01—19-03
modifications to process
appointment of trustee in sequestration,
19-05
discharge of AiB as trustee, 19-12
discharge of debtor, 19-11
distribution of estate, 19-10
generally, 19-04
statutory meeting, 19-07
submission of creditors' claims,
19-10
trustee's duty on receipt of statement of
assets and liabilities, 19-06
trustee's functions, 19-08
trustee's obligation to obtain account of
debtor's state of affairs, 19-09

Model Law on Cross-Border Insolvency

legislative developments, 2-27

Money advisers

debt arrangement scheme
approval of, 21-15—21-20
fees, 21-21
functions and duties, 21-22—21-27
generally, 21-14
revocation of approval, 21-28—21-30
suspension of approval, 21-28—21-30

Money attachments

see **Attachments**

Moratorium on diligence

debt payment programmes,
21-96—21-97
protected trust deeds, 22-64—22-65

Moveable property

vesting of estate in trustees,
11-42—11-45

Notice

creditors' meetings, 10-140

Notification of award

procedure for, 8-49—8-50

Obtaining credit without disclosing relevant information

offences, 17-35—17-40

Offences

Accountant in Bankruptcy, 4-19—4-20
Bankruptcy (Scotland) Act 2016,
17-29—17-42
common law, 17-43—17-44
effect of sequestration, 11-181
failure to come to Scotland when required
by court, 17-33
general offences, 17-31—17-32
introduction, 17-28
obtaining credit without disclosing relevant
information, 17-35—17-40
pledge or disposal of property obtained on
credit, 17-34
proceedings for, 17-41—17-42
reporting of, 17-45—17-46
specific offences, 17-29—17-30

Official Receiver

establishment of, 4-56

Order for division and sale

family home, 12-74—12-88

Partnerships

- applications for sequestration of estate of
 - by Member State insolvency practitioner, 7-160—7-164
 - by partnership, 7-132—7-142
 - by qualified creditor, 7-143—7-154
 - by temporary administrator, 7-155—7-159
 - by trustee under trust deed, 7-165—7-169
 - generally, 7-129—7-131
- partnership debts
 - creditors' claims, 16-62—16-63
- sequestration of, 6-07

Payments distributors

- debt arrangement scheme
 - approval of, 21-32—21-33
 - fees, 21-34
 - functions of, 21-35—21-36
 - generally, 21-31
 - revocation of approval, 21-37—21-39
 - suspension of approval, 21-37—21-39

Payment systems

- EU Insolvency Regulation, 25-84—25-85

Pending actions

- EU Insolvency Regulation, 25-93—25-94

Pension rights

- effect of sequestration, 11-105—11-115

Pension trustees

- disqualification of debtor, 17-22—17-23

Pensions

- excessive pension contributions
 - burden of proof, 14-89
 - generally, 14-83—14-85
 - persons who may challenge, 14-86
 - remedies, 14-90—14-92
 - what can be challenged, 14-87—14-88
- pension-sharing cases, 14-93—14-100

Periodical allowance

- creditors' claims, 16-43—16-46

Personal bar

- post-sequestration dealings with estate, 11-175

Petitions for recall

- review of award of sequestration, 9-06—9-24

Personal injuries claims

- effect of sequestration, 11-102—11-103

Petitions for sequestration

- see also* **Applications for sequestration**
- circumstances where award may not be made, 8-20
- concurrent proceedings, 8-23—8-28
- debtor contribution orders, 11-135
- determination of petition, 8-14—8-22
- generally, 8-08
- hearing, 8-13
- refusal of award, 8-47—8-48
- registration of warrant to cite, 8-37—8-38
- trust deeds for creditors, 22-55—22-56
- warrant to cite, 8-09—8-12

Petitions to nobile officium

- review of award of sequestration, 9-60—9-61

Pledge or disposal of property obtained on credit

- offences, 17-34

Poindings of the ground

- regulation of diligence on sequestration, 15-44—15-45

Possession and occupation

- family home, 12-67

Postponed debts

- distribution of estate, 16-109—16-110

Pre-application moratorium

- actions prevented by, 5-12
- availability, 5-09
- awards of sequestration and, 8-21
- debtor applications for sequestration, 5-08
- duration, 5-13—5-15
- introduction, 5-01—5-03
- nature and extent of, 5-12
- notice to AiB, 5-04—5-07
- register of insolvencies, 4-29
- repeated notice within 12 months, 5-10
- response to notice by AiB, 5-11

Preferred debts

- distribution of estate, 16-98—16-105

Preferences

- unfair preferences
 - common law, 14-63—14-72
 - creation of preference, 14-55
 - exemptions, 14-57
 - nature of preference, 14-56
 - persons who may challenge, 14-51
 - remedies, 14-58—14-62
 - statutory preferences, 14-49—14-62
 - time limits, 14-54
 - what can be challenged, 14-52—14-53

Principles of bankruptcy law*Consultation on Bankruptcy Law Reform*

- (2012), 3-16—3-17
- introduction, 3-01—3-03, 3-12
- justifications for insolvency law, 3-04—3-08
- legislative reforms, 3-15
- Response to the Consultation on Bankruptcy Law Reform*, 3-18
- Scottish Law Commission, 3-13—3-14
- underlying principle, 3-12

Prior transactions

- challenges to
 - background, 14-02—14-04
 - common law, 14-07—14-12
 - excessive pension contributions, 14-83—14-92
 - extortionate credit transactions, 14-101—14-111
 - gratuitous alienations, 14-14—14-48
 - interrelationship of provisions, 14-13
 - introduction, 14-01
 - orders on divorces or dissolution of civil partnership, 14-73—14-82
 - pension-sharing cases, 14-93—14-100
 - statutory provisions, 14-05—14-06
 - unfair preferences, 14-49—14-72

Priority

- distribution of estate, 16-90—16-93

Proceeds of Crime Act 2002

- effect of sequestration, 11-70—11-76

Protected trust deeds

- accession by creditors, 22–85
- acquirenda, 22–70—22–71
- administration of
 - accounts, 22–124—22–127
 - challenges to prior transactions, 22–117
 - contributions from income, 22–111
 - directions, 22–120—22–121
 - distribution of estate, 22–118—22–119
 - generally, 22–108—22–110
 - realisation of heritable property, 22–112—22–116
 - reports, 22–124—22–127
 - supply of information to AiB, 22–122—22–123
 - trustee's remuneration, 22–128—22–131
- appeals, 22–145—22–149
- applications to sheriff, 22–150—22–151
- conditions for protection, 22–66—22–82
- conversion to sequestration, 22–155—22–159
- debtors, 22–66
- discharge of debtor
 - effect of discharge, 22–137—22–138
 - generally, 22–132
 - procedure, 22–133—22–136
- discharge of trustee
 - effect of discharge, 22–142—22–143
 - procedure, 22–139—22–141
 - retention of documents, 22–144
- effects of protection
 - on creditors, 22–92—22–94
 - on debtor, 22–95—22–96
 - on diligence, 22–97—22–99
 - on essential supplies, 22–100—22–107
- electronic delivery of notices, 22–152—22–154
- estate to be conveyed, 22–68—22–69
- income, 22–72—22–77
- information sent to creditors, 22–84
- introduction, 22–60—22–63
- legislative developments, 2–25, 2–29
- modification of provisions relating to, 22–160
- notice in register of insolvencies, 22–83
- pre-application moratorium, 22–64—22–65
- procedure for obtaining protection, 22–83—22–91
- procedure prior to granting, 22–78—22–82
- register of insolvencies, 4–29
- registration, 22–86—22–91
- trustees, 22–67

Proxies

- creditors' meetings, 10–146

Quorum

- creditors' meetings, 10–147

Realising estate

- abandonment and compromise of claims, 12–39—12–42
- co-operation of debtor, 12–46—12–47
- contracts, 12–22—12–36
- council tax, 12–37
- debtor's account of current state of affairs, 12–44—12–45
- family home, 12–65—12–88
- general powers of trustees, 12–18

- generally, 12–17
- heritable property subject to security, 12–53—12–64
- money received by trustee, 12–43
- property charges, 12–38
- redirection of mail, 12–19—12–21
- sale of estate, 12–48—12–52

Recall of sequestration

- Accountant in Bankruptcy
 - generally, 9–25—9–38
 - remit to sheriff, 9–46
 - review of an appeal against decision, 9–47 9–49
 - where AiB trustee, 9–39—9–45
- bankruptcy restriction orders and, 17–123—17–128
- introduction, 9–02—9–05
- non-entitled spouse or civil partner, by, 9–50—9–53
- petitions for recall, 9–06—9–24

Receiverships

- register of insolvencies, 4–29

Recognition of judgments

- EU Insolvency Regulation
 - judgments opening insolvency proceedings, 25–95—25–97
 - other judgments, 25–98
 - public policy, 25–99

Recovery of documents and information

- debtor's account of current state of affairs, 13–20—13–21
- examination of persons
 - appearance before trustee, 13–24—13–25
 - generally, 13–22—13–23
 - private examination, 13–26
 - procedure, 13–28—13–36
 - public examination, 13–27
- interim trustees, 13–04—13–08
- introduction, 13–01—13–03
- statement of assets and liabilities, 13–14—13–19
- trustees, 13–09—13–13

Recovery of estate

- challenging prior transactions
 - background, 14–02—14–04
 - common law, 14–07—14–12
 - excessive pension contributions, 14–83—14–92
 - extortionate credit transactions, 14–101—14–111
 - gratuitous alienations, 14–14—14–48
 - interrelationship of provisions, 14–13
 - introduction, 12–16, 14–01
 - orders on divorces or dissolution of civil partnership, 14–73—14–82
 - pension-sharing cases, 14–93—14–100
 - statutory provisions, 14–05—14–06
 - unfair preferences, 14–49—14–72
 - generally, 12–13—12–15

Reduction of award

- review of award of sequestration, 9–54—9–58

Redundancy payments

- effect of sequestration, 11–124—11–125

Register of inhibitions and adjudications

- register of insolvencies and, 4–33

Register of insolvencies

- bankruptcy restriction orders, 4-29
- bankruptcy restriction undertakings, 4-29
- contents, 4-26, 4-30
- copies, 4-32
- debt arrangement scheme and, 4-27
- form of, 4-28
- information not included, 4-31
- inspection, 4-32
- interim bankruptcy restriction orders, 4-29
- maintenance of, 4-26
- pre-application moratorium, 4-29
- protected trust deeds, 4-29
- receiverships, 4-29
- register of inhibitions and adjudications and, 4-33
- sequestrations, 4-29
- winding up, 4-29

Registered social landlords

- disqualification of debtor, 17-25

Registration

- awards of sequestration
 - debtor application, 8-36
 - effect of registration, 8-39-8-42
 - warrant to cite, 8-37-8-38
- debt arrangement scheme,
 - 21 146-21-149
- protected trust deeds, 22-86-22-91

Remedies

- challenging prior transactions
 - excessive pension contributions,
 - 14 90-14-92
 - extortionate credit transactions,
 - 14-108-14-111
 - gratuitous alienations, 14-32-14-40
 - orders on divorces or dissolution of civil partnership, 14-80-14-82
 - unfair preferences, 14-58-14-62

Removal

- commissioners in sequestration,
 - 10-116-10-117
- interim trustees in sequestration,
 - 10-15-10-16
- trustees in sequestration, 10-87

Remuneration

- judicial factors, 23-29
- protected trust deeds, 22-128-22-131
- trust deeds for creditors, 22-29

Rent

- sequestration for
 - regulation of diligence, 15-48

Reservation of title

- effect of sequestration
 - forms of retention of title clauses,
 - 11-85
 - generally, 11-84
 - other provisions in clauses,
 - 11-86-11-89
 - practical issues relating to,
 - 11-90-11-95
- EU Insolvency Regulation, 25-78-25-81

Resignation

- commissioners in sequestration, 10-115
- interim trustees in sequestration,
 - 10-17-10-18
- trustees in sequestration, 10-84-10-85

Revival of sequestration

- judicial composition, 18-19-18-22
- no judicial composition, 18-23-18-31

Revocation

- debt arrangement scheme
 - appeals, 21-130
 - application, 21-119-21-121
 - approval of money adviser,
 - 21-28-21-30
 - approval of payment distributors,
 - 21-37-21-39
 - by administrator, 21-118
 - completion, 21-132-21-135
 - decision to revoke, 21-124
 - effect of, 21-126-21-129
 - grounds, 21-122-21-123
 - notification, 21-125
 - register, 21-131
- trust deeds for creditors, 22-39

Rights in rem

- EU Insolvency Regulation, 25-72-25-76

Royal burghs

- sequestration of, 6-07

Sale of estate

- management and realisation of estate,
 - 12-48-12-52

Scottish Ministers

- appointment of Accountant in Bankruptcy,
 - 4-04-4-05

Secondary proceedings

- EU Insolvency Regulation
 - applicable law, 25-121
 - application to open, 25-132-25-133
 - co-ordination of main and secondary proceedings, 25-139-25-149
 - decision to open, 25-134-25-138
 - generally, 25-118-25-120
 - undertaking to avoid, 25-122-25-131

Secured debts

- creditors' claims, 16-56-16-61

Secured property

- administration of estate
 - application to court, 12-58-12-64
 - calling up, 12-56
 - generally, 12-53-12-55
 - notice of default, 12-57
- effect of sequestration, 11-79-11-82

Sederunt book

- management and realisation of estate,
 - 12-108-12-113

Sequestrated estates

- end of sequestration, 18-18

Sequestration

- see also* **Applications for sequestration; Awards of sequestration; Cross-border insolvency**
- alternatives to
 - composition, 20-07-20-09
 - debt arrangement scheme,
 - 20-10-20-11
 - introduction, 20-01-20-03
 - judicial factors, 20-14-20-16
 - trust deed for creditors, 20-12-20-13
 - voluntary arrangements with creditors,
 - 20-04-20-06
- date of sequestration, 8-31-8-35

- effects of
 - consigned sums, 11–100—11–101
 - criminal injuries compensation, 11–104
 - disputes about vesting, 11–166—11–170
 - estate vesting in trustee, 11–04—11–22
 - funds held by bank, 11–98—11–99
 - income contributions, 11–126—11–165
 - introduction, 11–01—11–03
 - offences relating to estate, 11–181
 - pension rights, 11–105—11–115
 - personal injuries claims, 11–102—11–103
 - post-sequestration dealings with estate, 11–171—11–180
 - property exempt from attachment, 11–55—11–69
 - property situated outwith Scotland, 11–96—11–97
 - property subject to diligence, 11–83
 - property subject to landlord's hypothec, 11–77—11–78
 - property subject to orders under Proceeds of Crime Act 2002, 11–70—11–76
 - property subject to retention or reservation of title, 11–84—11–95
 - property subject to security, 11–79—11–82
 - re-vesting of estate, 11–182—11–198
 - redundancy payments, 11–124—11–125
 - student loans, 11–116—11–119
 - third parties, liabilities to, 11–120—11–123
 - trustee's right to debtor's property, 11–23—11–54
 - estates to be sequestrated
 - co-operative and community benefit societies, 6–07
 - companies, 6–06
 - entities, 6–05
 - existence of entity, 6–08
 - friendly societies, 6–07
 - generally, 6–04
 - limited liability partnerships, 6–06
 - limited partnerships, 6–07, 6–09
 - partnerships, 6–07
 - royal burghs, 6–07
 - trade unions, 6–07
 - unincorporated bodies, 6–07
 - universities, 6–07
 - introduction, 6–01
 - jurisdictional approach to, 6–10
 - nature of, 6–02—6–03
 - register of insolvencies, 4–29
 - sequestration not to fall asleep, 8–29
 - transfer of sequestration, 8–30
- Set off**
- EU Insolvency Regulation, 25–77
- Special destinations**
- vesting of estate in trustees, 11–39—11–41
- Spouses**
- recall of award of sequestration, 9–50—9–53
- Statement of affairs**
- procedure on award of sequestration, 8–53—8–58
- Statement of assets and liabilities**
- minimal asset cases, 19–06
 - procedure on award of sequestration, 8–53—8–58
 - recovery of documents and information, 13–14—13–19
- Statement of undertakings**
- procedure on award of sequestration, 8–51—8–52
- Statutory meeting**
- calling of, 8–60—8–62
 - introduction, 8–59
 - minimal asset cases, 19–07
 - procedure at meeting, 8–63—8–66
 - procedure where no statutory meeting, 8–67
- Student loans**
- creditors' claims, 16–64
 - effect of sequestration, 11–116—11–119
- Supervision**
- commissioners in sequestration, 10–131—10–133
 - interim trustees in sequestration, 10–50—10–52
 - trustees in sequestration, 10–107—10–111
- Suspension and interdict**
- review of award of sequestration, 9–59
- Tantum et tale**
- vesting of estate in trustees, 11–49—11–54
- Temporary administrators**
- applications for sequestration
 - estate of body corporate or unincorporated body, 7–194—7–198
 - estate of deceased debtor, 7–82—7–86
 - estate of living debtors, 7–45—7–49
 - estate of partnership, 7–155—7–159
 - estate of trust, 7–119—7–123
- Territorial proceedings**
- EU Insolvency Regulation
 - effects of recognition, 25–101
 - jurisdiction, 25–43—25–46
- Territorialism**
- cross-border insolvency, 24–20—24–21
- Theory of insolvency law**
- creditor wealth maximisation, 3–09—3–10
 - creditors' bargain, 3–09
 - multiple values/eclectic approach, 3–10—3–11
- Third parties**
- rights against insurers, 11–120—11–123
- Third party protection**
- EU Insolvency Regulation, 25–92, 25–114—25–116
- Time limits**
- challenging prior transactions
 - extortionate credit transactions, 14–106
 - gratuitous alienations, 14–20
 - orders on divorces or dissolution of civil partnership, 14–78
 - unfair preferences, 14–54
 - creditors' claims, 16–05—16–08
 - warrants to cite, 8–11
- Title to sue**
- post-sequestration dealings with estate, 11–177—11–179

Trade unions

sequestration of, 6–07

Trust deeds for creditors

accession to, 22–19

alternatives to sequestration, 20–12–20–13

audit of trustee's accounts, 22–29

Bankruptcy (Scotland) Act 2016

apparent insolvency, 22–53–22–54

definitions, 22–43–22–51

family home, 22–57

generally, 22–42

petition for sequestration by trustee,
22–55–22–56

relevant provisions, 22–52

Schedule 4 provisions, 22–59

utilities, 22–58

challenge to, 22–40

contents, 22–15–22–16

conveyance to trustee, 22–20

creditors' claims, 22–28

debt arrangement scheme and, 22–38

debt payment programmes, 21–95, 21–102

development of law, 22–03–22–14

discharge of debtor, 22–30–22–31

discharge of trustee, 22–32

distribution to creditors, 22–28

effect of granting on debtor, 22–41

effect of sequestration on deed,
22–34–22–37

effect on prior diligence, 22–21–22–23

introduction, 22–01–22–02

liability of trustee, 22–26–22–27

powers of trustee, 22–24–22–25

protected trust deeds

accession by creditors, 22–85

acquirenda, 22–70–22–71

administration of, 22–108–22–131

appeals, 22–145–22–149

applications to sheriff, 22–150–22–151

conditions for protection, 22–66–22–82

conversion to sequestration,

22–155–22–159

debtors, 22–66

discharge of debtor, 22–132–22–138

discharge of trustee, 22–139–22–144

effects of protection, 22–92–11–107

electronic delivery of notices,
22–152–22–154

estate to be conveyed, 22–68–22–69

income, 22–72–22–77

information sent to creditors, 22–84

introduction, 22–60–22–63

modification of provisions relating to,
22–160

notice in register of insolvencies, 22–83

pre-application moratorium,
22–64–22–65procedure for obtaining protection,
22–83–22–91procedure prior to granting,
22–78–22–82

registration, 22–86–22–91

trustees, 22–67

purpose, 22–17

revocation, 22–39

termination of trust, 22–33

trustee's remuneration and outlays, 22–29

trustees, 22–18

Trustees in sequestration*see also* **Interim trustees in sequestration;**
Trustees under trust deed; Vesting of
estate in trustees**Accountant in Bankruptcy acting as**

accounts in bankruptcy, 16–130–16–134

discharge of debtor, 17–59–17–62

discharge of trustee, 18–14–18–16,
19–12

generally, 4–36–4–38

interim trustee, 10–44–10–49

procedure on completion of

administration of estate, 18–07

recall of sequestration, 9–39–9–45

scheme of division, 16–130–16–134

appointmentconsiderations to be taken into account,
10–59debtor applications for sequestration,
10–57–10–58

following revival or sequestration, 10–98

generally, 8–49–8–50, 10–53

petitions for sequestration,
10–54–10–56**background to current law, 10–03–10–06****discharge of**

end of sequestration, 18–09–18–17

generally, 10–106

minimal asset cases, 19–12

functionsapplications for directions by trustee,
10–104applications in relation to administration
of estate, 10–105

bankruptcy restrictions, 10–103

generally, 10–99

qualifications on carrying out functions,
10–100–10–101

termination of, 10–106

introduction, 10–01–10–02**management and realisation of estate**abandonment and compromise of claims,
12–39–12–42

appointment of agents, 12–07

co-operation of debtor, 12–46–12–47

commissioners' advice, 12–08

compliance with directions,
12–10–12–11

consultation with AiB, 12–09

contracts, 12–22–12–36

council tax, 12–37

debtor's account of current state of
affairs, 12–44–12–45

EU law, 12–12

family home, 12–65–12–88

fiduciary duties, 12–05

general powers of trustees, 12–18

generally, 12–17

heritable property subject to security,
12–53–12–64

incompetence, 12–06

money received by trustee, 12–43

property charges, 12–38

redirection of mail, 12–19–12–21

- representation of creditors, 12-03—12-04
- representation of debtor, 12-03
- role of trustee, 12-03
- sale of estate, 12-48—12-52
- minimal asset cases, 19-08
- recovery of documents and information, 13-09—13-13
- replacement following vote at statutory meeting
 - generally, 10-60
 - no replacement elected, 10-64
 - replacement elected, 10-65—10-82
 - voting at meeting, 10-61—10-63
- replacement in other circumstances
 - death, 10-86
 - generally, 10-83
 - handover to new trustee, 10-88—10-90
 - removal, 10-87
 - resignation, 10-84—10-85
 - trustees acting in multiple sequestrations, 10-91—10-97
- right to debtor's property
 - debtor's home, 11-32—11-38
 - generally, 11-23
 - heritable property, 11-24—11-41
 - moveable property, 11-42—11-45
 - non-vested contingent rights, 11-46—11-48
 - special destinations, 11-39—11-41
 - tantum et tale, 11-49—11-54
- sequestered trustees, 18-18
- statement of affairs, 8-53—8-58
- supervision of, 10-107—10-111
- suspected offences, 10-102
- Trustees under trust deed**
 - see also* **Interim trustees in sequestration; Trustees in sequestration; Vesting of estate in trustees**
 - applications for sequestration
 - estate of living debtors, 7-55—7-61
 - estate of partnership, 7-165—7-169
- Trusts**
 - applications for sequestration of estate of
 - by majority of trustees, 7-98—7-106
 - by Member State insolvency practitioner, 7-124—7-128
 - by qualified creditor, 7-107—7-118
 - by temporary administrator, 7-119—7-123
 - introduction, 7-97
- UNCITRAL Model Law on Cross-Border Insolvency**
 - international initiatives in cross-border insolvency, 24-31
 - scope of, 25-179—25-187
- Unfair preferences**
 - common law, 14-63—14-72
 - creation of preference, 14-55
 - exemptions, 14-57
 - nature of preference, 14-56
 - persons who may challenge, 14-51
 - remedies, 14-58—14-62
 - statutory preferences, 14-49—14-62
 - time limits, 14-54
 - what can be challenged, 14-52—14-53
- Unincorporated associations**
 - applications for sequestration of estate of
 - by authorised person, 7-172—7-181
 - by Member State insolvency practitioner, 7-199—7-203
 - by qualified creditor, 7-182—7-193
 - by temporary administrator, 7-194—7-198
 - introduction, 7-170—7-171
 - sequestration of, 6-07
- Universalism**
 - cross-border insolvency, 24-17—24-19
- Universities**
 - sequestration of, 6-07
- Untraced debtors**
 - discharge of debtor, 17-67—17-74
- Utilities**
 - trust deeds for creditors, 22-58
- Vesting of estate in trustees**
 - acquirenda, 11-14—11-21
 - deceased debtors, 11-22
 - disputes about, 11-166—11-170
 - effect of vesting
 - debtor's home, 11-32—11-38
 - generally, 11-23
 - heritable property, 11-24—11-41
 - moveable property, 11-42—11-45
 - non-vested contingent rights, 11-46—11-48
 - special destinations, 11-39—11-41
 - tantum et tale, 11-49—11-54
 - estate at date of sequestration, 11-05—11-13
 - introduction, 11-04
 - re-vesting of estate in debtor
 - background, 11-182—11-188
 - debtor's right or interest in family home, 11-192—11-198
 - non-vested contingent interests, 11-189—11-191
- Voluntary arrangements with creditors**
 - alternatives to sequestration, 20-04—20-06
- Warrants to cite**
 - fresh warrants, 8-12
 - hearing, 8-10
 - registration, 8-37—8-38
 - requirement for, 8-09
 - time limits, 8-11
- Winding up**
 - register of insolvencies, 4-29
- Wrongful sequestration**
 - damages, 9-62

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